No. 08-1184

In the Supreme Court of the United States

LINDEN D. BOWMAN, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Congress has directed the Secretary of Defense (Secretary) to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." 10 U.S.C. 1143a(a). The Secretary has promulgated 32 C.F.R. 77.1-.6, which allows service members who retire early to earn service credit toward their retirement pay by working for public service and community service organizations, 32 C.F.R. 77.4(b)(2). The Secretary does not offer credit for work at "organizations * * * administered by businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization," 32 C.F.R. 77.3(a).

The question presented is whether the Secretary's decision not to extend credit for employment consisting of religious instructions, worship services, or any form of proselytization is consistent with 10 U.S.C. 1143a and the equal protection component of the Fifth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 564 F.3d 765. The opinion of the district court (Pet. App. 25a-55a) is reported at 512 F. Supp. 2d 1056.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2008. The petition for a writ of certiorari was filed on March 18, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has directed the Secretary of Defense (Secretary) to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after dis-

charge or release from active duty." National Defense Authorization Act for Fiscal Year 1993 (1993 Act), Pub. L. No. 102-484, sec. 4462(a)(1), § 1143a(a), 106 Stat. 2739. As part of that enactment, service members who retire with fewer than 20 years of active duty can accrue additional service credit for calculation of their retirement pay if they work for a qualifying public or community service organization between the time of retirement and the time they would have attained 20 years of military service. See § 4464(a), 106 Stat. 2741. "[T]he years of the [retiree's] employment by a public service or community service organization * * * [are to be] treated as years of active duty service in the Armed Forces." § 4464(a)(2)(A), 106 Stat. 2741.

The statute defines the term "public service and community service organization" to include (1) "[a]ny organization" that provides "[e]lementary, secondary, or postsecondary school teaching or administration," "[s]upport of such teaching or school administration," "[l]aw enforcement," "[p]ublic health care," "[s]ocial services," or "[a]ny other public or community service," and (2) any nonprofit organization that coordinates the provision of any of those services. 10 U.S.C. 1143a(g).

The statute does not define the phrases "social services" or "other public or community service." The Senate Committee Report on 10 U.S.C. 1143a, however, explains that Congress enacted that statute to help meet "'critical needs in our communities' such as 'in education, law enforcement, and health care that are underserved.'" Pet. App. 48a (quoting S. Rep. No. 352, 102d Cong., 2d Sess. 201, 202 (1992) (*Senate Report*)).

Pursuant to 10 U.S.C. 1143a, the Secretary promulgated 32 C.F.R. 77.1-.6, which created the Program to Encourage Public and Community Service (Program or

PACS). Under the Program, the Secretary maintains two registries. The PACS Personnel Registry "includes information on the particular job skills, qualifications and experience of" retired personnel eligible for the Program. 32 C.F.R. 77.6(e). The PACS Organizational Registry "includes information" on organizations eligible for the Program. 32 C.F.R. 77.6(f). The Program requires early retirees—those service members who retire with more than 15 years but fewer than 20 years of active service, 32 C.F.R. 77.3(c)—to register for PACS. Post-retirement employment with a PACS-eligible organization "is encouraged *but not required*." 32 C.F.R. 77.6(c)(3) (emphasis added).

Those early retirees who do work for a PACS-eligible "public and community service organization" accrue additional service credit for purposes of their retirement pay. See 32 C.F.R. 77.3(b) and (c), 77.4(b)(2). The Program defines "[p]ublic and community service organization" as any government or private organization providing services related to (1) elementary, secondary, or post secondary school teaching or administration, (2) support of teachers or school administrators, (3) law enforcement, (4) public health care, (5) social services, (6) public safety, (7) emergency relief, (8) public housing, (9) conservation, (10) the environment, (11) job training, or (12) "[o]ther public and community service not listed previously, but consistent with or related to services described [above]." 32 C.F.R. 77.3(d). The Program, however, does not offer retirement credit for work at the following organizations: "businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instruc-

tions, worship services, or any form of proselytization." 32 C.F.R. 77.3(a).

2. According to his complaint, petitioner served intermittently in the United States Air Force from September 1977 until he retired in January 1996, at which point he had accumulated approximately 17 years and three months of service. Pet. App. 27a. In January 1996, after his retirement from the Air Force, petitioner began employment with the People's Church of the C&MA in Geneva, Ohio (Church) as a lay intern and later as a youth minister. *Ibid.* He was continuously employed with the Church until February 2001. *Ibid.* Although the complaint does not explain petitioner's responsibilities at the Church, petitioner "does not dispute that his duties included religious instructions, worship services, or proselytization." *Id.* at 5a.

The complaint alleges that in 1998, 2002, and 2004, petitioner submitted requests to the Department of Defense (DoD) for service credit under the Program for his work at the Church. Pet. App. 5a. According to the complaint, DoD has not granted or processed those requests because petitioner seeks credit for service with a religious organization. *Id.* at 5a-6a.

3. Petitioner filed suit against the Secretary in the district court for the Northern District of Ohio. He alleged that the Program, by not granting service credit for work at religious institutions, violates both 10 U.S.C. 1143a and the equal protection component of the Fifth Amendment. Pet. App. 1a, 6a.

The Secretary moved to dismiss the complaint because, *inter alia*, it failed to state a claim for which relief could be granted. Pet. App. 29a-30a. The district court granted the Secretary's motion. *Id.* at 40a-54a. The court held that the Program is consistent with 10 U.S.C.

1143a because the Secretary construes the regulations as "allow[ing] early retirees to participate in the [Program] when they work for nonprofit organizations engaged in religious activities if the activities are unrelated to religious instruction[], worship services, or any form of proselytization." *Id.* at 41a (citation omitted; second brackets in original).

The district court also held that the Program does not violate equal protection. The court applied rational basis scrutiny to the Program because it did not interfere with the right to free exercise of religion, was not motivated by animosity toward religion, and did not disfavor religion. See Pet. App. 47a-49a. The court held that the Program serves a rational basis because, *inter alia*, religious activities fall outside the purposes for which Congress authorized the Program—"'to fill critical needs in our communities' such as in 'education, law enforcement, and health care that are underserved.'" *Id.* at 48a (quoting *Senate Report* 201, 202).

4. The court of appeals affirmed. Pet. App. 1a-24a. The court first held that the Program was authorized by 10 U.S.C. 1143a. Pet. App. 7a. Because Congress had not unambiguously defined "public service and community service organization" in Section 1143a(g), it had left "a gap for the Secretary to fill." *Id.* at 11a. The Secretary's decision to "exclude[] from § 1143a(g)'s definition of service all activities involving 'religious instructions, worship or proselytization,'" *id.* at 13a, was a permissible way to fill that gap because nothing in Section 1143a(g)'s text or legislative history "suggest[ed] that Congress intended to encourage retirees to accept positions which would involve" such activities, *ibid.*

The court of appeals then held that the Program was consistent with equal protection. The court determined

that the Program was subject to rational basis scrutiny because it did not discriminate along religious lines or burden petitioner's right to free exercise. Pet. App. 13a-21a. Instead, the Program merely recognized that "religious instructions, worship services, or any form of proselytization," as well as work for "businesses organized for profit, labor unions, and partisan political organizations," fall outside the category of activities for which Congress intended the Program to be available. *Id.* at 19a. The court thus concluded that "the regulation is rationally related to limiting the retirement credit to jobs which fill critical needs in the community, such as in education, law enforcement, and health care." *Id.* at 23a (internal quotation marks omitted).

ARGUMENT

Petitioner asserts that the Program is inconsistent with 10 U.S.C. 1143a and violates equal protection. The court of appeals correctly rejected those claims, and its decision does not conflict with any ruling of this Court or any other court of appeals. And the particular program that is at issue in this lawsuit has now terminated. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that the Secretary's Program is a permissible interpretation of 10 U.S.C. 1143a. Indeed, petitioner does not even assert a conflict in the circuit courts of appeals on this issue (or any other issue in the case).

a. The Secretary has decided not to provide retirement credit for work at "organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." 32 C.F.R. 77.3(a). That decision is a "reasonable" interpretation of Section 1143a. *Chev-*

ron U.S.A. Inc. v. *NRDC*, 467 U.S. 837, 844 (1984) (*Chevron*).

In Section 1143a, Congress did not indicate whether religious institutions qualify as "public service and community service organization[s]" at which early retirees can earn service credit. 10 U.S.C. 1143a(g). According to that provision, the term "public service and community service organization" includes "[a]ny organization" that offers "teaching or administration," "[l]aw enforcement," "[p]ublic health care," "[s]ocial services," or "[a]ny other public or community service." 10 U.S.C. 1143a(g)(1)(A)-(E). The plain text of the statute does not identify whether religious activities are to be included *or* excluded. Nor is it clear whether the vague terms used in Section 1143a(g)—"social services" and "public or community service"—are meant to cover work at religious institutions.[1] Thus, Section 1143a(g) is "silent or ambiguous" on this issue, *Chevron*, 467 U.S. at 843, and the Secretary's interpretation will be valid unless it is "manifestly contrary to the statute," *id.* at 844.

The Secretary's understanding of Section 1143a(g) is reasonable and therefore permissible. The text of Section 1143a(g) specifically lists "[e]lementary, secondary, or postsecondary school teaching or administration," "[l]aw enforcement," and "[p]ublic health care" as services that are to be covered by the Program. 10 U.S.C. 1143a(g). Because "a word is given more precise content by the neighboring words with which it is associated,"

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[1] Petitioner alleged in his complaint that his "work as a youth pastor constituted 'public and community service' within the meaning of 10 U.S.C. § 1143a(g)." See Pet. 11 n.1. That allegation does not carry weight because "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft* v. *Iqbal*, 129 S. Ct. 1937, 1949 (2009).

United States v. *Wilson*, 128 S. Ct. 1830, 1839 (2008), it is reasonable to infer that the general terms "public and community service" and "social services" should be construed in light of the more specific references to education, law enforcement, and public health care. That conclusion is supported by the statute's purpose. As both courts below recognized, Congress enacted 10 U.S.C. 1143a to help meet "'critical needs in our communities' such as 'in education, law enforcement, and health care that are underserved,'" Pet. App. 48a (quoting *Senate Report* 201, 202); see *id.* at 12a.

Consistent with Section 1143a's text and purpose, the Program excludes certain organizations: "businesses organized for profit, labor unions, partisan political organizations, or organizations engaged in religious activities, unless such activities are unrelated to religious instructions, worship services, or any form of proselytization." 32 C.F.R. 77.3(a). As the court of appeals correctly held, the Program reflects the Secretary's reasonable judgment that these kinds of activities do not closely enough serve the needs that Congress wanted to fill. See Pet. App. 12a-13a. Petitioner points to no case that holds to the contrary, and further review is thus unwarranted.

b. In petitioner's view (Pet. 10-11), because Section 1143a(g) does not explicitly "exclud[e] work for religious organizations and institutions" from the definition of "public service and community service organization[s]," Congress must have intended for such work to be included. That proposition is at odds with basic principles of statutory interpretation. The Court has long acknowledged that drawing an inference from congressional silence is a "hazardous enterprise." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979). Recently, in *En-*

tergy Corp. v. *Riverkeeper, Inc.*, the Court said that it would "prove[] too much" to conclude that just because a statute "does not expressly authorize" something, the statute "displays an intent to forbid its use." 129 S. Ct. 1498, 1508 (2009). Likewise, it would "prove[] too much" to conclude that just because Section 1143a(g) does not forbid service credit for work at religious institutions, it meant to authorize such credit.

Petitioner also argues (Pet. 11-12) that certain other statutes, which state that religious organizations that wish to participate as providers of secular government services may not use federal money to engage in religious instruction, worship, or proselytization, show that Congress knows how to exclude religious activities. In light of those statutes, petitioner contends, courts should assume that Congress intends such an exclusion only when it expressly provides one. See *ibid.* The statutes upon which petitioner relies, however, are all distinguishable from Section 1143a. See 42 U.S.C. 300x-65(i); 29 U.S.C. 2938(a)(3); 42 U.S.C. 9920(c). Each statute was enacted for the purpose of ensuring that religious institutions are not wrongly excluded from being allowed to participate as providers of secular government services. Since those statutes expressly contemplate that religious institutions will be providing government services, Congress also expressly included prohibitions on the direct use of government funds for inherently religious activity. By contrast, 10 U.S.C. 1143a does not expressly direct or contemplate the inclusion of religious organizations, and it would be improper to draw any inferences from such congressional silence.

c. Petitioner argues (Pet. 13-16) that even if Section 1143a is unclear, the Secretary is not entitled to deference for his interpretation. That contention does not

warrant review because it was not addressed by the lower courts. *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). In any event, petitioner's arguments lack merit.

First, petitioner contends (Pet. 13) that "[t]he deference required under *Chevron* is inapplicable when the agency action does not involve the exercise of any agency expertise in the implementation of stated Congressional policy." In petitioner's view (Pet. 14-15), because "there is nothing to support the idea that the Secretary or the Department of Defense has any particular expertise in" public or community service, the Secretary is entitled to no interpretive deference. Petitioner's premise is factually and legally unsound.

The subject matter of Section 1143a certainly falls within the Secretary's expertise over matters that are related to military service. Congress enacted that provision to facilitate the downsizing of the armed forces following the collapse of communism in Eastern Europe and the dissolution of the former Soviet Union. See 1993 Act § 4101, 106 Stat. 2658. Providing a retirement credit for service members who would retire early and work in community service jobs was proposed and enacted as a "tool * * * to reduce the 15 to 20-year element of the personnel inventory." *Senate Report* 201. The Secretary's definition of the scope of this retirement credit therefore is directly related to the size of the active-duty force, a matter that involves quintessentially military judgments.

More fundamentally, petitioner is mistaken about the *Chevron* doctrine. *Chevron* "recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it *is entrusted to administer*." 467 U.S. at 844 (emphasis added); see

National Cable & Telecommc'ns Ass'n v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("In *Chevron*, this Court held that ambiguities in statutes *within an agency's jurisdiction to administer* are delegations of authority to the agency to fill the statutory gap in reasonable fashion.") (emphasis added). Here, the Secretary undoubtedly "administers" Section 1143a. See 10 U.S.C. 1143a(a) ("The Secretary of Defense shall implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty."). Thus, his reasonable interpretations of that provision must be accorded deference.

Second, petitioner contends (Pet. 15) that "judicial deference * * * is not warranted under *Chevron* because the legislation at issue here did not leave it to the Secretary to fill gaps or elucidate general standards." That contention also rests on a misunderstanding of the Program. In *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001), this Court held that "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." Such "[d]elegation of * * * authority may be shown in a variety of ways," including "by an agency's power to engage in * * * notice-and-comment rulemaking." *Id.* at 227.

The Program is exactly the kind of administrative process *Mead* had in mind. Congress gave the Secretary, by way of the president, general authority to "prescribe regulations to carry out his functions, powers, and duties." 10 U.S.C. 121. Congress further directed the

Secretary to "implement a program to encourage members and former members of the armed forces to enter into public and community service jobs after discharge or release from active duty." 10 U.S.C. 1143a(a). And, as set forth above, Congress provided a vague definition of "public service and community service organization." 10 U.S.C. 1143a(g). The Secretary, employing his general power to "prescribe regulations" and his specific charge to "implement" the public and community service program, issued a notice-and-comment rulemaking to fill the gap in Congress' definition of "public service and community service organization." See 59 Fed. Reg. 40,809 (1994) (final rule).[2] That rulemaking, which carries the force of law, warrants deference under *Mead*.

2. The Due Process Clause of the Fifth Amendment "forbids the Federal Government to deny equal protection of the laws." *Vance* v. *Bradley*, 440 U.S. 93, 95 n.1 (1979). The court of appeals correctly concluded that the Program is consistent with equal protection.

a. A governmental classification is reviewed for a rational basis unless it "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as * * * religion." *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976). The Program does neither.

The Program does not draw any suspect classification. Instead, the Program rests on a neutral foundation—effectuating Section 1143a's goal of filling vacancies in certain high-need sectors. See pp. 7-8, *supra*. To accomplish that objective, the Program exempts several general categories of employment: work for businesses, labor unions, and partisan political organizations, and

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[2] Petitioner is thus wrong to allege (Pet. 16) that "[t]he regulation at issue here did not result from any formalized administrative process."

religious instructions, worship services, or any form of proselytization. As the court of appeals recognized, "[t]he breadth of the exclusion suggests that the Secretary was not discriminating along religious lines." Pet. App. 19a.

Nor does the Program intrude on the fundamental right to free exercise of religion. As an initial matter, the Court need not consider this issue because petitioner did not even raise it in the district court. Petitioner's complaint never mentions free exercise, and his opposition to the motion to dismiss argued only that the Program drew a suspect classification. See Pl.'s Mem. in Opp. to Gov't Mot. to Dismiss 12 ("the [Program] makes a classification based upon religion"). Indeed, the district court recognized that petitioner "does not contend that [the Program] interferes with his fundamental right to freely exercise his religion." Pet. App. 45a.

In any event, although the court of appeals did address the issue, it correctly concluded that the Program does not interfere with the right to free exercise. That conclusion was a straightforward application of this Court's decisions in *Locke* v. *Davey*, 540 U.S. 712 (2004), and *Johnson* v. *Robison*, 415 U.S. 361 (1974). At issue in *Davey* was a college scholarship program operated by the State of Washington. 540 U.S. at 716. The program provided stipends for high-achieving high school graduates, with one exception: students could not use the scholarship to pursue a degree in theology. *Ibid*. The Court held that the program did not violate free exercise because it "impose[d] neither criminal nor civil sanctions on any type of religious service or rite." *Id.* at 720. Instead, "[t]he State ha[d] merely chosen not to fund a distinct category of instruction." *Id*. at 721. The Court thus "[could not] conclude that the denial of funding for

vocational religious instruction alone is inherently constitutionally suspect." *Id.* at 725.

At issue in *Robison* was the constitutionality of Congress' decision to extend education benefits to draftees who had served on active duty in the armed forces but not to draftees who had been relieved of active duty due to conscientious objections and had instead completed civilian service. See 415 U.S. at 362-364. The Court concluded that this scheme was constitutional because it imposed at most "an incidental burden" on the right of free exercise. *Id.* at 385. The provision of education benefits to veterans of the armed forces was meant "to advance the neutral, secular governmental interests of enhancing military service and aiding the readjustment of military personnel to civilian life," and conscientious objectors "were not included in this class of beneficiaries, not because of any legislative design to interfere with their free exercise of religion, but because to do so would not rationally promote the Act's purposes." *Ibid.*

For reasons similar to *Davey* and *Robison*, the Program does not interfere with the right to free exercise. It does not punish religious conduct or prevent anyone from engaging in such conduct because service members are free not to participate in the Program. The Program merely creates a category of benefits by providing early retirees with the option of working at certain public service and community service organizations, thereby advancing the neutral goal of boosting services in high-need sectors. Although the Program does not extend benefits for religious instructions, worship services, or any form of proselytization, any resulting burden on religion is incidental and does not implicate the Free Exercise Clause. Indeed, this Court has made clear that the government's "decision not to subsidize the exercise

of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny." *Ysursa* v. *Pocatello Educ. Ass'n*, 129 S. Ct. 1093, 1098 (2009) (citation omitted); see *Regan* v. *Taxation with Representation*, 461 U.S. 540, 549 (1983).[3]

b. Petitioner believes (Pet. 19-23) that *Davey* and *Robison* are not correct frames of reference for this case. Instead, according to petitioner, the court of appeals should have looked to this Court's decisions in *McDaniel* v. *Paty*, 435 U.S. 618 (1978), and *Sherbert* v. *Verner*, 374 U.S. 398 (1963). As an initial matter, however, *Davey* found both *McDaniel* and *Sherbert* irrelevant to the constitutionality of Washington's scholarship program. See 540 U.S. at 720-721. Because this case and *Davey* are materially indistinguishable, *McDaniel* and *Sherbert* are also not relevant here. In any event, neither *McDaniel* nor *Sherbert* controls this case.

In *McDaniel*, the Court ruled that Tennessee had violated the Free Exercise Clause by barring ministers from serving as legislators or delegates at a constitutional convention. 435 U.S. at 629. Two competing rights were at stake in that case: on the one hand, the Free Exercise Clause protects "the right to preach, proselyte, and perform other similar religious func-

[3] Notably, as the district court recognized, "the Program credits military personnel for their work at religious organizations, so long as the activities performed by the early retiree are unrelated to religious instructions, worship services, or any form of proselytization." Pet. App. 46a (citation omitted). So, for instance, an early retiree could get credit for doing health-care related work at a religious institution, as long as the work does not involve religious instructions, worship services, or proselytization. Petitioner is thus wrong to suggest that under the Program, "*any work* for an organization that engages in religious instruction, religious services or proselytization is disqualified." Pet. 23 (emphasis added).

tions," *id.* at 626; on the other hand, the Tennessee constitution protects "the right * * * to seek and hold office as legislators or delegates to the state constitutional convention," *ibid.* But "under the clergy-disqualification provision, [a minister could not] exercise both rights simultaneously because the State has conditioned the exercise of one on the surrender of the other." *Ibid.*

McDaniel thus involved an "either-or" situation. Either the plaintiff could exercise his right to free exercise, or he could exercise his right to serve in public office. But there was no way he could exercise both rights. For two reasons, the Program does not create a comparable dilemma. First, there is no issue of competing rights. Whereas in *McDaniel*, Tennessee had "encroached upon [the] right to the free exercise of religion" by "punishing a religious profession with the privation of [the] civil right [to run for office]," 435 U.S. at 626 (citation omitted), early retirees have no independent right to earn service credit. Thus, early retirees like petitioner, who choose to engage in "religious instructions, worship services, or any form of proselytization," are not deprived of any right to which they were otherwise entitled. They are merely ineligible for the optional service credit offered by the Secretary. Second, unlike *McDaniel*, the Program does not require early retirees to *surrender* religious activities in order to earn service credit. An individual can earn credit by working for a PACS-eligible organization and is also otherwise free to engage in activities that relate to "religious instructions, worship services, or any form of proselytization."

In *Sherbert*, the plaintiff was released by her employer because her religion forbade her from working on Saturdays; and for the same reason, she was unable to find other employment. 374 U.S. at 399. She applied for

benefits under South Carolina's unemployment-compensation scheme. That scheme did not authorize benefits if the applicant had "failed, without good cause . . . to accept available suitable work when offered," *id.* at 401, and the plaintiff was denied benefits because her restriction on working Saturdays was found not to be "good cause," *id.* at 399-402. The Court held that the plaintiff's free exercise right had been violated because "not only is it apparent that [her] declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." *Id.* at 404. Thus, "[t]he ruling force[d] her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." *Ibid.*

Unlike the unemployment-compensation scheme in *Sherbert*, the Program here does not pressure, let alone force, anyone to surrender their religious conduct or practices. The burden it imposes on religious conduct is benign. As the court of appeals observed, petitioner "worked as a youth minister for pay and any loss of an incremental increase in his [military] retirement pay burdened him much less than losing unemployment compensation altogether." Pet. App. 17a.

c. "[A] statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *FCC* v. *Beach Commc'ns., Inc.*, 508 U.S. 307, 313 (1993). A regulation that has a "fair and substantial relation" to the object of the statute that the agency is interpreting categorically satisfies the rational basis

test. *Robison*, 415 U.S. at 374-375. Under those principles, the court of appeals correctly concluded that the Secretary's regulation has a valid rational basis.

As set forth above, *supra*, pp. 7-8, the Secretary's conclusion that work related to religious instruction, worship, and proselytization falls outside the category of activities for which Section 1143a(g) authorized retirement credit is a reasonable and lawful effort to follow congressional intent. The classification thus serves a rational basis. Because no other court of appeals has come to a contrary conclusion and because the decision below is consistent with this Court's precedent, further review is unwarranted.

3. Even if the foregoing issues were otherwise to warrant the Court's attention, the decision below is of little prospective significance, and further review of this case is unwarranted.

The time period for seeking retirement credit under the PACS Program has elapsed. Congress' final amendment of the Program's statutory authorization extended the Program until September 1, 2002, see Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, § 554, 116 Stat. 2553, and the last individual who retired under the temporary early retirement authority (TERA) relevant to this case left the armed forces on August 31, 2002. That person's period of eligibility for seeking a retirement credit closed on August 31, 2007. 32 C.F.R. 77.3(b). Pursuant to DoD instructions, a qualified retiree must complete all reporting of qualified periods of employment within one year. See DoD, *Instruction No. 1340.19*, *Certification of Public and Community Service Employment of Military Retirees* para. 5.3.3 (Nov. 17, 1993).

In light of the above facts, as of the end of calendar year 2008, the Secretary's Office of Military Personnel Policy ceased processing new applications for retirement credit and minimized or eliminated associated support for the Program. To that end, the TERA website was officially shut down on February 20, 2009. See *Special Announcement About the TERA Website* (visited July 7, 2009) <https://www.dmdc.osd.mil/tera/>.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2009