No. _____

In the Supreme Court of the United States

Derwin Patten, Roy Patten, and Hazell Brooks,
Petitioners,

v.

District of Columbia
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

Thomas Ruffin, Jr.
Counsel of Record
RUFFIN LEGAL SERVICES
153 Galveston Place, S.W., Suite 4
Washington, D.C. 20032
(202) 561-2898
iska999@yahoo.com

Counsel for Petitioners

QUESTIONS PRESENTED

As legislated by Congress, the Randolph Sheppard Act of 1936 requires an exhaustion of administrative remedies by blind people aggrieved by a Randolph Sheppard Vending Facilities Program ("Randolph-Sheppard program"). As provided for in the act, the U.S. Department of Education authorizes state governments and the District of Columbia to establish Randolph-Sheppard programs, which license blind citizens to be self-employed retailers or "blind vendors" inside government buildings. However, the Randolph Sheppard Act does not bar state governments and the District of Columbia from discriminating against the blind.

In this case, the questions presented, which should be settled by this Court, and which the D.C. Circuit decided in a way that conflicts with this Court's reasoning in ***Fry v. Napoleon Community Schools***, 137 S.Ct. 743 (2017), and which conflicts with the Eighth Circuit's opinion in ***Randolph v. Rogers***, 253 F.3d 342 (2001), may be stated as follows:

1. Does a federal statute that requires an exhaustion of administrative remedies bar a public entity discrimination claim under the Americans with Disabilities Act of 1990 ("ADA"), the Rehabilitation Act of 1973, and a state antidiscrimination statute when the plaintiff files the discrimination claim in court without exhausting administrative remedies, but does so on the basis of the state's statutory waiver of its federal right to exhaust such remedies?

2. With its requirement for an exhaustion of administrative remedies, does the Randolph Sheppard Act preclude relief under the ADA, the Rehabilitation Act, and state antidiscrimination statutes for public entity discrimination against blind vendors and other disabled persons in the Randolph-Sheppard program?

PARTIES TO THE PROCEEDING

Hazell Brooks, Derwin Patten, and Roy Patten litigated this case as plaintiffs and as appellants in the proceedings below.

The District of Columbia litigated this case as the defendant and as the appellee in the proceedings below.

DIRECTLY RELATED PROCEEDINGS

There are no proceedings directly related to this case.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases:

Statutes:

Regulations:

LIST OF COURT PROCEEDINGS

The petitioners filed this lawsuit, titled *Hazell Brooks, et al. v. District of Columbia* (Case 1:18-CV-732 CRC), in the U.S. District Court for the District of Columbia on March 30, 2018. The district court dismissed this lawsuit pursuant to **rule 12(b)** on March 22, 2019, and, on May 9, 2019, the district court denied the petitioners' **rule 59(e)** motion to alter or amend judgment.

After filing their notice of appeal on June 7, 2019, the petitioners litigated their appeal in *Derwin Patten, et al. v. District of Columbia* (Case No. 19-7074) before the U.S. Court of Appeals for the District of Columbia Circuit. On August 13, 2021, the D.C. Circuit affirmed the district court's dismissal of this lawsuit. On October 15, 2021, the D.C. Circuit denied the petitioners' request for rehearing and for rehearing *en banc*.

CITATIONS TO COURT OPINIONS AND ORDERS IN THIS CASE

Brooks v. District of Columbia, 375 F. Supp. 3d 41 (D.D.C. 2019).
Patten v. District of Columbia, 9 F.4th 921 (D.C. Cir. 2021).
Patten v. District of Columbia, 2021 U.S. App. Lexis 31154 (D.C. Cir. Oct. 15, 2021)(rehearing *en banc* denied).
Patten v. District of Columbia, 2021 U.S. App. Lexis 31158 (D.C. Cir. Oct. 15, 2021)(panel rehearing denied).

BASIS FOR SUPREME COURT JURISDICTION

On August 13, 2021, the D.C. Circuit entered the judgment that the petitioners ask this Court to review. On October 15, 2021, the D.C. Circuit denied the petitioners' request for a rehearing and a rehearing *en banc*. This Court has jurisdiction pursuant to **28 U.S.C. § 1254(1)**.

RELEVANT STATUTES AND REGULATIONS[1]

5 U.S.C. § 702
20 U.S.C. § 107
20 U.S.C. § 107a(a)(5)
20 U.S.C. § 107b(6)
20 U.S.C. § 107d-1(a)
20 U.S.C. § 107d-2(a)
20 U.S.C. § 107e(1)
20 U.S.C. § 107f
20 U.S.C. § 1400(d)(1)(A)
20 U.S.C. § 1412(a)(1)(A)
20 U.S.C. § 1415(f)-(g) and (*l*)
28 U.S.C. § 2254(b)(1)(A) and (b)(3)
29 U.S.C. § 794(a)
29 U.S.C. § 794a
42 U.S.C. § 1997e(a)
42 U.S.C. § 12132
42 U.S.C. § 12133

---

[1] A verbatim restatement of these statutes and regulations may be found in the appendix.

705 ILCS § 505/1
705 ILCS § 505/8
705 ILCS § 505/25
D.C. Code § 2-1401.01
D.C. Code § 2-1402.73
D.C. Code § 2-1403.03(b)
D.C. Code § 2-1403.16
D.C. Code § 2-1831.09(b) and (e)-(f)
4 DCMR 128.1
28 C.F.R. § 35.130(b)(2)
28 C.F.R. § 35.160(a)(1) and (b)(1)
28 C.F.R. § 35.170(c)
28 C.F.R. § 35.172(d)
28 C.F.R. § 35.190(b)(7)
29 DCMR 218.2(b)-(c)
34 C.F.R. § 104.4(b)(1)(iv)

STATEMENT OF THE CASE

This lawsuit requires an interpretation of the Randolph Sheppard Act of 1936, which, at **20 U.S.C. §§ 107b(6)** and **107d-1(a)**, requires an exhaustion of state remedies that must include a "fair" and "full evidentiary hearing". The petitioners filed this lawsuit under title II of the ADA, **42 U.S.C. § 12132**, and under section 504 of the Rehabilitation Act, **29 U.S.C. § 794(a)**, as well as under sections 273, 303(b), and 316(a) of the District of Columbia's Human Rights Act of 1977 ("DCHRA"), **D.C. Code §§ 2-1402.73**, **2-1403.03(b)**, and **2-1403.16(a)**, and the petitioners filed this lawsuit to seek remedies for public entity disability discrimination that the Randolph Sheppard Act never prohibited.

A. The Facts

The petitioners, namely, Hazell Brooks, Derwin Patten, and Roy Patten ("Hazell Brooks and the Patten brothers"), worked as self-employed blind vendors with their own vending businesses in the District of Columbia's Randolph-Sheppard program. **SAC, ¶¶ 3-5**.[2] Each petitioner was blind as defined in **20 U.S.C. § 107(e)(1)**, with each petitioner suffering from either "total vision impairment" or "substantial vision impairment". **SAC, ¶¶ 3-5**. In this way, Hazell Brooks' and the Patten brothers'

[2] "SAC" refers to the petitioners' Second Amended Complaint. In this case, since the lower federal courts dismissed this lawsuit and affirmed that dismissal on the basis of a motion to dismiss, this Court and the parties "must take all of the factual allegations in the [Second Amended C]omplaint as true". ***Iqbal v. Ashcroft***, 556 U.S. 662, 678 (2009).

blindness substantially limited their ability to see, read, write, work, perform manual tasks, and care for themselves. **SAC, ¶ 25**.

For the benefit of blind citizens like Hazell Brooks and the Patten brothers, Congress enacted the Randolph Sheppard Act at **20 U.S.C. §§ 107 *et seq***., which "provides opportunities for blind people to manage vending facilities for profit in government buildings". **SAC, ¶ 6(a)**. In their Randolph-Sheppard vending facilities, the blind petitioners sold food, newspapers, lottery tickets, and other retail products. *See* **20 U.S.C. § 107a(a)(5)**. The District of Columbia, through its D.C. Department on Disability Services ("DDS"), managed the local Randolph-Sheppard program, which initially "assessed and confirmed" the petitioners' blindness and then set up their government-supported vending facilities within locally situated federal buildings. **SAC, ¶¶ 6(a)-(b)** and **46(a)(1)-(2)**.

Since at least October 1, 2010, the Patten brothers received from the District's Randolph-Sheppard program hundreds, if not thousands, of food inspection reports, financial reports, government notices, business letters, and other written communications in small print, that is, in twelve-point font, ten-point font, and eight-point font, regarding DDS's "services, benefits, activities, legal protections, and other opportunities". **SAC, ¶¶ 9(b)-(c)**, **10(a)-(b)**, and **10(e)**. However, as blind people, the Patten brothers could not read these business documents. **SAC, ¶ 10(a)**. Similarly, since August 13, 2014, Hazell Brooks received from the District's Randolph-Sheppard program hundreds, if

not thousands, of written reports, notices, letters, and other communications in small print about DDS's "services, benefits, activities, legal protections, and other opportunities", but, like the Patten brothers, Hazell Brooks' blindness prevented her from reading these business documents. **SAC, ¶¶ 9(b)-(c)**, **10(a)-(b)**, and **10(e)**.

From about 2014 through January 12, 2018, Hazell Brooks and the Patten brothers asked DDS on several occasions to provide them with auxiliary aids, such as "'ADA[3] compliant' large print" and automated reading machines, "that would reasonably accommodate the plaintiffs' blindness", so that they could read the District of Columbia's business communications. **SAC, ¶¶ 46(b)-(o)**. However, from about 2014 through April 18, 2018, the District of Columbia ignored or flatly rejected the petitioners' requests for auxiliary aids. **SAC, ¶¶ 46(b)-(o)**.

Moreover, the respondent District of Columbia, through DDS and its employees, performed several segregated Food Code inspections of Hazell Brooks' and the Patten brothers' vending facilities. **SAC, ¶¶ 9(d)** and **18(a)** through **21(c)**. In other words, DDS performed Food Code inspections of only Randolph-Sheppard blind vendor's facilities, including the blind petitioners' vending businesses. **SAC, ¶¶ 21(a)-(b)**. In the meantime, the District of Columbia's Department of Health ("DOH") performed Food Code inspections of all local food establishments, such that DOH

[3] In this context, "ADA" means Americans with Disabilities Act.

inspected both the petitioners' facilities and sighted food operators' facilities. Therefore, the petitioners faced a double-load of Food Code inspections by the District of Columbia, one by DDS and another by DOH, while sighted food vendors received merely one set of Food Code inspections, those performed by DOH.

On March 30, 2018, the petitioners filed this lawsuit against the District of Columbia. The petitioners filed their lawsuit in U.S. district court, and they did so on authority from the **D.C. Code § 2-1403.03(b)**, which allowed Hazell Brooks and the Patten brothers to file a discrimination lawsuit against the District of Columbia in any "court of competent jurisdiction". *See* **D.C. Code § 2-1403.03(b)**; *see also* **D.C. Code § 2-1403.16(a)**. In their lawsuit, the petitioners complained that, by communicating with them in small business print that the blind petitioners could not read, by refusing to provide auxiliary aids, and by performing DDS inspections of the petitioners' facilities in a fashion that segregated the petitioners from sighted food operators, the District of Columbia violated the ADA, the Rehabilitation Act, and DCHRA.

On March 22, 2019, the U.S. district court invoked **rule 12(b)** and dismissed the petitioners' lawsuit. On August 13, 2021, the D.C. Circuit affirmed the district court's dismissal of this lawsuit. On October 15, 2021, the D.C. Circuit denied the petitioners' request for a rehearing and a rehearing *en banc*.

B. Statutory Background

On December 13, 1977, the Council of the District of Columbia enacted the DCHRA. **D.C. Code 2-1401.01 *et seq.***; **D.C. Law 2-38**. By enacting this legislation, the Council intended "to secure an end in the District of Columbia to discrimination for any reason other than individual merit". **D.C. Code § 2-1401.01**. However, in ***Armstrong v. D.C. Public Library***, 154 F. Supp. 2d 67 (D.D.C. 2001), a federal district court held that, according to section 303 of the DCHRA, a plaintiff could not bring an action in court against the District of Columbia for a violation of the DCHRA, but rather that an individual aggrieved by a District of Columbia violation of the DCHRA had to exhaust administrative remedies. ***Armstrong***, 154 F. Supp. 2d at 74.

The Council of the District of Columbia quickly responded to ***Armstrong*** by enacting the Human Rights Amendment Act of 2002. In section 2(g) of that legislation, the Council amended the DCHRA by adding a section 273 that established the following rule outlawing "discriminatory practice[s]" by the District of Columbia:

> Except as otherwise provided for by District [of Columbia] law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived:

> race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, or place of residence or business.

D.C. Code § 2-1402.73; D.C. Law 14-189, § 2(g)(Oct. 1, 2002).

In section 2(h)(3) of the Human Rights Amendment Act, the Council went a step further, so as to be clear about its intent to create a cause of action against the District of Columbia for civil rights violations. In this section 2(h)(3), the Council amended section 303 of the DCHRA by adding the following subsection (b):

> (b) A person claiming to be aggrieved by an unlawful discriminatory practice on the part of District government agencies, officials, or employees may elect to file an administrative complaint under the rules of procedure established by the Mayor under this section or a civil action in a court of competent jurisdiction under section 316 [that is to say, **D.C. Code § 2-1403.16**].

D.C. Code § 2-1403.03(b); D.C. Law 14-189, § 2(h)(3). This language waived the District's right to an exhaustion of administrative remedies for civil rights claims against it.

In other words, this legislation established a right to "a civil action in a court of competent

jurisdiction" if that action sought redress for an "unlawful discriminatory practice on the part of District [of Columbia] agencies, officials, and employees", even if those agencies, officials, or employees worked within the District's Randolph-Sheppard program. **D.C. Code § 2-1403.03(b)**. However, the Randolph Sheppard Act mandated that DDS "provide to any blind licensee dissatisfied with any action arising from … the … program an opportunity for a fair hearing". **20 U.S.C. § 107b(6)**. The act added that, in the District of Columbia, "any blind licensee who is dissatisfied with any action … of the … program may … request … a full evidentiary hearing". **20 U.S.C. § 107d-1(a)**. Hence, the Randolph Sheppard Act obliged the petitioners to exhaust the District's remedies before bringing their claims about disability discrimination to court.

Nevertheless, the District's **§ 2-1403.03(b)** waiver of administrative remedies for a plaintiff's civil rights claims, including civil rights claims against the Randolph-Sheppard program, fulfilled an important purpose, because the Randolph Sheppard Act never outlawed discrimination against blind vendors. Instead, the Randolph Sheppard Act funded state vending facility programs that provided blind people "with remunerative employment", and, in this way, the act stimulated "the blind to greater efforts in … mak[ing] themselves self-supporting". **20 U.S.C. §§ 107(a)** and **107f**. However, unlike the DCHRA, the ADA, the Rehabilitation Act, and other civil rights statutes, the Randolph Sheppard Act never guaranteed equal protection or other civil rights for blind people. *See* **20 U.S.C. §§ 107 *et seq***.

Therefore, if the petitioners challenged the District of Columbia through the administrative system authorized by the Randolph Sheppard Act, **20 U.S.C. §§ 107b(6)** and **107d-1(a)**, that system, as set up within the D.C. Office of Administrative Hearings ("OAH"),[4] would be without jurisdiction to hear the petitioners' disability discrimination claims. *See* **4 DCMR 128.1**; *contrast* **28 C.F.R. §§ 35.170(c)** and **35.190(b)(7)**. In fact, OAH has no authority to issue an injunction against DDS' discriminatory inspections or against its use of small print communications to the blind petitioners, and they have no authority to award damages or a reasonable attorney's fee for civil rights violations. *See* **D.C. Code § 2-1831.09(b)** and **(e)-(f)**(OAH authority); ***D.C. Office of Tax & Revenue v. Shuman***, 82 A.3d 58, 69-72 (D.C. 2013). Worse, still, for victims of the District's illegal discrimination against the blind, judicial review of Randolph-Sheppard administrative remedies would be limited in scope by the Administrative Procedures Act. *See* **20 U.S.C. § 107d-2(a); 5 U.S.C. §§ 702** and **706**; *see* ***Patten v. District of Columbia***, 9 F.4th 921, 927 (D.C. Cir. 2021).

Knowing this, the Council nonetheless prohibited unlawful discriminatory practices by the District of Columbia, and the Council outlawed this behavior while waiving the District's right to an exhaustion of administrative remedies for claims alleging discrimination on account of such bases as race, color, national origin, sex, religion, and

[4] *See* **29 DCMR 218.2(b)-(c)**.

disability. Therefore, the District of Columbia waived administrative remedies for its violations of the petitioners' rights under the DCHRA, the ADA, and the Rehabilitation Act. **D.C. Code § 2-1403.03(b)**. Meanwhile, the DCHRA barred the District from discriminating "on the basis of an individual's actual or perceived … disability". **D.C. Code § 2-1402.73**. Similarly, the ADA and the Rehabilitation Act[5] prohibited any state and the District of Columbia from discriminating against a "qualified individual with a disability". **42 U.S.C. § 12132; 29 U.S.C. § 794(a)**.

While implementing the ADA, the Justice Department mandated that a public entity, such as the District of Columbia, "take appropriate steps to ensure that communications" with disabled persons "are as effective as communications with others". **28 C.F.R. § 35.160(a)(1)**. The Justice Department also ruled that, pursuant to the ADA, "a public entity shall furnish appropriate auxiliary aids and services … to afford individuals with disabilities … an equal opportunity to participate in … a service, program, or activity of a public entity". **28 C.F.R. § 35.160(b)(1)**. In addition, the Justice Department's ADA regulations barred public entities from denying "a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different [from what people without disabilities participate in]". **28**

---

[5] Actually, the Rehabilitation Act barred discrimination "solely by reason" of a person's disability, and it applied to "any program or activity receiving Federal financial assistance". **29 U.S.C. § 794(a)**.

C.F.R. § 35.130(b)(2); *accord* **34 C.F.R. § 104.4(b)(1)(iv)**.[6] For Hazell Brooks and the Patten brothers, these civil rights and implementing regulatory protections filled in for the lack of such protections by the Randolph Sheppard Act.

REASONS FOR GRANTING PETITION

Like several other instances of state and federal legislation, the DCHRA explicitly waived the right to an exhaustion of administrative remedies. **D.C. Code § 2-1403.03(b)**. The statute ruled that a person "aggrieved by" illegal discrimination on the part of the District of Columbia or its employees "may elect to file … a civil action in a court of competent jurisdiction" under the **D.C. Code § 2-1403.16**. In **§ 2-1403.16(a)**, the DCHRA decreed that "any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate". **D.C. Code § 2-1403.16(a)**.

However, in a substantial departure from the manner in which courts typically treat such statutory waivers, the D.C. Circuit held that, notwithstanding the waiver in **§ 2-1403.03(b)**, the petitioners must exhaust the District's remedies in its Randolph-Sheppard program before filing a lawsuit invoking the ADA, the Rehabilitation Act, and the District's antidiscrimination statute. *See* ***Patten***, 9 F.4th at 926 and 929. Although the

---

[6] The U.S. Department of Education issued **34 C.F.R. § 104.4(b)(1)(iv)** so as to interpret the Rehabilitation Act.

Randolph Sheppard Act offers no protection against illegal discrimination, and although a Randolph-Sheppard claim would not result in an award of damages or a reasonable attorney's fee, the D.C. Circuit held that, for the blind petitioners, the Randolph Sheppard Act's administrative remedies offered the petitioners their only hope for redress.

This decision departed substantially from this Court's reasoning in ***Fry v. Napoleon Community Schools***, 137 S.Ct. 743 (2017), and, indeed, the D.C. Circuit's decision also conflicts directly with the Eighth Circuit's decision in ***Randolph v. Rogers***, 253 F.3d 342 (8th Cir. 2001), which ruled that public entity claims under the ADA and the Rehabilitation Act may be litigated in court without exhausting administrative remedies. ***Randolph***, 253 F.3d at 346-48. The question of whether a state's waiver of federal administrative remedies allows a plaintiff to file suit without first exhausting remedies has never been settled by this Court, but it should be settled by writ of certiorari in this case. Also, the conflict between the D.C. Circuit and the Eighth Circuit about whether ADA and Rehabilitation Act claims against a public entity need to be exhausted before being filed in court should also be settled by writ of certiorari. Otherwise, Randolph-Sheppard blind vendors will be without ADA and Rehabilitation Act civil rights protections.

*A. D.C. Circuit's Opinion Conflicts with **Fry**'s Reasoning and Precedent While Deciding an Important Federal Question That Should Be Settled by This Court*

In this case, the D.C. Circuit reasoned that the Randolph-Sheppard "exhaustion requirement … applies so long as the aggrieved parties are [Randolph-Sheppard] licensees and the challenged action involves [an] operation or administration of the [Randolph-Sheppard] program". ***Patten***, 9 F.4th at 925. On that basis, the D.C. Circuit held that, because the Randolph Sheppard Act's "grievance scheme is mandatory and covers the plaintiffs' claims", the Randolph Sheppard Act "required the plaintiffs to exhaust their administrative and arbitral remedies before seeking judicial review". ***Patten***, 9 F.4th at 926 and 929. However, the D.C. Circuit ignored the petitioners' argument that, for civil rights claims, the District of Columbia statutorily waived administrative remedies by enacting the **D.C. Code § 2-1403.03(b)**.

In contrast, this Court in ***Fry*** interpreted the Individuals with Disabilities Education Act ("IDEA") and determined that the ADA and the Rehabilitation Act can be enforced in court without first exhausting IDEA's administrative remedies, but only if, as a condition precedent, the "gravamen" of the ADA and the Rehabilitation Act claims never invoked a remedy designed to fulfill the purpose of IDEA, and if IDEA waived exhaustion when IDEA failed to provide the remedies pursued in the plaintiff's ADA and Rehabilitation Act claims. ***Fry***, 137 S.Ct. at 755-57. The ***Fry*** Court ruled in this manner after

examining the purpose of IDEA, which mandated that IDEA-subsidized public schools provide each of their disabled students with a "free appropriate public education" ("FAPE"). ***Fry***, 137 S.Ct. at 753; **20 U.S.C. § 1400(d)(1)(A)**.

In ***Fry***, a crippled child asserting ADA rights wanted to be accompanied in school by her "service dog" who steadied the child's mobility and helped with other tasks made difficult by the child's disabled condition. Despite the child's ADA rights, local officials barred the dog from the school building, but, as required by IDEA, the officials fully accommodated the child's FAPE rights by providing a human aid who adequately assisted the child with mobility and other tasks. However, the child insisted that, under the ADA, she enjoyed a right to be self-reliant at school, and that, even with a human aid, she could not be self-reliant without her service dog.

Under the express wording of IDEA, the child's ADA rights could be enforced in court after the child first exhausted administrative remedies, except that, according to **20 U.S.C. § 1415(*l*)**, the exhaustion requirement did not apply to "relief" unavailable under IDEA. **20 U.S.C. § 1415(*l*)**; ***Fry***, 137 S.Ct. at 750. In other words, **§ 1415(*l*)** created a conditional waiver of the exhaustion mandate. In ***Fry***, the child sued to enforce her ADA rights, but she did so in reliance on the conditional waiver in **§ 1415(*l*)** and thus without exhausting IDEA's administrative remedies. On appeal, this Court recognized the **§ 1415(*l*)** conditional waiver and held that, "in a suit brought under" a statute other than IDEA, if "the

remedy sought is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required". ***Fry***, 137 S.Ct. at 754.

In this case, Hazell Brooks' and the Patten brothers' second amended complaint presented a similar fact pattern. The petitioners alleged ADA, DCHRA, and Rehabilitation Act disability discrimination claims for damages against the District of Columbia, while the plaintiff in ***Fry*** sued a local school district for a reasonable accommodation and damages under the ADA. The petitioners never sought with their discrimination claims to enforce the Randolph Sheppard Act and its promise of entrepreneurial opportunities, and the ***Fry*** plaintiff never sought with her ADA claim to enforce IDEA and its promise of a free appropriate public education.

As an additional concern, the waiver invoked by the petitioners resembles the waiver in ***Fry***. For example, in ***Fry***, IDEA[7] waived exhaustion if the child's ADA and Rehabilitation Act claims sought relief that would be unavailable under IDEA. That is to say, IDEA created a conditional waiver of the exhaustion mandate. Similarly, in the petitioners' lawsuit, the DCHRA, or the **D.C. Code § 2-1403.03(b)**, allowed Hazell Brooks and the Patten brothers the option of filing in court their DCHRA and other discrimination claims without first exhausting remedies. With that option, **§ 2-1403.03(b)** created in the DCHRA an unconditional waiver of the District's exhaustion rights.

---

[7] **20 U.S.C. § 1415(*l*).**

Meanwhile, the Randolph Sheppard Act never outlawed disability discrimination. *See* **20 U.S.C. §§ 107 *et seq***. Yet, the act served the fundamental purpose of "providing remunerative employment" to blind people. **20 U.S.C. § 107(a); 49 Stat. 1559**. Similarly, IDEA served a "principal purpose" ahead of all others, that of ensuring that schools receiving IDEA funding provided disabled students with a free appropriate public education. ***Fry***, 137 S.Ct. at 748-49 and 753; **20 U.S.C. § 1412(a)(1)(A)**. Therefore, the ADA in ***Fry*** and the ADA, DCHRA, and Rehabilitation Act in this case offered relief that IDEA and the Randolph Sheppard Act never afforded – judicially imposed damages, injunctions, and attorneys' fees so as to redress illegal discrimination.

Thus the ***Fry*** Court recognized what the D.C. Circuit ignored, that the judiciary owed an obligation to protect statutory waivers of administrative remedies. In ***Fry***, the statutory waiver language at **20 U.S.C. § 1415(*l*)** established three rules: (1) IDEA students may seek relief under the ADA, the Rehabilitation Act, and other such federal laws; (2) unless otherwise provided, a FAPE claim asserting ADA, Rehabilitation Act, or other such federal rights must first be exhausted under **20 U.S.C. § 1415(f)-(g)**; and (3) ADA, Rehabilitation Act, and other civil rights claims seeking relief not available under IDEA may be litigated in court without exhausting remedies. **20 U.S.C. § 1415(*l*)**; ***Fry***, 137 S.Ct. at 750. As recognized by this Court in ***Fry***, this third rule is IDEA's conditional waiver of the exhaustion mandate.

With ***Fry*** as its guide, the D.C. Circuit owed an obligation to heed the statutory waiver in **§ 2-1403.03(b)**. After all, **§ 2-1403.03(b)** expressly allowed Hazell Brooks and the Patten brothers to forgo the District's administrative remedies as authorized by the Randolph Sheppard Act and file their disability discrimination claims in a "court of competent jurisdiction". **D.C. Code § 2-1403.03(b)**. This **§ 2-1403.03(b)** waiver deserves the same respect that this Court afforded in ***Fry*** to the statutory waiver of IDEA's administrative remedies.

Indeed, the following examples show that courts give due respect to statutory and other waivers by allowing a plaintiff to file claims in court without exhausting remedies. One example, the *habeas corpus* statute in **28 U.S.C. § 2254(b)(1)(A)**, established that the writ "shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available to the courts of the State". **28 U.S.C. § 2254(b)(1)(A)**. However, the statute permits states to "waive the requirement", **28 U.S.C. § 2254(b)(3)**, and federal courts honor this prerogative by allowing states to waive exhaustion. ***Sharrieff v. Cathel***, 574 F.3d 225, 226, 228 (3rd Cir. 2009); *see* ***Banks v. Dretke***, 540 U.S. 668, 705 (2004).

In addition, Title II of the ADA implicitly waives any requirement for exhausting remedies.[8] *See* **42 U.S.C. § 12133**; *see* ***Randolph***, 253 F.3d at 347. As a matter of fact, the U.S. Department of

[8] This issue shall be discussed in more detail in the part B.

Justice, in its regulations interpreting the ADA, declared that, "at any time, the complainant may file a private suit pursuant to section 203 of the [Americans with Disabilities] Act, **42 U.S.C. 12133**". **28 C.F.R. § 35.172(d)**; *see* ***Randolph***, 253 F.3d at 347, n. 10.

For claims invoking the Prisoner Litigation Reform Act ("PLRA"), this Court recognized that exhaustion may be avoided if it proves to be "unavailable". **42 U.S.C. § 1997e(a)**; ***Ross v. Blake***, 578 U.S. 632, 642 (2016). In ***Ross***, this Court held that "an inmate … must exhaust available remedies, but need not exhaust unavailable ones". ***Ross***, 578 U.S. at 642. Therefore, **§ 1997e(a)**, as construed by the Court, allowed a prisoner to file a PLRA claim in court without exhausting administrative remedies if those remedies are "not capable of use to obtain relief". ***Ross***, 578 U.S. at 643-44.

In another context, that of the Fair Labor Standards Act ("FLSA"), a plaintiff may litigate in court a substantive right under the FLSA without first exhausting arbitral or other remedies. ***Barrentine v. Arkansas-Best Freight Systems***, 450 U.S. 728, 739-41 (1981); ***Local 246 Utility Workers Union v. Southern Cal. Edison Co.***, 83 F.3d 292, 297 (9th Cir. 1996); ***Boyd v. Lynch***, 669 Fed. Appx. 456, 457 (9th Cir. 2016)(*per curiam*). Therefore, when a collective bargaining agreement requires arbitration, "a claim based on substantive rights under the Fair Labor Standards Act is not subject to an exhaustion requirement". ***Local 245 Utility Workers Union***, 83 F.3d at 297.

A last example for purposes of this petition may be found in state legislation. In this context, the Illinois General Assembly established a court of claims to hear cases based on contract, tort, actual innocence, and other matters. **705 ILCS, §§ 505/1** and **505/8**. Yet, in section 505/25, the legislature demanded that "any person who files a claim in the court shall, before seeking final determination of his or her claim[,] exhaust all other remedies". **705 ILCS, § 505/25**. Nevertheless, in ***Escobar v. State***, 55 Ill Ct. Cl. 433 (2013), the court ruled "that the state may waive the exhaustion requirement", with the court adding that, if the exhaustion defense is "not raised prior to trial, the issue is waived". ***Escobar***, 55 Ill. Ct. Cl. at 435.

These examples support the principle that the judiciary owes an obligation to comply with a legislature's legitimate policy decisions about whether, and to what extent, the government waives a statutory exhaustion mandate. *See* ***Ross***, 578 U.S. at 641-42. In fact, this Court acknowledged that, when a legislature amends a statute, "courts must 'presume it intends the change to have real and substantial effect'". ***Ross***, 578 U.S. at 641-42. In fact, "a court should 'give effect', if possible, to every clause and word of a statute". ***Moskal v. United States***, 498 U.S. 103, 109 (1990). Fittingly, then, the waiver in the **D.C. Code § 2-1403.03(b)** should be respected as the legislative vehicle allowing the petitioners to file their ADA, Rehabilitation Act, and DCHRA claims in court without exhausting Randolph-Sheppard administrative remedies. For these and other reasons, and particularly because the D.C. Circuit's opinion conflicted with the

reasoning and precedent in ***Fry***, this Court should grant certiorari.

B. The D.C. Circuit's Decision Is Wrong and Conflicts with Eighth Circuit Decision in ***Randolph***

The D.C. Circuit held that, notwithstanding the blind petitioners' ADA, Rehabilitation Act, and DCHRA discrimination claims, they owed an absolute obligation to exhaust the District's Randolph-Sheppard remedies before filing their discrimination claims in court. ***Patten***, 9 F.4th at 926-29. Without saying so, the D.C. Circuit's holding meant that, because of the exhaustion mandate in **20 U.S.C. §§ 107b(6)** and **107d-1(a)**, blind people in a Randolph-Sheppard program have none of the civil remedies, such as damages, injunctive relief, and a reasonable attorney's fee, as established in the ADA, the Rehabilitation Act, and other statutes,[9] both federal and state, that outlaw public entity discrimination. For Randolph-Sheppard blind vendors, this loss of their civil rights will be devastating, especially since about 1,821 blind vendors participate in the Randolph-Sheppard program. U.S. Ed. Dept., RSA website at https://rsa.ed.gov/about/programs/randolph-sheppard-vending-facility-program ("In FY 2017, a total of 1,821 blind vendors operated 2090 vending facilities").

[9] For example, the D.C. Circuit's holding precludes a Randolph-Sheppard blind vendor who never exhausted remedies from filing a private action against the District of Columbia for race discrimination under Title VI of the Civil Rights Act of 1964.

However, section 505(a)(2) of the Rehabilitation Act, **29 U.S.C. § 794a(a)(2)**, established that, for unlawful disability discrimination, "the remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 … shall be available to any person aggrieved by any act or failure to act by a recipient of Federal assistance". **29 U.S.C. § 794a(a)(2)**; *see* ***Dertz v. City of Chicago***, 912 F. Supp. 319, 324, n. 1 (N.D.Ill. 1995). Aware of this statute, the Supreme Court in ***Cannon v. University of Chicago***, 441 U.S. 677 (1979), declared that administrative remedies in Title VI need not be exhausted before the filing of a private suit pursuant to the act. ***Cannon***, 441 U.S. at 704-08, nn. 41-42. In other words, ***Cannon*** recognized that Title VI, with its right to a private cause of action, overrode any preference for exhausting its federal administrative remedies. ***Cannon***, 441 U.S. at 706, n. 41.

As a result, the Rehabilitation Act also overrode any preference for exhausting administrative remedies. After all, **§ 794a(a)(2)**, or section 505(a)(2) of the Rehabilitation Act, co-opted the same "remedies, procedures, and rights [as] set forth in title VI of the Civil Rights Act". **29 U.S.C. § 794a(a)(2)**; ***Dertz***, 912 F. Supp. at 324, n. 1. Therefore, since Title VI overrode any preference for exhausting administrative remedies, section 505(a)(2) of the Rehabilitation Act, or **29 U.S.C. § 794a(a)(2)**, also trumped the Randolph-Sheppard exhaustion mandate as spelled out in both **20 U.S.C. §§ 107b(6)** and **107d-1(a)** and **29 DCMR 218.2(b)-(c)**.

In like fashion, Title II of the ADA established that "the remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (**29 U.S.C. 794a**) shall be the remedies, procedures, and rights this [ADA] title provides to any person alleging discrimination on the basis of disability in violation of" **42 U.S.C. § 12132**. **42 U.S.C. § 12133**. In other words, "Title II [of the ADA] adopts the remedies, rights and procedures [of] the Rehabilitation Act of 1973 …, which does not require exhaustion of administrative remedies". ***Dertz***, 912 F. Supp. at 324.

In ***Randolph***, the Eighth Circuit observed that "an aggrieved individual … may proceed directly to federal court on a claim under Title II of the ADA". ***Randolph***, 253 F.3d at 347. The Justice Department similarly interpreted **§ 12133** by decreeing in a regulation that, "at any time, the complainant may file a private suit pursuant to section 203 of the [Americans with Disabilities] Act, **42 U.S.C. § 12133**". **28 C.F.R. § 35.172(d)**; *see* ***Randolph***, 253 F.3d at 347, n. 10. In other words, the Justice Department recognized that, for disability discrimination claims against a public entity, the ADA overrode exhaustion mandates in other statutes. **28 C.F.R. § 35.172(d)**; *see* **42 U.S.C. § 12333** (enforcement provisions in Title II of ADA).

No doubt, the D.C. Circuit wrongly decided the petitioners' case while issuing an opinion that conflicted with the Eighth Circuit's decision in ***Randolph***. After all, the court mistakenly insisted that the petitioners owed an obligation to exhaust

Randolph Sheppard Act remedies regarding their disability discrimination claims, although the court's exhaustion requirement contravenes the petitioners' ADA, Rehabilitation Act, and DCHRA rights and remedies. In other words, the ADA, the Rehabilitation Act, and the DCHRA afforded the petitioners a cause of action in court for disability discrimination, and that cause of action allowed the petitioners to seek damages, injunctive relief, and a reasonable attorney's fee. **D.C. Code §§ 2-1403.03(b)** and **2-1403.16(a)-(b)**; **42 U.S.C. § 12133**; **29 U.S.C. § 794a(a)(2)** and **(b)**. In contrast, the Randolph Sheppard Act targeted the petitioners as participants in the Randolph-Sheppard program and afforded them OAH administrative hearings[10] that lacked a potential for damages, injunctive relief, or attorneys' fees. **20 U.S.C. § 107d-1(a)**(authorizing Randolph-Sheppard remedies); *see* **D.C. Code § 2-1831.09(b)** and **(e)-(f)**(OAH authority); *see* ***Shuman***, 82 A.3d at 69-72 (OAH authority).

In other words, the D.C. Circuit's analysis in ***Patten*** focused on the functioning and operations of the Randolph-Sheppard program, *see* ***Patten***, 9 F.4th at 925-28, while the Eighth Circuit analysis in ***Randolph*** concentrated not on the functioning and operations of the prison that incarcerated the plaintiff, but rather on the plaintiff's *allegations* about being a deaf person whom the state refused to accommodate with a sign-language interpreter for prison hearings and medical services, *see* ***Randolph***, 253 F.3d at 343-44. In effect, then, the

[10] The District's Randolph-Sheppard hearings take place at OAH. **29 DCMR 218.2(b)-(c)**.

D.C. Circuit analysis of the petitioners' claims in ***Patten*** proved to be public-entity-focused while the Eighth Circuit analysis of the ***Randolph*** claims proved to be allegation-focused.

For instance, in ***Patten***, the D.C. Circuit described "the [petitioners'] disputed [ADA, DCHRA, and Rehabilitation Act] claims" as being "not wholly collateral to the [Randolph-Sheppard] scheme", albeit while those same claims "challenge core aspects of the 'operation and administration' of the vending facility program'". ***Patten***, 9 F.4th at 927. Because of this analysis, the D.C. Circuit never focused on the petitioners' well-pled allegations about segregated inspections and about a denial of auxiliary aids for reading the District's small print business documents.

On the other hand, the Eighth Circuit in ***Randolph*** observed that "injunctive relief would necessarily be directed at accessibility of hearing-impaired services" at the prison housing the plaintiff. ***Randolph***, 253 F.3d at 346. The Eighth Circuit also noted that one defendant "has authority over the entire MDOC and an injunction against her would have effect no matter where in the MDOC system Randolph is incarcerated". ***Randolph***, 253 F.3d at 346. On that basis, the Eighth Circuit reasoned that an injunction against that defendant in her official capacity would be legitimate under the ADA and the Rehabilitation Act while also constitutional under the Eleventh Amendment. ***Randolph***, 253 F.3d at 345-46.

Because the Eighth Circuit focused on the "accessibility of hearing-impaired services" for a deaf prisoner and on the need for injunctive relief to "be directed at accessibility of hearing-impaired services", the court properly concluded that the plaintiff could file his ADA and Rehabilitation Act claims in court without exhausting PLRA and ADA remedies. ***Randolph***, 253 F.3d at 347. On the other hand, the D.C. Circuit sought more to protect the Randolph-Sheppard "grievance scheme" from becoming "optional" than to protect the blind petitioners from receiving small print they could not read, from being denied reading aids, and from being segregated from sighted food operators.

Hence, the D.C. Circuit ignored the District of Columbia's unconditional waiver in the **D.C. Code § 2-1403.03(b)**, which allowed the petitioners to file their ADA, DCHRA, and Rehabilitation Act claims in court without exhausting remedies. *See* **D.C. Code § 2-1403.03(b)**; *accord* **28 C.F.R. 35.172(d)**. As a result, the D.C. Circuit wrongly concluded that "the plaintiffs had to proceed through the [Randolph-Sheppard] grievance procedure before pursuing their discrimination claims in court". ***Patten***, 9 F.4th at 929. Because of this conflict in the Eighth Circuit and the D.C. Circuit about whether ADA and Rehabilitation Act remedies must be exhausted, this Court should grant certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Thomas Ruffin, Jr.
Counsel of Record
RUFFIN LEGAL SERVICES
153 Galveston Place, S.W., Suite 4
Washington, D.C. 20032
(202) 561-2898
iska999@yahoo.com

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7074

Derwin Patten, et al.
Appellants

v.

District of Columbia
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00732)

Argued Nov. 23, 2020 Decided Aug. 13, 2021

Thomas T. Ruffin, Jr., Ruffin Legal Services, argued the cause and filed the briefs for appellants.

Carl J. Schifferle, Deputy Solicitor General, Office of the Attorney General for the District of Columbia, argued the cause for appellee. With him on the brief were *Karl A. Racine*, Attorney General, *Loren L. AliKhan*, Solicitor General, and *Caroline S. Van Zile*, Deputy Solicitor General.

Before: Rogers, Katsas, and Rao, *Circuit Judges*.

Opinion for the Court filed by Circuit Judge Katsas.

Katsas, Circuit Judge: The Randolph-Sheppard Act creates state-administered programs for blind individuals to operate vending facilities on federal property. The Act also creates a grievance scheme for vendors to challenge a state's operation of its program. This case presents the question whether a vendor may bypass that scheme when challenging the operation of a Randolph-Sheppard program under other statutes that prohibit discrimination based on disability.

I

A

The Randolph-Sheppard Act (RSA) gives licensed blind individuals a priority to operate vending facilities on federal property. 20 U.S.C. § 107(b). State and federal agencies share responsibility for administering the RSA. On the federal level, the Secretary of Education promulgates implementing regulations and designates a state agency to administer the program within each state and the District of Columbia. *Id.* §

107a(a). The designated state agency licenses eligible vendors, seeks appropriate placements for them, promulgates further regulations, and monitors vendors for compliance. *Id.* § 107a(b), (c). The state agency must give vendors training materials and access to financial data regarding its operation of the program. 34 C.F.R. §§ 395.11-.12.

The RSA sets forth a grievance scheme for vendors to challenge a state's operation of its Randolph-Sheppard program. The statute provides that "[a]ny blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing." 20 U.S.C. § 107d-1(a); *see also id.* § 107b(6) (state licensing agency must provide "an opportunity for a fair hearing"). A licensee dissatisfied with the results of that hearing may seek further review before the Secretary, who must "convene a panel to arbitrate the dispute." *Id.* § 107d-1(a). The panel consists of two arbitrators designated by the licensee and the state agency respectively, and a third arbitrator jointly designated by the other two. *Id.* § 107d-2(b). The panel's decision is subject to judicial review as final agency action under the Administrative Procedure Act. *Id.* § 107d-2(a).

In the District of Columbia, the designated licensing agency is the Rehabilitation Services Administration, a component of the District's Department on Disability Services. Its implementing regulations set forth both substantive rules and grievance procedures. The Administration

must enter into an operating agreement with each licensed vendor, which must set forth both the duties of the vendor and the responsibilities of the Administration to provide various forms of assistance. 29 D.C. Mun. Reg. (DCMR) § 206. Regulations elaborate on how the Agency must train vendors, *id.* § 210, and what financial information it must make available to them, *id.* § 216. In addition, the Administration must give vendors various documents about the program's operation, *id.* § 217.1; must consult with a blind vendors' committee about program operations, *id.* § 211.1; and must equip and initially stock each covered vending facility, *id.* § 202.1. As to grievance procedures, a vendor "dissatisfied with any licensing agency action arising from the operation or administration of the Program" may seek either an informal meeting with an appropriate agency official or a hearing before the D.C. Office of Administrative Hearings (OAH). *Id.* § 218.2(b). The vendor may appeal an adverse OAH order either to the D.C. Court of Appeals, as permitted by D.C. law, or to the Secretary, as provided by the RSA. *Id.* § 218.2(c).

B

The plaintiffs are current and former vendors in the District's Randolph-Sheppard program. They claim that the District has discriminated against them, based on their blindness, in its administration of the program. As relevant here, they contend that the District conducts discriminatory inspections of vending facilities and that it fails to provide aids such as human or electronic readers. The plaintiffs did not challenge these alleged practices through the

Randolph-Sheppard grievance procedure. Instead, they filed a lawsuit in federal district court, which alleged disability-based discrimination in violation of Title II of the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act, and the District of Columbia Human Rights Act (DCHRA).

The district court dismissed the case for failure to exhaust administrative remedies under the RSA. The court reasoned that exhaustion was required because the claims challenged the District's operation or administration of its Randolph-Sheppard program, even if the claims also arose under the anti-discrimination statutes. *Brooks v. District of Columbia*, 375 F. Supp. 3d 41, 44-48 (D.D.C. 2019). The court further rejected the plaintiffs' argument that exhaustion would be futile because the OAH assertedly lacks jurisdiction to hear claims under the RSA. *Id*. at 48-49.

After the plaintiffs appealed the dismissal, they moved for relief from judgment under Federal Rule of Civil Procedure 60(b)(3). The district court denied the motion, and the plaintiffs did not separately appeal that denial.

II

The principal question on appeal is whether the vendors were required to exhaust administrative remedies under the RSA before filing their discrimination claims in federal court. That is a legal question, which we review *de novo*. *Artis v. Bernanke*, 630 F.3d 1031, 1034 (D.C. Cir. 2011).

We first consider the RSA grievance scheme, and we then address how it interacts with the anti-discrimination statutes.

A

We begin with the RSA scheme. One of our cases described exhaustion under the RSA as a "jurisdictional" requirement for judicial review. *Comm. of Blind Vendors of D.C. v. District of Columbia*, 28 F.3d 130, 133 (D.C. Cir. 1994). But later Supreme Court decisions have clarified that an exhaustion requirement is jurisdictional only if Congress "clearly states" as much. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006). Section 107d-1(a) contains no such clear statement, so it is not jurisdictional.

Nonetheless, exhaustion under the RSA scheme is mandatory, as this Court held in *Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 101-04 (D.C. Cir. 1986). As noted above, the RSA provides that "[a]ny blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to a State licensing agency a request for a full evidentiary hearing." 20 U.S.C. § 107d-1(a). Although the word "may" is ordinarily … permissive," we held that structural and contextual considerations "defeat[] any inference" that the grievance scheme is optional. *Weinberger*, 795 F.2d at 102 n. 19. In particular, the RSA "establishes a clear and explicit system for resolution of disputes," it "specifically conditions resort to the Secretary on initial action by the state

licensing agency," and it makes an arbitration decision judicially reviewable as final agency action. *See id*. at 102-03. We found it "unlikely" that "an aggrieved party could, whenever it chose, circumvent the system and seek *de novo* determination in federal court." *Id*. at 103. Thus, we held that the RSA exhaustion provision is mandatory for claims to which it applies. *Id*. at 104.

B

The RSA grievance scheme squarely covers the claims in this case. Again, the scheme extends to "[a]ny blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program." 20 U.S.C. § 107d-1(a). The double use of the word "any" signifies breadth. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). And we have previously interpreted the phrase "arising from" to mean "originate or stem from." *N. Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1260 (D.C. Cir. 2020)(cleaned up). The exhaustion requirement thus applies so long as the aggrieved parties are licensees and the challenged actions involve operation or administration of the program. The plaintiffs here are current or former licensees, and they challenge actions that involve program administration.

Counts 1 through 3 of the complaint have evolved during this litigation. Initially, the plaintiffs alleged that the District inspected their facilities through poorly trained Administration monitors instead of through the Department of Health. But the District proved that the Department did perform

inspections. Then, the plaintiffs complained of having to endure inspections from both the Administration and the Department, whereas sighted proprietors were inspected only by the Department. Either way, these claims challenge the program's monitoring procedures or the quality of its monitors, which go directly to program operation or administration. Under the RSA, a state licensing agency must monitor compliance with program rules and regulations. 20 U.S.C. § 107a(b). And like all vendors, the plaintiffs entered into operating agreements specifically setting forth how the Administration would supervise them. 29 DCMR § 206.2(b). Monitoring and inspection procedures clearly involve operation and administration of the program.

Counts 4 through 6 of the complaint challenge the Administration's alleged failure to provide auxiliary aids, such as human readers and automated reading machines, so that vendors can read program documents. The plaintiffs argue that the Randolph-Sheppard program gives them no right to auxiliary aids, and thus does not cover their claims. But whether the program entitles vendors to auxiliary aids is beside the point, for the decision not to provide them involves program operation and administration regardless. Moreover, the Randolph-Sheppard program does give blind vendors affirmative rights to "effective" training programs covering "all aspects of vending facility operation for blind persons," 34 C.F.R. § 395.11, as well as access to financial information about the state licensing agency's operation of the program, *id*. § 395.12. And the D.C. implementing regulations further require

the Administration not only to give blind vendors copies of all "documents relating to the operation of the Program," but also to "explai[n]" to them the "content of the documents." 29 DCMR § 217. In seeking aids to read program documents, the vendors necessarily invoke access rights under these provisions. The claims for auxiliary aids thus also involve program operation and administration.

Because the RSA grievance scheme is mandatory and covers the plaintiffs' claims, the RSA required the plaintiffs to exhaust their administrative and arbitral remedies before seeking judicial review.

C

The plaintiffs seek to avoid the RSA grievance scheme by raising claims only under anti-discrimination statutes. They further argue that exhaustion would have been futile because OAH does not have jurisdiction over RSA claims. We reject both contentions.

1

The vendors argue that exhaustion was not required because they seek to pursue claims only under the ADA, the Rehabilitation Act, and the DCHRA. But even if the claims here fall within those anti-discrimination statutes as well as within the RSA, we conclude that the RSA grievance scheme nonetheless applies.

In seeking to harmonize the RSA with the anti-discrimination statutes, we must engage in the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination." *United States v. Fausto*, 484 U.S. 439, 453 (1988). We are guided by the "old and familiar rule" that "the specific governs the general," which is "particularly true" where "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC V. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012)(cleaned up). These principles control this case: The RSA imposes a comprehensive, two-level system of administrative and arbitral review for challenges to the operation or administration of a Randolph-Sheppard program. And the RSA is far more specific than any of the three anti-discrimination statutes.

Thunder Basin Coal Company v. Reich, 510 U.S. 200 (1994), confirms this analysis. There, the Supreme Court articulated a two-part test to determine whether parties must channel claims through an available administrative scheme in order to seek judicial review. First, we consider whether the text and structure of the governing statutes make it "fairly discernible" that Congress "intended to preclude initial judicial review" prior to exhaustion. *Id.* at 207 (cleaned up). If so, we then consider whether the claims at issue are "of the type" that must first be exhausted. *Id.* at 212. In *Thunder Basis*, the Court applied this framework to require mining companies to exhaust available administrative remedies under the Federal Mine

Safety and Health Amendments Act of 1977 before seeking judicial review of a claim that the mining regulation at issue violated the National Labor Relations Act. *See id*. at 207-16 . Likewise, in *Elgin v. Department of the Treasury*, 567 U.S. 1 (2012), the Court applied *Thunder Basin* to require disciplined federal employees to exhaust available administrative remedies under the Civil Service Reform Act before seeking judicial review of a claim that the statute under which they were disciplined was facially unconstitutional. *See id*. at 10-23.

The *Thunder Basin* test is satisfied here. To begin, the detailed, precise, and comprehensive nature of an administrative-review scheme counts against immediate resort to federal district court. *See, e.g., Elgin*, 567 U.S. at 10-12; *Thunder Basin*, 510 U.S. at 207-09; *Am. Fed'n of Gov't Emps., AFL-CIO v. Trump*, 929 F.3d 748, 755 (D.C. Cir. 2019); *Arch Coal, Inc. v. Acosta*, 888 F.3d 493, 499-500 (D.C. Cir. 2018). As we explained in *Weinberger*, the RSA establishes just such a scheme, which prompted us to describe it as "exclusive." *See* 795 F.2d at 103-04. Given the "painstaking detail" with which the RSA sets forth an administrative and arbitral scheme to resolve vendor grievances, the intent to make the scheme exclusive is "fairly discernible." *See Elgin*, 567 U.S. at 11-12.

To decide whether a specific-review scheme covers the claims at issue, we must consider whether the claims are "wholly collateral" to the scheme, whether application of the scheme would "foreclose all meaningful judicial review," and whether the claims are "outside the agency's expertise." *See, e.g.,*

Elgin, 567 U.S. at 15; *Thunder Basin*, 510 U.S. at 212-13. As shown above, the disputed claims here are not wholly collateral to the scheme, but instead challenge core aspects of the "operation or administration of the vending facility program" of the District. 20 U.S.C. § 107d-1(a). The clarity with which the statute covers these claims would likely be dispositive, but we note that the other *Thunder Basin* considerations point in the same direction.

The RSA provides that any final arbitral determination is subject to judicial review through the Administrative Procedure Act, *see* 20 U.S.C. § 107d-2(a), so requiring exhaustion would merely postpone – rather than preclude – a judicial assessment of the plaintiffs' claims. In this respect, the case for exclusivity here is even stronger than it was in *Thunder Basin* and *Elgin*. In those cases, the administrative scheme led to final agency action reviewable only in a court of appeals, *Elgin*, 567 U.S. at 10; *Thunder Basin*, 510 U.S. at 208. The plaintiffs there argued that they could receive no meaningful review because the agency lacked the authority to decide their constitutional claims, and the court of appeals lacked the ability to develop the factual record needed to resolve them. The Supreme Court nonetheless concluded that court-of-appeals review was good enough. *See Elgin*, 567 U.S. at 16-21; *Thunder Basin*, 510 U.S. at 215. But here, the RSA grievance scheme channels claims into the district court. So once the administrative process has run its course, a vendor then may pursue discrimination claims there.

As for agency expertise, the claims here plainly implicate the Administration's authority and expertise as the state agency administering a program to assist blind vendors. The plaintiffs briefly suggest that the OAH lacks authority to resolve their discrimination claims. But even if that were true, one part of the available administrative process involves meeting with the Administration's Chief of its Division of Services for the Blind, who clearly has relevant expertise. 29 DCMR § 218.2(b)(1). Another part involves review before an arbitral panel that, because it is appointed directly or indirectly by the affected parties, presumably also has relevant expertise. 20 U.S.C. § 107d-2(b)(1). As to the OAH itself, even if it did not directly resolve claims of disability-based discrimination, its expertise could still "be brought to bear on" those issues. *Thunder Basin*, 510 U.S. at 214-15; *see Elgin*, 567 U.S. at 22-23. For example, administrative expertise on what counts as "effective" training programs for blind vendors under the RSA, *see* 34 C.F.R. § 395.11, might be highly informative for a judge considering what constitutes a reasonable accommodation for blind vendors under the ADA.

The RSA scheme is not only comprehensive, but also far narrower than the anti-discrimination statutes invoked by the plaintiffs. The RSA applies only in one narrow context – the operation of vending facilities on federal property. And it benefits only one category of disabled individuals – the blind. In contrast, Title II of the ADA forbids any public entity from discriminating based on any type of disability, 42 U.S.C. § 12132; section 504 of

the Rehabilitation Act forbids any federally funded program or activity from discriminating based on any type of disability, 29 U.S.C. § 794(a); and the DCHRA prohibits all types of disability-based discrimination by any District agency, D.C. Code § 2-1402.73. These statutes cover many more programs and many more categories of disability than does the RSA.

Allowing challengers to proceed through a more general statute is particularly inappropriate when doing so would eviscerate specific requirements of the narrower scheme. *See, e.g., EC Term of Years Tr. v. United States*, 550 U.S. 429, 433 (2007); *Brown v. GSA*, 425 U.S. 820, 834 (1976). Here, the anti-discrimination statutes define a state agency's failure to make reasonable accommodations as a form of disability-based discrimination. *See, e.g., Tennessee v. Lane*, 541 U.S. 509, 531-33 (2004)(ADA); *Alexander v. Choate*, 469 U.S. 287, 300-01 (1985)(Rehabilitation Act); *Whitlock v. Vital Signs, Inc.*, 116 F.3d 588, 591-93 (D.C. Cir. 1997)(DCHRA). Thus, almost any RSA claim by blind vendors – that a state licensing agency has improperly administered or operated a program designed to afford them a preference – could be recast as a claim that the agency has not reasonably accommodated their disability. Under the plaintiffs' theory, the RSA's grievance scheme, which we have specifically held to be mandatory, would become optional in most if not all cases to which it applies. That is not a sensible reading of the statutes at issue, which we must interpret "as a harmonious whole rather than at war with one another." *Epic Sys. Corp. v. Lewis*, 138 S.Ct. 1612, 1619 (2018).

For these reasons, we hold that the plaintiffs had to proceed through the RSA grievance procedure before pursuing their discrimination claims in court.

2

Alternatively, the plaintiffs ask us to excuse their failure to exhaust on futility grounds. We have previously considered whether the RSA exhaustion requirement permits exceptions for futility. *See Weinberger*, 795 F.2d at 106-07. In *Ross v. Blake*, 136 S.Ct. 1850 (2016), the Supreme Court subsequently held that courts may not impose judge-made exceptions on statutory exhaustion requirements, though they may continue to impose exceptions on judge-made exhaustion requirements. *See id.* at 1856-57. We need not decide whether *Ross* forecloses any futility exception to the RSA exhaustion requirement, which we inferred from the comprehensiveness of the grievance scheme, *see Weinberger*, 795 F.2d at 100-04. Assuming that a futility exception still exists, we conclude that it does not apply here.

Any futility exception would apply, if at all, "in only the most exceptional circumstances." *Weinberger*, 795 F.2d at 106 (cleaned up). Thus, "resort to arbitration must appear clearly useless, either because the agency charged with arbitration has indicated that it does not have jurisdiction over the dispute, or because it has evidenced a strong stand on the issue in question and an unwillingness to reconsider the issue." *Id.* at 105-06 (cleaned up). The plaintiffs do not argue that the OAH has ever

disclaimed jurisdiction over RSA claims. By contrast, the District cites many RSA cases heard by the OAH, including some brought by the plaintiffs. And the OAH's website explains that "[a] blind vendor who objects to any DDS/RSA decision may appeal to the [OAH]." *Department on Disability Services*, DC.gov, https://oah.dc.gov/page/department-disability-services (last visited August 4, 2021).

The parties dispute whether the OAH may properly hear RSA claims. In affirming a recent OAH decision involving one of the plaintiffs here, the D.C. Court of Appeals reserved this issue. *Patten v. D.C. Dep't on Disability Servs.*, 248 A.3d 116, slip op. at 7 (D.C. 2021)(unpublished table decision). But in doing so, the court stressed that the OAH continues to decide RSA cases, and it expressly refused to "upend" that "practice." *Id.* at 8. In other words, the plaintiffs raise an objection that the Court of Appeals has declined to adopt and that runs counter to longstanding OAH practice in RSA cases. The plaintiffs thus have not shown that the OAH would "certainly, or even probably," have refused to consider their claims. *Weinberger*, 795 F.2d at 106-07. No futility exception could apply here.

III

Finally, the plaintiffs seek to challenge the district court's denial of their Rule 60(b)(3) motion for relief from judgment. But although the plaintiffs timely appealed the district court's order dismissing this case for failure to exhaust, they did not appeal that court's later denial of their Rule 60(b)(3) motion.

Our jurisdiction extends to appeals from "final decisions," 28 U.S.C. § 1291, that are appealed within 30 days, *see id*. § 2107. A denial of a Rule 60(b) motion is final and thus appealable. *Browder v. Dir., Dep't of Corr.*, 434 U.S. 257, 263 n. 7 (1978). Yet, the plaintiffs failed to appeal the denial in this case. And the denial of a post-judgment motion under Rule 60 does not merge into an earlier final-judgment appeal. *See* Fed. R. App. P. 4(a)(4)(B)(ii)(to "challenge a order disposing of any motion" under Rule 60, a party must timely file a new or amended notice of appeal); *United States v. Cunningham*, 145 F.3d 1385, 1393 (D.C. Cir. 1998)(rejecting "the proposition that a timely-filed notice of appeal automatically includes appeal of a subsequently-denied post-trial motion"). Because the plaintiffs failed to file a timely notice of appeal from the denial of their Rule 60(b)(3) motion, as required under section 2107, we lack jurisdiction to review the denial. *See Hamer v. Neighborhood Hous. Servs. Of Chi.*, 138 S.Ct. 13, 20-21 (2017).

IV

We affirm the dismissal of the complaint for failure to exhaust, and we dismiss the challenge to the denial of the Rule 60(b)(3) motion for lack of appellate jurisdiction.

So ordered.

Appendix B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 18-cv-00732 (CRC)

Hazell Brooks, et al.
Plaintiffs

v.

District of Columbia
Defendant

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00732)

Decided March 22, 2019 Filed March 22, 2019

Christopher R. Cooper, United States District Judge

Three blind vending-facility operators challenge the District of Columbia's inspections of their establishments and calculation of their income under a federal program that gives preferences to visually impaired vendors. Although Plaintiffs frame their challenge under various anti-discrimination statutes, the substance of their complaints concerns the District's administration of the program. As a result, they were required to litigate their claims through local administrative processes before filing suit in federal court, which they did not do. The Court therefore must dismiss the case.

I. Background

Congress enacted the Randolph-Sheppard Act ("RSA" or "Act") in 1936 to provide employment opportunities to individuals with vision impairments. 20 U.S.C. § 107(a). The Act gives licensed blind persons priority to operate vending facilities located on federal property. Id. § 107(b). It also entitles them to a percentage of all income generated by vending machines located on that property, even if those machines are not operated by program participants. Id. § 107d-3.

Participating states (including the District of Columbia) and the federal government share responsibility for administering the Act. The Secretary of Education interprets and enforces the Act and designates a state licensing agency ("SLA") to administer the Act within each participating

state. Id. § 107a(a). In the District of Columbia, that agency is the Department on Disability Services, Rehabilitation Services Administration ("DDS-RSA"). Each SLA manages the day-to-day operations of the RSA in its state by, among other things, licensing individual vendors, identifying locations for facilities, and monitoring compliance with the program's rules and regulations. 20 U.S.C. § 107a(b).

Plaintiffs Hazell Brooks, Derwin Patten, and Roy Patten are current or past participants in the District of Columbia's Randolph Sheppard Vending Facilities Program ("RSVFP" or "Program"). Second Am. Compl., ECF No. 17-1, ("SAC") ¶¶ 3-5. They allege that they have suffered "ongoing discrimination" based on their blindness arising from the District's administration of the Program, including "discriminatory inspections of blind vendors' facilities," "failure to provide adequate auxiliary aids for blind vendors," and "excessive or unauthorized deductions, set asides, and other such levies and expenses on vending machine" and "vending operations." Id. at 2. Plaintiffs assert claims of discrimination under Title II of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the District of Columbia Human Rights Act ("DCHRA"). They also bring claims for breach of fiduciary duty, unjust enrichment, and resulting trusts related to the allegedly excessive deductions.

II. Legal Standards

The District of Columbia has moved to dismiss the case for failure to exhaust administrative remedies under Federal Rules of Civil Procedure 12(b)(1) and failure to state a claim under Rule 12(b)(6).[1] When analyzing a motion to dismiss under either Rule 12(b)(1) or 12(b)(6), the Court "assumes the truth of all well-pleaded factual allegations in the complaint and construes reasonable inferences from those allegations in the plaintiff's favor, but is not required to accept the plaintiff's legal conclusions as correct." *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d 1, 4, 411 U.S. App. D.C. 301 (D.C. Cir. 2014)(citation omitted); *see also Jerome Stevens Pharms., Inc. v. FDA*, 402 F.3d 1249, 1253, 365 U.S. App. D.C. 270 (D.C. Cir. 2005). When considering a 12(b)(6) motion, the Court "may only consider the facts alleged in the complaint, documents attached as exhibits or incorporated by reference in the complaint, and matters about which the Court may take judicial notice." *Gustave-Schmidt v. Chao*, 226 F. Supp. 2d 191, 196 (D.D.C. 2002).

---

[1] Although the D.C. Circuit in 1994 described the RSA's administrative exhaustion requirement as jurisdictional, *see Comm. of Blind Vendors of D.C. v. District of Columbia*, 28 F.3d 130, 133, 307 U.S. App. D.C. 263 (D.C. Cir. 1994), two federal courts of appeals more recently have relied on the Supreme Court's "clear statement" rule in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 126 S.Ct. 1235, 163 L.Ed.2d 1997 (2005), to hold that it is not. *See Kansas Dep't for Children & Families v. SourceAmerica*, 874 F.3d 1226, 1248 (10th Cir. 2017); *Kentucky v. United States ex rel. Hagel*, 759 F.3d 588, 597-99 (6th Cir. 2014).

III. Analysis

A. Mandatory Exhaustion under the Randolph-Sheppard Act

The Randolph-Sheppard Act contains a detailed administrative grievance procedure. A licensee "who is dissatisfied with any action arising from the operation or administration of the vending facility program" is entitled to a "full evidentiary hearing" by the SLA. 20 U.S.C. § 107d-1(a); *see also* id. § 107b(6)(requiring SLAs to provide "dissatisfied" licensees with "an opportunity for a fair hearing"); 34 C.F.R. § 395.13 (same). To implement these requirements, the District of Columbia provides for an "[i]nformal due process hearing before the D.C. Office of Administrative Hearings (OAH)." D.C. Mun. Reg., tit. 29, § 218.2(b)(3). An aggrieved licensee dissatisfied with the results of the OAH hearing "may appeal … either to the D.C. Court of Appeals … or to the United States Secretary of Education." Id. § 218.2(c). If the licensee elects the latter, the Secretary submits the complaint to an arbitration panel pursuant to 20 U.S.C. § 107d-1(a). The panel's decision is considered "final and binding" except as subject to judicial review as a final agency action under the Administrative Procedure Act. Id.; id. § 107d-2(a); 34 C.F.R. § 395.13.

The D.C. Circuit has long held that a licensee must exhaust these administrative remedies before seeking judicial review in federal court. *Comm. of Blind Vendors of D.C.*, 28 F.3d at 133-35; *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 102-04, 254 U.S. App. D.C. 45 (D.C. Cir. 1986); *see*

also Morris v. Maryland, 908 F.2d 967 (tbl.) [published in full-text format at 1990 U.S. App. Lexis 27323], 1990 WL 101396, at *3 (4th Cir. 1990); *Fillinger v. Cleveland Soc'y for the Blind*, 587 F.2d 336, 338 (6th Cir. 1978). Plaintiffs did not do so here. In their complaint, they do not allege that they exhausted the available administrative remedies before turning to this Court.[2] And in their opposition, they note attempts to exhaust by only two of the three named plaintiffs. Opp'n, ECF 21, at 8-9. But even those attempts were insufficient. As explained, Plaintiffs were required to appeal the OAH's determination to either the D.C. Court of Appeals or the Secretary of Education. They neither allege nor assert that they did either. Instead, they filed their suit in federal court, which only has jurisdiction to review claims arising out of the administration of the RSA after the arbitration panel convened by the Secretary reaches a decision and only then, under the strictures of the APA.

B. Plaintiffs' Counterarguments

Plaintiffs offer three reasons why the Act's exhaustion requirement does not bar their claims: (1) they do not in fact allege claims under the

---

[2] The District makes too much of Plaintiffs' allegation that "[t]o date, the class members never litigated the factual and legal problems outlined in this complaint." MTD, ECF No. 19, at 17-18 (quoting SAC ¶ 16(d)). This is not, as it would have the Court believe, a concession about a failure to exhaust. Rather, the Court interprets this statement to mean that Plaintiffs either have not had the opportunity to litigate their statutory claims in court as opposed to before the OAH, or they have not done so as a class.

Randolph-Sheppard Act; (2) D.C. waived the Act's exhaustion requirement when it passed the District of Columbia Human Rights Act; and (3) the OAH does not have jurisdiction over RSA claims. None is persuasive.

1. Nature of the claims

First, it makes no difference that Plaintiffs cloak their claims in terms of discrimination under the ADA, Rehabilitation Act, and DCHRA, because the Court is not bound by the specific labels used in the complaint. A plaintiff cannot circumvent a mandatory exhaustion or other jurisdictional requirements simply by relabeling a claim. *See Brown v. Gen. Servs. Admin.*, 425 U.S. 833, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976)("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumscribed by artful pleading."); *see also Fresno Cmty. Hosp. & Med. Ctr. v. Azar*, No. 18-cv-867-CKK, 370 F. Supp. 3d 139, 2019 U.S. Dist. Lexis 32173, 2019 WL 1003593, at *6 (D.D.C. Feb. 28, 2019)("But Plaintiffs' crafty pleading cannot hide the true nature of their claims. Nor can Plaintiffs' clever phrasing be used to avoid a bar on judicial review."). Instead, the Court looks through the form of the complaint to the substance of the allegations to determine the true nature of Plaintiffs' claims. *Valley Forge Christian Coll. v. Ams. Uited for Separation of Church & State, Inc.*, 454 U.S. 464, 477, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). To conclude otherwise would be to allow Plaintiffs to avoid the Act's detailed remedial scheme simply by

relabeling their dissatisfaction with its administration as discrimination.

Looking beyond labels, the substance of Plaintiffs' allegations demonstrates that they challenge, in three general ways, the District's administration of the RSVFP. Beginning with the most obvious claims, Counts 4 through 6 challenge DDS-RSA's alleged failure to provide specific "auxiliary aids" – such as "human readers[,] automated reading machines," SAC ¶ 42, and "modern electronic magnifiers," id. ¶ 43 – to Plaintiffs and other blind vendors. SAC ¶¶ 39-57. Instead, Plaintiffs claim, the SLA provided program participants with important materials in "small print" to ensure they would not be able to read it. Id. ¶¶ 13(e), 40. But, as the District points out, vocational rehabilitation services like the assistive technology Plaintiffs request are specifically addressed in the RSA's implementing regulations, *see* 34 C.F.R. § 395.11, and D.C.'s municipal regulations governing the RSVFP, *see* D.C. Mun. Reg. tit. 29, §§ 210.2, 299.1. And although the federal regulation provides that various auxiliary aids "shall be provided to blind individuals as vocational rehabilitation services under the Rehabilitation Act," 34 C.F.R. § 395.11, that reference does not mean that Plaintiffs' cause of action arises under the Rehabilitation Act. Rather, Plaintiffs challenge DDS-RSA's failure to provide various vocational rehabilitation services as *defined* by the Rehabilitation Act but as *required* under the RSA's implementing regulations. That is clearly a challenge concerning the administration of the Program.

Next, Counts 7 through 18 turn on Plaintiffs' broad assertion that the District used "secret mathematical formulas" to "charge[] class members, including plaintiffs, with vending machine deductions, set asides, and other such levies and expenses that the District of Columbia had no right or authority to charge against the account of plaintiffs and other class members." SAC ¶¶ 13(a), (b); *see also* id. ¶¶ 58-118. But the amount of vending-machine income to which RSVFP participants are entitled is specifically governed by 20 U.S.C. § 107d-3 and its implementing regulation, 34 C.F.R. § 395.8 ("Distribution and use of income from vending machines on Federal property"), as well as D.C. Municipal Regulation title 29, § 204 ("Income from Vending Facilities on Federal Property"). And the amount of funds "set aside … from the net proceeds of the operation of the vending facilities" for limited use like "maintenance and replacement of equipment" and "retirement or pension funds" is specifically governed by 20 U.S.C. § 107b(3). Because Plaintiffs claims turn on the District's compliance with these provisions, they squarely concern the operation and administration of the program and must be exhausted.[3]

---

[3] Plaintiffs also advance claims based on these allegations of unauthorized or excessive deductions under theories of breach of fiduciary, SAC ¶¶ 77-81, 108-12 (Counts 10 and 16), unjust enrichment, Pls. Opp'n at 42-43 (explaining that Counts 11 and 17, SAC ¶¶ 82-86, 113-15, erroneously used the term "constructive trust" for Plaintiffs' unjust enrichment claim), and resulting trust, SAC ¶¶ 87-89, ¶¶ 116-18 (Count 12 and 18). But as with their discrimination claims, Plaintiffs cannot simply re-label claims arising out of the manner in which the

And finally, Counts 1 through 3 challenge the use of "inadequately trained DDS-RSA monitors" rather than "professionally trained Department of Health ["DOH"] credentialed food inspectors" to inspect RSVFP participants' facilities. SAC ¶¶ 12(a), 17-38. According to Plaintiffs, "sighted vendors" – that is, owners of non-RSVFP food establishments – benefit from the professional counseling provided by DOH "credentialed inspectors," while Plaintiffs do not. Id. ¶ 12(b); *see also* id. ¶ 12(h)("For years, the District of Columbia, through its [DOH] food inspectors, provided this service for sighted vendors, but not with DDS-RSA disability monitors who inspected the vending facilities of Randolph-Sheppard blind vendors."). These "discriminatory inspections," Plaintiffs assert, lead to a "segregated regime" between blind and sighted vendors. Id. ¶ 12(k).

Plaintiffs' references to a "segregated regime" perhaps give Counts 1 through 3 more of a ring of discrimination that the two sets of claims discussed above. The Court nonetheless concludes that the substance of those counts turns on the operation of the "regime" itself – the qualifications of the RSVFP "monitors," the forms and inspection reports those monitors use, and the kind of supervision and counseling those monitors provide to blind vendors. These kinds of questions go directly to the administration of the Act and are properly subject to its exhaustion requirements.

DDS-RSA administers the RSVFP to avoid the Act's mandatory exhaustion requirements.

Alternatively, even if Counts 1 through 3 could somehow be interpreted as challenging discriminatory conduct outside the administration of the program, the Court concludes that Plaintiffs have not plausibly stated claims under the ADA, Section 504 of the Rehabilitation Act, or the DCHRA. To sustain a claim under these statutes, a plaintiff must show she was "excluded from participation in," "denied the benefits of," or "subject to discrimination" by a public entity "by reason of" her disability. 42 U.S.C. § 12132 (ADA); 29 U.S.C. § 794(a)(Rehabilitation Act); *Brown v. District of Columbia*, No. 16-cv-0947-EGS, 2017 U.S. Dist. Lexis 151291, 2017 WL 4174417, at *2 (D.D.C. Sept. 18, 2017)(explaining that all three statutes have similar requirements for disability claims).[4]

Plaintiffs theory regarding Counts 1 through 3 has been a moving target to say the least. In the Second Amended Complaint, they allege that they were denied the benefits and services that come from counseling by trained and licensed DOH inspectors, leading to the aforementioned "segregated regime" where sighted vendors received quality DOH inspections while blind vendors receive unauthorized, low-quality DDA-RSA inspections. SAC ¶¶ 19-21. But the District pointed out in its motion to dismiss that it is "a matter of indisputable

[4] Technically, the Rehabilitation Act requires a higher showing of causation. *Compare* 42 U.S.C. § 12132 (discrimination under ADA must be "by reason of such disability"), with 29 U.S.C. § 794(a)(discrimination under Rehabilitation Act must be "*solely* by reason of her or his disability" (emphasis added)).

public record [that] the RSVFP vending facilities plaintiffs operate *are* licensed and inspected by DOH." MTD at 22. In support, the District attaches to its motion copies of the most recent publicly available DOH inspection reports of Plaintiffs' facilities. Id., Ex. 3, ECF No. 19-3 (available at https://dc.healthinspections.us/?a=Inspections).[5]

Plaintiffs then shifted their theory for these counts. *See* Opp'n at 28-31. In their opposition, they argue that they "labored under segregated DDS-RSA *ultra vires* inspections by inadequately trained DDS-RSA employees who used bogus inspection report forms, and this happened while the plaintiffs faced *additional* inspections from DOH" while "sighted proprietors faced inspections *solely* from DOH, which used credentialed inspectors." Id. at 29 (emphasis added). In other words, Plaintiffs now complain that while sighted vendors only received inspections by DOH inspectors, blind vendors received two-fold inspections by both DOH inspectors *and* DDS-RSA monitors. But Plaintiffs did not receive the additional inspections by DDS-RSA monitors by reason of their blindness; they received additional inspections because of their participation in the

[5] As explained above, the Court may consider matters subject to judicial notice without converting the District's motion to dismiss into one for summary judgment. *Gustave-Schmidt*, 226 F. Supp. 2d at 196. "[M]atters in the general public record, including records and reports of administrative bodies," are subject to judicial notice. *Does I through III v. District of Columbia*, 238 F. Supp. 2d 212, 216 (D.D.C. 2003)(citation omitted). Plaintiffs do not dispute that the DOH inspection reports are reports by an administrative body and thus subject to judicial notice.

District's RSVFP. For instance, the RSA implementing regulations require SLAs to "carry out full responsibility for the supervision and management of each vending facility in its program in accordance with its established rules and regulations, this part, and the terms and conditions governing the permit" and also "take adequate steps to assure that each vendor understands the provisions of the permit and any agreement under which he operates, as evidenced by his signed statements." 34 C.F.R. § 395.3(a)(11)(i) & (vi). The challenged inspections are obviously designed to fulfill these regulatory responsibilities. Because the challenged conduct – the inspections by both DOH and DDS-RSA – was not plausibly undertaken by reason of Plaintiffs' blindness, Counts I through III fail to state claims of discrimination under the ADA, Rehabilitation Act, or DCHRA.

Ultimately though, Plaintiffs' allusions to segregation and discriminatory intent do not change the fact that their claims turn on the administration of the RSA and fall within the broad remedial scheme established for vendors' disputes regarding "*any* action arising from the operation or administration of the vending facility program." 20 U.S.C. § 107d-1(a)(emphasis added). A rose by any other name would smell as sweet, and an RSA claim brought under any other name is still subject to the Act's mandatory exhaustion requirement.[6]

---

[6] To be clear, the Court does *not* hold that a blind vendor can never bring a discrimination claim without first exhausting that claim pursuant to the Randolph-Sheppard Act. Rather, the Court only concludes that here, Plaintiffs' claims are, in

This result is consistent with other cases in which courts have rejected "the simple 'pleading trick' of adding a section 504 [of the Rehabilitation Act] claim to a complaint alleging violations of the [Randolph-Sheppard] Act." *New York v. U.S. Postal Serv.*, 690 F. Supp. 1346, 1353 (S.D.N.Y. 1988). For example, in *Kentucky v. United States*, 62 Fed. Cl. 445 (2004), *aff'd sub nom*, *Kentucky, Edu. Cabinet for the Blind v. United States*, 424 F.3d 1222 (Fed. Cir. 2005), the Court of Federal Claims rejected the Kentucky Department for the Blind's ("KDB") argument "that its claim is not an 'RSA claim' at all" and dismissed the case for failure to exhaust. Id. at 460. Despite KDB's "styling" the complaint "as a challenge entirely within the Tucker Act's jurisdiction" regarding procurement issues, the court concluded that the challenged "issue arose out of an alleged failure" to comply with RSA's priority scheme and thus was subject to the Act's mandatory administrative grievance procedures. Id. at 461-63.

2. Waiver

Plaintiffs' second argument against dismissal is likewise unavailing. They argue that the District of Columbia "waived its right to demand that the plaintiffs exhaust remedies with an administrative action before the OAH" when it passed the D.C. Human Rights Act. Opp'n at 12-13. Under the DCHRA, an individual may either file an administrative complaint or a civil action in a court

---

substance, challenges to the District's administration of the Act and therefore must be estimated.

of competent jurisdiction. D.C. Code § 2-1403.03(b). "In essence," Plaintiffs conclude, "the defendant statutorily waived its right to an exhaustion of remedies in discrimination lawsuits." Opp'n at 13. But, as explained above, Plaintiffs have brought a discrimination lawsuit in name only; the substance of their claims arises under the DDS-RSA's administration of the RSA.

Plaintiffs try in vain to connect the two statutory regimes by claiming that the District's Mayor exercised rulemaking authority under section § 2-1403.03(a) of the District of Columbia Human Rights Act to adopt § 218 of title 29 of the D.C. municipal regulations, which implements the RSA's administrative hearing requirements. But those regulations do not cross reference the DCHRA and in fact, the notice of final rulemaking states explicitly that the regulation was adopted pursuant to the authority set forth in section 109 of the Department on Disability Services Establishment Act of 2006, D.C. Code § 7-761.09 and Mayor's Order 2007-68 (which delegates rulemaking authority to the Department on Disability Services). *See* 61 D.C. Reg. 8741 (Aug. 22, 2014).

3. Jurisdiction

Third, and finally, Plaintiffs argue that even if they have asserted claims under the Randolph-Sheppard Act, the Court should not dismiss for failure to exhaust because the Office of Administrative Hearings lacks jurisdiction over claims arising under the Act. Pls.' First "Praecipe,",

ECF No. 28, at 1.[7] This is wrong. The subject matter jurisdiction of OAH extends to "all cases to which [the OAH Establishment Act of 2001] applies." D.C. Code § 2-1831.02(a). Although the Establishment Act does not specifically reference the Randolph-Sheppard Act, OAH still has jurisdiction over cases arising under the RSA. Section 2-1831.03 enumerates the types of cases over which the OAH has jurisdiction, including cases arising under the jurisdiction of the Department of Human Services, D.C. Code § 2-1831.03(a)(2), which historically administered the District's RSVFP, D.C. Resp. to Pls.' First Praecipe, ECF No. 29, Ex. 1, transferred authority over the Rehabilitative Services Administration, which administers the RSVFP, from DHS to the Department of Disability Services. D.C. Code § 7-761.08(b). At the time, though, OAH understood that it would "continue conducting hearings regarding the RSA program, and OAH's Chief Administrative Law Judge approved this request under D.C. Code § 2-1831.03(c)," M. F-G v. D.C. Dep't on Disability Servs., Rehab. Servs. Admin., No. DS-P-08-102477, 2009 WL 2491330, at *n.3 (D.C. OAH July 7, 2009). That code section provides for jurisdiction over agency decisions "not referenced in this section" through approval by the Chief Administrative Law Judge. Therefore, although the OAH Establishment Act of 2001 does

[7] Although Plaintiffs moved for leave to file a surreply – which they styled as a "rejoinder" – they did not seek the Court's permission to file their first and second "Praecipes," which the Court takes as additional supplemental responses. Out of an abundance of caution, however, the Court has considered the arguments advanced in those three responses. Counsel is admonished to adhere to the Court's rules in the future.

not specifically list DDS-RSA or RSVFP cases, those cases are still within OAH's jurisdiction.

IV. Conclusion

In conclusion, because Plaintiff's claims are premised on alleged violations of the Randolph-Sheppard Act and the manner in which the District administers that Act, they fall within the scope of the mandatory administrative requirements of the Act. Because Plaintiffs failed to exhaust their claims, the Court will grant the District of Columbia's motion to dismiss. An Order accompanies this Memorandum Opinion.

/s/ Christopher R. Cooper
United States District Judge

Date: March 22, 2019

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion to Dismiss is GRANTED. It is further **ORDERED** that Plaintiffs' Motion for Leave to File Rejoinder Against Motion to Dismiss is GRANTED. It is further **ORDERED** that Plaintiffs'

Motion for Hearing is DENIED.

SO ORDERED.

This is a final appealable Order.

/s/ Christopher R. Cooper
United States District Judge

Date: March 22, 2019

Appendix C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7074

Derwin Patten, et al.
Appellants

v.

District of Columbia
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00732)

Filed October 15, 2021

For Derwin Patten, Roy Patten, and Hazell Brooks:
Thomas T. Ruffin, Jr., Esquire, Ruffin Legal Services, Washington, D.C.

For District of Columbia, *Loren L. AliKhan*, Solicitor General, *Carl James Schifferle*, Assistant Attorney General, *Caroline S. Van Zile*, Deputy Solicitor General, Office of the Attorney General for the District of Columbia, Washington, D.C.

Before: Srinivasan, Chief Judge; Henderson, Rogers, Tatel, Millet, Pillard, Wilkins, Katsas, Rao, Walker, and Jackson, *Circuit Judges*.

Order

Upon consideration of appellants' corrected petition for rehearing *en banc*, and the absence of a request by any member of the court for a vote, it is **ORDERED** that the petition be denied.

Per Curiam

Appendix D

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-7074

Derwin Patten, et al.
Appellants

v.

District of Columbia
Appellee

Appeal from the United States District Court
for the District of Columbia
(No. 1:18-cv-00732)

Filed October 15, 2021

For Derwin Patten, Roy Patten, and Hazell Brooks:
Thomas T. Ruffin, Jr., Esquire, Ruffin Legal Services, Washington, D.C.

For District of Columbia, *Loren L. AliKhan*, Solicitor General, *Carl James Schifferle*, Assistant Attorney General, *Caroline S. Van Zile*, Deputy Solicitor General, Office of the Attorney General for the District of Columbia, Washington, D.C.

Before: Rogers, Katsas, and Rao, *Circuit Judges*.

Order

Upon consideration of appellants' corrected petition for panel rehearing filed on September 28, 2021, it is **ORDERED** that the petition be denied.

Per Curiam

Appendix E

STATUTES & REGULATIONS CITED IN PETITION FOR WRIT OF CERTIORARI

5 U.S.C. § 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensible party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit

expressly or impliedly forbids the relief which is sought.

20 U.S.C. § 107. Operation of Vending Facilities

(a) **Authorization**. For the purposes of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this Act [20 U.S.C. §§ 107 *et seq*.] shall be authorized to operate vending facilities on any Federal property.

(b) **Preferences regulations; justification for limitation on operation**. In authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency as provided in this Act [20 U.S.C. §§ 107 *et seq*.]; and the Secretary, through the Commissioner, shall, after consultation with the Administrator of General Services and other heads of departments, agencies, or instrumentalities of the United States in control of the maintenance, operation, and protection of Federal property, prescribe regulations designed to ensure that – (1) the priority under this subsection is given to such licensed blind persons (including assignment of vending machine income pursuant to section 7 of this Act to achieve and protect such priority), and (2) whenever feasible, one or more vending facilities are established on all Federal property to the extent that such facility or facilities would not adversely affect the interests of the United States.

Any limitation on the placement or operation of a vending facility based on a finding that such placement or operation would adversely affect the interests of the United States shall be fully justified in writing to the Secretary, who shall determine whether such limitation is justified. A determination made by the Secretary pursuant to this provision shall be binding on any department, agency, or instrumentality of the United States affected by such determination. The Secretary shall publish such determination, along with supporting documentation, in the Federal Register.

20 U.S.C. § 107a(a)(5). Federal and State responsibilities

(a) **Functions of Secretary; surveys; designation of state licensing agencies; qualifications for license; evaluation of programs**. The [Secretary of Education] … shall – …

(5) Designate as provided in section 3 of this Act [20 USCS § 107b] the State agency for the blind in each State, or, in any State in which there is no such agency, some other public agency to issue licenses to blind persons who are citizens of the United Staes and at least twenty-one years of age for the operating of vending facilities on Federal and other property in such State for the vending of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles or services dispensed automatically or manually and prepared on or off the premises in accordance with all applicable health laws, as determined by the

State licensing agency, and including the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State ….

20 U.S.C. § 107b(6). Application for designation as State licensing agency; cooperation with Secretary; furnishing initial stock

A State agency for the blind or other State agency desiring to be designated the licensing agency shall, with the approval of the chief executive of the State, make application to the Secretary and agree – … (6) to provide to any blind licensee dissatisfied with any action arising from the operation or administration of the vending facility program an opportunity for a fair hearing, and agree to submit the grievances of any blind licensee not otherwise resolved by such hearing to arbitration as provided in section 5 of this Act [20 U.S.C. § 107d-1].

20 U.S.C. § 107d-1(a). Grievances of blind licensees

(a) **Hearing and arbitration**. Any blind licensee who is dissatisfied with any action arising from the operation or administration of the vending facility program may submit to the State licensing agency a request for a full evidentiary hearing, which shall be provided by such agency in accordance with section 6 of this Act [107 U.S.C. § 107b(6)]. If such blind licensee is dissatisfied with any action taken or decision rendered as a result of such hearing, he may file a complaint with the Secretary who shall convene a panel to arbitrate the dispute pursuant to section 6 of this Act [107 U.S.C. § 107d-2], and the decision of such panel shall be final and binding on

the parties except as otherwise provided in this Act [107 U.S.C. §§ 107 *et seq*.]. Noncompliance by Federal departments and agencies; complaints by State licensing agencies; arbitration.

20 U.S.C. § 107d-2(a). Arbitration

(a) **Notice and hearing**. Upon receipt of a complaint filed under section 5 of this Act [20 USCS § 107d-1], the Secretary shall convene an ad hoc arbitration panel as provided in subsection (b). Such panel shall, in accordance with the provisions of subchapter II of chapter 5 of title 5, United States Code [5 USCS §§ 551 et seq.], give notice, conduct a hearing, and render its decision which shall be subject to appeal and review as a final agency action for purposes of chapter 7 of such title 5 [5 USCS §§ 701 et seq.].

20 U.S.C. § 107e(1). Definitions

As used in this Act [20 U.S.C. §§ 107 *et seq*.] –

(1) "blind person" means a person whose central vision does not exceed 20/200 in the better eye with correcting lenses or whose visual acuity, if better than 20/200, is accompanied by a limit to the field of vision in the better eye to such a degree that its widest diameter subtends an angle no greater than twenty degrees. In determining whether an individual is blind, there shall be an examination by a physician skilled in diseases of the eye, or by an optometrist, whichever the individual shall select.

20 U.S.C. § 107f. Authorization of appropriations.

There is hereby authorized to be appropriated such sums as may be necessary for carrying out the provisions of this Act [20 U.S.C. §§ 107-107f].

20 U.S.C. § 1400(d)(1)(A). Short title; findings; purposes

…

(d) **Purposes**. The purposes of this title [20 USCS §§ 1400 et seq.] are – (1)(A) to ensure that children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living ….

20 U.S.C. § 1412(a)(1)(A). State eligibility

(a) **In general**. A State is eligible for assistance under this part [20 USCS §§ 1411 et seq.] for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education.

(A) In general. A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

20 U.S.C. § 1415(f)-(g) and ***(l)***. Procedural safeguards

…

(f) **Impartial due process hearing**.

(1) In general.

(A) Hearing. Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session.

(i) Preliminary meeting. Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint –

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing. If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this part [20 USCS §§ 1411 et seq.] shall commence.

(iii) Written settlement agreement. In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is –

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period. If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations.

(A) In general. Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluation, that the party intends to use at the hearing.

(B) Failure to disclose. A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on the hearing. A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at minimum –

(i) not be –

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the abiity to understand, the provisions of this title [20 USCS §§ 1400 et seq.], Federal and State regulations pertaining to this title [20 USCS §§ 1400 et seq.], and legal interpretations of this title [20 USCS §§ 1400 et seq.] by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing. The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part [20 USCS §§ 1411 et seq.], in such time as the State law allows.

(D) Exceptions to the timeline. The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to –

(i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or

(ii) the local educational agency withholding of information from the parent that was required under this part [20 USCS §§ 1411 et seq.] to be provided to the parent.

(E) Decision of the hearing officer.

(i) In general. Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a fee appropriate public education.

(ii) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies –

(I) impeded the child's right to a free appropriate public education;

(II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction. Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational

agency to comply with procedural requirements under this section.

(F) Rule of construction. Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) **Appeal**.

(1) In general. If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal the findings and decision to the State educational agency.

(2) Impartial review and independent decision. The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such a review shall make an independent decision upon completion of such a review.

…

(*l*) **Rule of construction**. Nothing in this title [20 USCS §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, or remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 [29 USCS §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of an action under such laws seeking relief that is also available under this part [20 USCS §§ 1411 et seq.], the procedures available under subsections (f) and (g)

shall be exhausted to the same extent as would be required had the action been brought under this part [20 USCS §§ 1411 et seq.].

28 U.S.C. § 2254(b)(1)(A) and **(b)(3)**. State custody; remedies in Federal courts

…

(b)(1) An application for a writ of habeas corpus on behalf of person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State ….

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

29 U.S.C. § 794(a). Nondiscrimination under Federal grants and programs

(a) **Promulgation of rules and regulations**. No otherwise qualified individual with a disability in the United States, as defined in section 7(20) [29 U.S.C. § 705(20)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency

shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

29 U.S.C. § 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k)(42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3)(42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 501 of this Act [29 U.S.C. § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706

of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

(b) In any action or proceeding to enforce or change a violation of a provision of this title [29 USCS §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. § 1997e(a). Suits by prisoners

(a) **Applicability of administrative remedies**. No action shall be brought with respect to prison conditions under section 1979 of the Revised Statutes of the United States (42 U.S.C. § 1983), or any other Federal law, by a prisoner confined in a jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.

42 U.S.C. § 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].

705 ILCS § 505/1. Creation

The Court of Claims, hereinafter called the court, is created. It shall consist of 7 judges, who are attorneys licensed to practice law in the State of Illinois, to be appointed by the Governor by and with the advice and consent of the Senate, one of whom shall be appointed chief justice. In case of vacancy in such office during the recess of the Senate, the Governor shall make a temporary appointment until the next meeting of the Senate, when he shall nominate some person to fill such office. If the Senate is not in session at the time this Act takes effect, the Governor shall make temporary appointments as in case of vacancy.

705 ILCS § 505/8. Court of Claims jurisdiction; deliberation periods

The court shall have exclusive jurisdiction to hear and determine the following matters:

(a) All claims against the State founded upon any law of the State of Illinois or upon any regulation adopted thereunder by an executive or administrative officer or agency; provided, however,

the court shall not have jurisdiction (i) to hear or determine claims arising under the Workers' Compensation Act [820 ILCS 305/1 et seq.] or the Workers' Occupational Diseases Act [820 ILCS 310/1 et seq.], or claims for expenses in civil litigation, or (ii) to review administrative decisions for which a statute provides that review shall be in the circuit or appellate court.

(b) All claims against the State founded upon any contract entered into with the State of Illinois.

(c) All claims against the State for time unjustly served in prisons of this State when the person imprisoned received a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which he or she was imprisoned or he or she received a certificate of innocence from the Circuit Court as provided in Section 2-702 [735 ILCS 5/2-702] of the Code of Civil Procedure; provided, the amount of the award is at the discretion of the court; and provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $85,350; for imprisonment of 14 years or less but over 5 years, not more than $170,000; for imprisonment for over 14 years, not more than $199,150; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted. On or after the effective date of this amendatory Act of the 95th General Assembly, the court shall annually adjust the maximum awards authorized by this subsection (c) to reflect the increase, if any, in the Consumer Price Index For All Urban Consumers for the previous calendar year, as

determined by the United States Department of Labor, except that no annual increment may exceed 5%. For the annual adjustments, if the Consumer Price Index decreases during a calendar year, there shall be no adjustment for that calendar year. The transmission by the Prisoner Review Board or the clerk of the circuit court of the information described in Section 11(b) to the clerk of the Court of Claims is conclusive evidence of the validity of the claim. The changes made by this amendatory act of the 95th General Assembly apply to all claims pending on or filed on or after the effective date.

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Trustees of Chicago State University, the Board of Trustees of Eastern Illinois University, the Board of Trustees of Governors State University, the Board of Trustees of Illinois State University, the Board of Trustees of Northeastern Illinois University, the Board of Trustees of Northern Illinois University, the Board of Trustees of Western Illinois University, or the Board of Trustees of the Illinois Mathematics and Science Academy; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $2,000,000 to or for the benefit of any claimant. The $2,000,000 limit prescribed by this Section does not apply to an award of damages in

any case sounding in tort arising out of the operation by a State employee of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Trustees of Chicago State University, the Board of Trustees of Eastern Illinois University, the Board of Trustees of Governors State University, the Board of Trustees of Illinois State University, the Board of Trustees of Northeastern Illinois University, the Board of Trustees of Northern Illinois University, the Board of Trustees of Western Illinois University, or the Board of Trustees the Illinois Mathematics and Science Academy is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims. The changes to this Section made by this amendatory Act of the 100th General Assembly apply only to claims filed on or after July 1, 2015. The court shall annually adjust the maximum awards authorized by this subsection to reflect the increase, if any, in the Consumer Price Index For All Urban Consumers for the previous calendar year, as determined by the United States Department of Labor. The Comptroller shall make the new amount resulting from each annual adjustment available to the public via the Comptroller's official website by January 31 of every year.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the Line of Duty Compensation Act [820 ILCS 315/1 et seq.]. A claim under that Act must be heard and determined within one year after the application for that claim is filed with the Court as provided in that Act.

(g) All claims pursuant to the Crime Victims Compensation Act [740 ILCS 45/1 et seq.].

(h) All claims pursuant to the Illinois National Guardsman's Compensation Act [20 ILCS 1825/1 et seq.]. A claim under that Act must be heard and determined within one year after the application for that claim is filed with the Court as provided in that Act.

(i) All claims authorized by subsection (a) of Section 10-55 [5 ILCS 100/10-55] of the Illinois Administrative Procedure Act for the expenses incurred by a party in a contested case on the administrative level.

705 ILCS § 505/25. Exhaustion of remedies required

Any person who files a claim in the court shall, before seeking final determination of his or her claim[,] exhaust all other remedies and sources of recovery whether administrative or judicial; except that failure to file or pursue actions against State employees, acting within the scope of their employment, shall not be a defense.

D.C. Code § 2-1401.01. Intent of Council

It is the intent of the Council of the District of Columbia, in enacting this chapter, to secure an end in the District of Columbia to discrimination for any reason other than that of merit, including, but not limited to, discrimination by reason of race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, matriculation, political affiliation, genetic information, disability, source of income, status as a victim of an intrafamily offense, place of residence or business, and status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking.

D.C. Code § 2-1402.73. Application to the District government

Except as otherwise provided for by District law or when otherwise lawfully and reasonably permitted, it shall be an unlawful discriminatory practice for a District government agency or office to limit or refuse to provide any facility, service, program, or benefit to any individual on the basis of an individual's actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, disability, matriculation, political affiliation, source of income, place of residence or business, or status as a victim or family member of a victim of domestic violence, a sexual offense, or stalking.

D.C. Code § 2-1403.03(b). Establishment of procedure for complaints filed against District government

… (b) A person claiming to be aggrieved by an unlawful discriminatory practice on the part of District government agencies, officials, or employees may elect to file an administrative complaint under the rules of procedure established by the Mayor under this section or a civil action in a court of competent jurisdiction under [the D.C. Code] § 2-1403.16.

D.C. Code § 2-1403.16. Private cause of action

(a) Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of competent jurisdiction for damages and such other remedies as may be appropriate, unless such person has filed a complaint hereunder; provided, that where the Office [of Human Rights] has dismissed the complaint on grounds of administrative convenience, or where the complainant has withdrawn a complaint, such person shall maintain all rights to bring suit as if no complaint had been filed. No person who maintains, in a court of competent jurisdiction, any action based upon an act which would be an unlawful discriminatory practice under this chapter may file the same complaint with the Office [of Human Rights]. A private cause of action pursuant to this chapter shall be filed in a court of competent jurisdiction within one year of the unlawful discriminatory act, or the discovery thereof, except the limitation shall be within 2 years of the

unlawful discriminatory act, or the discovery thereof, for complaints of unlawful discrimination in real estate transactions brought pursuant to this chapter or the FHA. The timely filing of a complaint with the Office, or under administrative procedures established by the Mayor pursuant to [the D.C. Code] § 2-1403.03, shall toll the running of the statute of limitations while the complaint is pending.

(b) The court may grant any relief it deems appropriate, including, the relief provided in [the D.C. Code] §§ 2-1403.07 and 2-1403.13(a).

(c) The notice requirement of [the D.C. Code] § 12-309 shall not apply to any action brought against the District of Columbia under this section.

D.C. Code § 2-1831.09(b) and **(e)-(f)**. Powers, duties, and liabilities of Administrative Law Judges

…

(b) In any case in which he or she presides, an Administrative Law Judge may:

(1) Issue subpoenas and may order compliance therewith;
(2) Administer oaths;
(3) Accept documents for filing;
(4) Examine an individual under oath;
(5) Issue interlocutory orders and orders;
(6) Issue protective orders;
(7) Control the conduct of proceedings as deemed necessary or desirable for the sound administration of justice;

(8) Impose monetary sanctions for failure to comply with a lawful order or lawful interlocutory order, other than an order that requires payment of a sum certain as a result of an admission or finding of liability for any infraction or violation that is civil in nature;
(9) Suspend, revoke, or deny a license or permit;
(10) Perform other necessary and appropriate acts in the performance of his or her duties and properly exercise any other powers authorized by law;
(11) Engage in or encourage the use of alternative dispute resolution;
(12) When authorized by rules promulgated pursuant to § 2-505, issue administrative inspection authorizations that authorize the administrative inspection and administrative search of a business property or premises, whether private or public, and exclude any area of a premises that is used exclusively as a private residential dwelling. Subject to the exclusions of this paragraph, property (including any premises) is subject to administrative inspection and administrative search under this paragraph only if there is probable cause to believe that:
(A) The property is subject to one or more statutes relating to the public health, safety, and welfare;
(B) Entry to said property has been denied to officials authorized by civil authorities to inspect or otherwise to enforce such statutes and regulations; or
(C) Reasonable grounds exist for exercising such administrative inspection and search; and
(13) Exercise any other lawful authority.

…

(e) In addition to any other sanctions that an Administrative Law Judge may lawfully impose for the violation of any order or interlocutory order, an Administrative Law Judge, or a party in interest in an adjudicated case, may apply to any judge of the Superior Court of the District of Columbia for an order issued on an expedited basis to show cause why a person should not be held in civil contempt for a refusal to comply with an order or an interlocutory order issued by an Administrative Law Judge. On the return of an order to show cause, if the judge hearing the case determines that the person is guilty of refusal to comply with a lawful order or interlocutory order of the Administrative Law Judge without good cause, the judge may commit the offender to jail or may provide any other sanction authorized in cases of civil contempt. A party in interest may also bring an action for any other equitable or legal remedy authorized by law to compel compliance with the requirements of an order or interlocutory order of an Administrative Law Judge.

(f) An Administrative Law Judge has no authority to commit any person to jail.

4 DCMR 128. Discrimination complaints in other proceedings

128.1 Whenever an issue of discrimination as specified in § 101.1 is raised by a party in a grievance or adverse action proceeding before any appropriate agency of the District government, the hearing office shall inform the person raising the

complaint of discrimination that the complaint will not be admitted as an issue in the grievance or adverse action proceeding and that the complaint should be submitted to the Director [of the Office of Human Rights].

28 C.F.R. § 35.130(b)(2). General prohibitions against discrimination

… (b)(2) A public entity may not deny a qualified individual with a disability the opportunity to participate in services, programs, or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

28 C.F.R. § 35.160(a)(1) and **(b)(1)**. General

(a)(1) A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.

…

(b)(1) A public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public, an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.

28 C.F.R. § 35.170(c). Complaints

…

(c) Where to file. An individual may file a complaint with any agency that he or she believes to be the appropriate agency designated under subpart G of this part, or with any agency that provides funding to the public entity that is the subject of the complaint, or with the Department of Justice for referral as provided in § 35.171(a)(2).

28 C.F.R. § 35.172(d). Investigations and compliance reviews

…

(d) At any time, the complainant may file a private suit pursuant to section 203 of the Act, 42 U.S.C. 12133, whether or not the designated agency finds a violation.

28 C.F.R. § 35.190(b)(7). Designated agencies

…

(b) The Federal agencies listed in paragraphs (b)(1) through (8) of this section shall have responsibility for implementation of subpart F of this part for components of State and local governments that exercise responsibilities, regulate, or administer services, programs, or activities in the following functional areas.

…

(7) Department of Labor: All programs, services, and regulatory activities relating to labor and the work force.

29 DCMR 218.2(b)-(c). Due Process Scope and Procedures for Blind Vendors, Program Applicants and RSVFP Trainees

…

218.2 … (b) A vendor who is dissatisfied with a licensing agency action arising from the operation or administration of the [Randolph-Sheppard Vending Facility] Program may pursue any of the following options:
(1) Informal administrative review meeting with the Chief of the Division of Services for the Blind (DSB);
(2) [Repealed];
(3) Impartial due process hearing before the D.C. Office of Administrative Hearings ("OAH");

(c) A vendor aggrieved by an Order issued by OAH, may appeal this Order either to the D.C. Court of Appeals, pursuant to D.C. Official Code § 2-1831.16(c)-(e), or to the United States Secretary of Education, pursuant to 34 C.F.R. § 395.13.

34 C.F.R. § 104.4(b)(1)(iv). Discrimination prohibited

…

(b) Discriminatory actions prohibited. (1) A recipient, in providing any aid, benefit, or service, may not,

directly or through contractual, licensing, or other arrangements, on the basis of handicap: … (iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others; …