No. 19-1452

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STATE OF KANSAS, BY AND THROUGH THE KANSAS DEPARTMENT FOR CHILDREN AND FAMILIES,

Intervenor-Appellant,

v.

SOURCEAMERICA, *et al.*,

Plaintiffs-Appellees,

and

UNITED STATES DEPARTMENT OF EDUCATION, *et al.*,

Defendants-Appellees/Cross Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia (Ellis, J.)

BRIEF FOR AMICI CURIAE NATIONAL FEDERATION OF THE BLIND AND NATIONAL COUNCIL OF STATE AGENCIES FOR THE BLIND IN SUPPORT OF INTERVENOR-APPELLANT STATE OF KANSAS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for amici curiae National Federation of the Blind and National Council of State Agencies for the Blind certify that neither amicus is a publicly held corporation, that neither amicus has a parent corporation, and that no publicly held corporation owns 10 percent or more of either amicus's stock.

Dated: July 22, 2019

By: 
Attorney for Amici Curiae

NOTICE OF CONSENT TO FILING

Pursuant to Rule 29(a)(2), all parties have consented to the filing of this amicus brief.

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The National Federation of the Blind and the National Council of State Agencies for the Blind, by and through their counsel, submit this brief in support of Intervenor–Appellant, State of Kansas.[1]

Interest & Authority of Amici Curiae

Amici are organizations representing the blind, including blind vendors, and state licensing agencies in every state in the country.

The National Federation of the Blind ("NFB") is the nation's oldest and largest organization of blind persons. The NFB has affiliates in all 50 states, Washington, D.C., and Puerto Rico. The NFB and its affiliates are widely recognized by the public, Congress, executive agencies of state and federal governments, and the courts as a collective and representative voice on behalf of blind Americans and their families. The organization promotes the general welfare of the blind by assisting the blind in their efforts to integrate themselves into society on terms of equality and by removing barriers that result in the denial of opportunity to blind persons in virtually every sphere of life, including education, employment, family and community life, transportation, and recreation. The National Association of Blind Merchants (NABM), a division of the NFB, organizes and advocates for blind entrepreneurs working in cafeterias and other

[1] No party's counsel authored this brief in whole or in part. No party, nor a party's counsel, nor any person other than the amici curiae, made a monetary contribution intended to fund preparation or submission of this brief.

vending facilities made available by the Randolph-Sheppard Act. Its members include blind vendors throughout the country, including in Kansas, and it actively educates and advocates for blind vendors nationwide.

The National Council of State Agencies for the Blind (NCSAB) represents state licensing agencies in all 50 states and the U.S. Territories that were created pursuant to the Randolph-Sheppard Act to administer the Act and its state-law counterparts. These laws provide for state licensing agencies to recruit and train blind vendors and pursue opportunities for blind vendors to work in federal and state buildings. Part of NCSAB's mission is to serve as an advisory body to the Department of Education's Rehabilitation Services Administration in the Department's administration of the Randolph-Sheppard Act and other services for individuals who are blind or visually impaired.

The NFB and NCSAB represent the individuals who work most closely with the Randolph-Sheppard Act on a daily and annual basis. These organizations know the history of the Act, understand the intricacies of its application, and appreciate its importance to the employment of blind individuals.

Introduction

Congress established the Randolph-Sheppard Act in 1936 and amended it in 1954 and 1974 to promote blind entrepreneurship. It has described the Act as "one of the most practical and effective employment opportunity programs ever enacted by Congress." S. Rep. No. 93-937, at 13 (1974).[2]

When it broadened and strengthened the Act in 1974, Congress found that, "contrary to the spirit of the Act, which strives to encourage the establishment and growth of blind entrepreneurs, certain agencies have construed the [scope of the Act] narrowly, to the detriment of blind vendors." *Id.* at 16. In describing the need for the 1974 amendments, Congress explicitly recognized the hostility of some federal departments and agencies, including the Department of Defense, to the Act's goal of maximizing opportunities on federal properties for blind vendors to operate vending facilities, including cafeterias. *Id.* at 10, 16–17. Congress therefore delegated to the Department of Education (then the Department of Health, Education and Welfare) – and only that Department – the authority and obligation to promulgate regulations implementing the Act. 20 U.S.C. §§ 107(b), 107a(6)(B); *see* S. Report No. 93-937 at 15–16. With respect to cafeterias, Congress delegated to the Department of Education the authority to promulgate regulations "to establish a priority for the operation of cafeterias on Federal

[2] Amici have filed the Senate Report in an attachment to this brief.

property by blind licensees . . . ." 20 U.S.C. § 107d-3(e). This Court has previously held that the Act's provisions and regulations regarding cafeterias apply to military dining facilities. *NISH v. Cohen*, 247 F.3d 197, 206 (4th Cir. 2001); *see also NISH v. Rumsfeld*, 348 F.3d 1263 (10th Cir. 2003).

Pursuant to that explicit statutory authority, the Department of Education enacted regulations regarding the "operation of cafeterias by blind vendors," 34 C.F.R. § 395.33, which this Court has previously found to be entitled to *Chevron* deference. *NISH v. Cohen*, 247 F.3d at 201–02. Those regulations provide for "priority in the operation of cafeterias by blind vendors" that "shall be expected to **provide maximum employment opportunities to blind vendors to the greatest extent possible**." 34 C.F.R. § 395.33(a). They require that "the appropriate State licensing agency shall be invited to respond to solicitations for offers **when a cafeteria contract is contemplated** . . . ." *Id.* § 395.33(b). And they require that "[a]ll contracts or other existing arrangements **pertaining to the operation of cafeterias on Federal property**" not already covered by contracts with or permits issued to state licensing agencies shall be renegotiated to apply the provisions of the Randolph-Sheppard cafeteria regulations. *Id.* § 395.33(c) (emphasis added to all three subsections).

Those regulations thus require that the Randolph-Sheppard priority apply to all contracts pertaining to the operation of cafeterias on federal property. They do

not require that the contract be for a single operator of a cafeteria or for a primary operator (indeed, the word "operator" does not appear in the cafeteria provisions of either the Act or regulations). They make no distinction with respect to the type of cafeteria contract, nor do they recognize any distinction between the Department of Defense-created categories of "full food service" contracts and "dining facility attendant" contracts. The Fort Riley dining facility attendant contract inarguably pertains to the operation of cafeterias.

A contract for washing dishes, scrubbing pots, and mopping the floor of a cafeteria is as much a contract "for the operation of a cafeteria" as a contract for food preparation. Without those services, the cafeteria could not operate. If the Randolph-Sheppard priority applied only to contracts to operate the entire cafeteria, as the district court apparently believed, the Army could subvert the Randolph-Sheppard priority by splitting any cafeteria contract in two and asserting that neither contract is for the full operation of a cafeteria. If the Army succeeds in removing the current opportunity for a blind vendor to operate a cafeteria contract at Fort Riley (which consists primarily of the same services included in the new contract), it will have eliminated, rather than maximized, opportunities for blind vendors in those buildings. To prevent that result, the Randolph-Sheppard regulations answer the question of whether its priority applies to that new contract in the affirmative.

If, as some courts have found, this Court believes there is an ambiguity with respect to whether the Randolph-Sheppard priority applies to contracts to provide services in federal cafeterias that are not for the full operation of the cafeteria or do not include food preparation, Congress's goal of "enlarging the economic opportunities of the blind" (20 U.S.C. § 107(a)) and the Secretary of Education's mandate that the application of the priority to the operation of cafeterias "shall be expected to provide maximum employment opportunities to the greatest extent possible" (34 C.F.R. § 395.33(a)) both counsel in favor of a broad reading of the applicable statute and regulations.

To the extent that any ambiguity remains after applying that lens, the Secretary of Education removed it in a letter to Congressman Pete Sessions, then-chairman of the House Rules Committee, in which she stated that "[t]he Department of Education believes that the Randolph-Sheppard priority applies to both types of cafeteria contracts," i.e., to both "full food service" and dining facility attendant" contracts. Letter from Betsy DeVos, Secretary of Education, to Pete Sessions, House of Representatives (Mar. 5, 2018), 6 J.A. 2261–62. Secretary DeVos specifically referred with approval to the decision of the arbitration panel in this case. *Id.* As explained further below, the official opinion of the Secretary of Education in a letter setting out the position of the Department of Education – the

federal authority charged with implementing the Act and regulations – is entitled to *Auer* deference.

Over 1,800 blind Americans currently work as vendors under the federal and state RSAs. Of these, 44 administer contracts at military dining facilities. The opportunities to administer the usually large and desirable contracts relating to the operation of troop dining facilities provide an incentive for entrepreneurial blind persons to participate in the Randolph-Sheppard program. The "set aside" funds that flow from those contracts to the state licensing agencies also provide a significant portion of the budgets that allow those agencies to support blind vendors at other locations. The entrepreneurial opportunities for the blind created by the Randolph-Sheppard Act at a relatively small number of vending facilities on federal and state properties contrast with the almost-always low-level, often minimum-wage jobs for people with disabilities who provide the goods and services listed on the wide-ranging procurement list created pursuant to the Javits-Wagner-O'Day Act, administered by SourceAmerica.

One final introductory point is worth noting: The unusual posture of this case that has led to the United States, speaking through the Department of Justice, articulating the position of the Department of Defense (which has persistently sought to undermine the Randolph-Sheppard priority) rather than the Department of Education (the agency charged with interpreting and implementing the

Randolph-Shepard Act). The procedural history that led to this situation is as follows:

(1) When the Army sought to replace Kansas's longstanding contract to provide cafeteria services at Fort Riley pursuant to the Randolph-Sheppard priority with a "dining facilities attendant" contract to which the Army asserted that priority would not apply, Kansas promptly sought a Randolph-Sheppard arbitration hearing as required by the Randolph-Sheppard Act (2.J.A. 460–61);

(2) SourceAmerica and Lakeview Center's (hereinafter jointly referred to as "SourceAmerica") sought to intervene in that arbitration (2.J.A. 478–81, 484–85) but was not permitted to do so by the Department of Education;

(3) Kansas sought and obtained a preliminary injunction from the United States District Court for the District of Kansas to preserve its existing right to operate the contract for food services at Fort Riley, with the court finding that Kansas had a substantial likelihood of success on the merits. 171 F. Supp. 3d 1145, 1157–65, 1171 (D. Kan. 2016);

(4) SourceAmerica intervened in that district court action, but its motion to dismiss was denied, 192 F. Supp. 3d 1184, 1214–15 (D. Kan. 2016);

(5) Kansas prevailed in the arbitration regarding Fort Riley (6 J.A. 2194–225); and

(6) Rather than return to the district court proceeding in Kansas in which it had already intervened, SourceAmerica commenced the instant case in the Eastern District of Virginia[3] against the Department of Education (by virtue of the arbitration panel having acted in its name) and the Department of Defense (a nominal defendant, the desire of which is to award the contract to SourceAmerica).

The Department of Justice represents the United States in actions in federal court. It has chosen to advocate for the position of the Department of Defense in this case, but the Department of Education has never withdrawn or superseded Secretary DeVos's opinion letter. Congress charged the Department of Education – not the Department of Defense or the Department of Justice – with interpreting and implementing the Randolph-Sheppard Act. In these circumstances, the District Court's belief that the position argued by the Department of Justice was the official position of the Department of Education regarding the interpretation of its regulation is understandable but mistaken.[4]

[3] Arguably, in the interest of comity and judicial efficiency, that court should have refused to consider the suit and transferred it to the District of Kansas, where the dispute was already at issue with all of the same parties.

[4] Amici agree with Kansas's arguments regarding SourceAmerica's lack of a right to intervene in the Randolph-Sheppard arbitration. However, because amici believe that they have more to offer this Court with respect to the application of the Randolph-Sheppard Act and regulations to military dining facilities, this brief will focus on that issue.

Argument

This Court should reverse the district court's overly narrow interpretation of 34 C.F.R. § 395.33 for three reasons:

First, a broad interpretation of the scope of the Randolph-Sheppard cafeteria regulations ensures compliance with their mandate that operation of cafeterias "provide maximum employment opportunities to blind vendors to the greatest extent possible" and that the priority apply to "all contracts pertaining to the operation of a cafeteria." 34 C.F.R. § 395.33(b) and (c).

Second, no language in the Randolph-Sheppard Act or regulations mandates that "the operation of a cafeteria" can be performed by only one entity per location. A contract for washing dishes and cleaning the tables and floors of a cafeteria is as much a contract for the operation of that cafeteria as a contract for food preparation. The cafeteria could not exist, and food could not be served, without both such operations, and the Randolph-Sheppard priority therefore applies regardless of whether the Army contracts for the two sets of services jointly or separately (or contracts for one and performs the other itself). A ruling to the contrary would allow the Army to evade the mandate to maximize opportunities for blind vendors with respect to "the operation of cafeterias" by dividing cafeteria contracts or removing food preparation from such contracts.

And finally, the Secretary of Education – who has sole authority to promulgate these regulations – published a well-reasoned letter explaining her interpretation that the relevant provisions apply to all cafeteria contracts, including both "full food service" and "dining facility attendant" contracts and citing with approval the arbitration panel's decision regarding the Fort Riley DFA contract. Her letter is persuasive and owed deference.

Both Congress, in amending the Randolph-Sheppard Act in 1974, and the Secretary of Education, in promulgating regulations pursuant to the Act's instruction to prescribe regulations establishing a priority for the operation of cafeterias on federal properties made clear that their goal was to maximize opportunities for blind vendors. That goal is manifest in those regulations' application to "all contracts pertaining to the operation of cafeterias," which the arbitration panel properly found to apply to the Fort Riley cafeteria contract despite the Army's attempt to avoid the R-S priority by removing food preparation from that contract. If the regulations themselves are insufficiently clear regarding the implementation of that goal, the Department of Education has recently clarified that the priority applies to "dining facility attendant" contracts, in an official letter from the Secretary of Education that explicitly approves of the Fort Riley arbitration decision and is entitled to deference.

I. The Randolph-Sheppard priority for "the operation of cafeterias" by blind licensees applies to "all contracts . . . pertaining to the operation of cafeterias," including contracts for "dining facility attendant" services.

The Randolph-Sheppard Act and its implementing regulations apply to all contracts pertaining to the operation of cafeterias on federal property, including the Fort Riley "dining facility attendant" solicitation.

The Act and its regulations establish a priority for "the operation of cafeterias on Federal property by blind licensees," 20 U.S.C. § 107d-3(e), 34 C.F.R. § 395.33, subject to an exception if the property manager convinces the Secretary of Education, by means of a written justification, that the application of the priority would otherwise adversely affect the interests of the United States, 20 U.S.C. § 107(b); 34 C.F.R. § 395.30(b)).

The Act and its legislative history reflect that Congress intended to "encourage the establishment and growth of blind entrepreneurs" and to provide them with opportunities "wherever feasible." S. Rep. 93-937 at 16; 20 U.S.C. § 107(b)(2). The legislative history demonstrates that Congress was tasking the Department of Education with expanding opportunities for blind licensees, including opportunities related to the operation of cafeterias, in the face of what

Congress saw as inappropriate hostility from the Department of Defense (as well as some other departments and agencies). S. Rep. 93-937 at 10, 16–17.[5]

With respect to cafeterias on federal properties, the Act directs the Department of Education to "prescribe regulations to establish a priority for the operation of cafeterias on Federal property by blind licensees . . . ." 20 U.S.C. § 107d-3(e).

The Secretary of Education (then the Secretary of Health, Education & Welfare) accordingly promulgated regulations that apply to all cafeterias on federal property. The regulations mandate that the operation of cafeterias on federal properties "shall be expected to **provide maximum employment opportunities to blind vendors** to the greatest extent possible." 34 C.F.R. §§ 395.33(a) (emphasis added). The regulations require that the State Licensing Agency be invited to apply "when **a cafeteria contract** is contemplated," and they establish that the priority shall apply to "all contracts or other existing arrangements **pertaining to the**

[5] In enacting the 1974 amendments to the Randolph-Sheppard Act, Congress repeatedly took note of the military's hostility to the Act and its purposes. "Commanders of military installations are singularly insensitive to the need to develop the program." S. Rep. No. 93-937 at 10. "Very few blind vendors are to be found at military installations. Witnesses before the Committee have stated that each military post or base commander is in charge of his particular installation, and that, for the most part, commanders are either hostile or indifferent to the Randolph-Sheppard program. This attitude has severely curtailed the growth of the program within the Defense Department." *Id.* at 17. The Committee held up the rare example of a military base with numerous blind-operated cafeterias and snack bars to demonstrate the possibility of a better alternative. *Id.* at 16-17.

operation of cafeterias on Federal property . . . ." *Id.* §§ 395.33(b) and (c) (emphasis added).

A. The regulations' direction to maximize opportunities for blind vendors in the operation of cafeterias counsels in favor of a broad application of the Randolph-Sheppard cafeteria priority.

As noted above, consistent with Congressional intent to expand opportunities for the blind and to regulate the operation of cafeterias on federal properties to achieve that end, the Department of Education's Randolph-Sheppard cafeteria regulations require that the operation of cafeterias on federal properties "shall be expected to provide maximum employment opportunities to blind vendors to the greatest extent possible." 34 C.F.R. §§ 395.33(a). That mandate, which is entirely consistent with the Act's intent, counsels in favor of a broad application of the Randolph-Sheppard priority to federal cafeterias, and in favor of affirming the arbitration panel's decision here.

A holding to the contrary would encourage the Army and other hostile federal property managers to play games with their cafeteria contracts in an attempt to avoid the Randolph-Sheppard priority, as the Army did here. Directly contrary to the regulations' requirement, the Army at Fort Riley took deliberate steps to attempt to avoid the application of the priority and to eliminate, rather than maximize, employment opportunities for blind vendors. The arbitration panel found in this case, based on the testimony of the Army's Contract Specialist, that

"potato peeling was eliminated purposefully to bring the contract within the Army's definition [of a "dining facility attendant" contract] . . . and to insulate it from the RS Act mandate for priority." Findings of Fact and Decision at 23, 6 J.A. 2216.

B. The regulations apply the Randolph-Sheppard priority to all contracts pertaining to the operation of cafeterias on federal property.

Most significantly, the Randolph-Sheppard cafeteria regulations require that the State Licensing Agency be invited to apply "when a cafeteria contract is contemplated," and they establish that the priority shall apply to "all contracts or other existing arrangements pertaining to the operation of cafeterias on Federal property . . . ." *Id.* §§ 395.33(b) and (c).

Nothing in § 395.33(c) supports the Army's argument that the "pertaining to the operation of cafeterias" regulation applied only to the transitional period when the regulations were first adopted. Reading the regulation that way would have the illogical effect that in 1977 – and *only* in 1977 – blind vendors were entitled to a priority for all existing contracts "pertaining to the operation of cafeterias." If that were so, vendors receiving the renegotiated "pertaining to" contracts that existed in 1977 would be thrown out of work once those contracts expired because they merely "pertained" to the operation of cafeterias but did not constitute "operation"

of a cafeteria under § 395.33(a). *Id.* There is no indication that either Congress or the Department of Education intended such a result.

When the regulations became effective, they required the entire universe of contracts subject to the Act to be negotiated under it. The regulations describe this universe as all contracts that pertain to the operation of a cafeteria – not only the first time such a contract expired, but every time. Neither the Act nor the regulations have changed in the interim, and the universe of contracts subject to the Act remains the same.

Any argument to the contrary would render the phrase "pertaining to" superfluous. The only plausible reading is a more expansive one than the district court allowed: that all contracts pertaining to the operation of a cafeteria fall within the ambit of the RSA.

Having already mistakenly concluded that contracts for the operation of a cafeteria only receive Randolph-Sheppard priority if the vendor controls or manages the entire facility, the district court attempted to cabin the application of the regulations' application to all contracts pertaining to the operation of a cafeteria by relying on the phrase "pursuant to the provisions of this section," then looping back to its narrow reading of "the operation of cafeterias" while ignoring other provisions such as the requirement to maximize opportunities for blind vendors *SourceAmerica v. U.S. Dep't of Ed.*, 368 F. Supp. 3d. 974, 994 (E.D. Va. 2019).

C. The Randolph-Sheppard cafeteria regulations are consistent with the Act, so courts must defer to the Department of Education's decision to maximize opportunities for blind vendors and apply the priority to contracts pertaining to the operation of cafeterias.

As both this Court and the Tenth Circuit have held, the Department of Education's Randolph-Sheppard regulations, and in particular the cafeteria regulations, are entitled to *Chevron* deference. *NISH v. Cohen*, 247 F.3d at 201–02, and *NISH v. Rumsfeld*, 348 F.3d at 1266–71, both applying *Chevron, U.S.A, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). As the Supreme Court held in *Chevron*, "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 843–44. Here, Congress explicitly left a gap for the Department of Education to fill with respect to the application of the Randolph-Sheppard priority to cafeterias on federal properties.

Applying Congress's direction "to establish a priority for the operation of cafeterias on Federal property by blind vendors" to include contracts "pertaining to the operation of cafeterias on Federal property" in no way contradicts the statute. To the contrary, that broad application is consistent with the Act's goal of creating opportunities for blind vendors "wherever feasible," 20 U.S.C. § 107(b), and carries out the Congressional purpose of promoting opportunities for blind

entrepreneurs. As *Chevron* held, the Supreme Court "has long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . . ." 467 U.S. at 844.

D. By providing that the Randolph-Sheppard cafeteria priority would not apply to a small subset of "mess attendant services" contracts, Congress indicated its belief that the priority applied to all other such contracts.

In 2006, Congress confirmed that the Randolph-Sheppard priority applies to "mess attendant services" and other "services supporting the operation of a military dining facility" by providing in that year's defense authorization act that the priority does not apply to such services if they were on the Javits-Wagner-O'Day procurement list as of October 2006, thereby implicitly acknowledging that the Act's priority does apply to such services if they were not on the list as of that date. John Warner National Defense Authorization Act of 2007, Pub. L. 109-364, div. A, title VIII, § 856(a) (Oct. 17, 2006), 120 Stat. 2083. The mess attendant services, also known as dining facility attendant services, at Fort Riley were not on the procurement list as of October 2006. Because the JWNDAA did not exempt them from the application of the Randolph-Sheppard priority, they are subject to that priority.

II. More than one entity can conduct "the operation" of a cafeteria as that phrase is used in the Randolph-Sheppard Act and regulations, and such operation need not include food preparation.

Nothing in the Randolph-Sheppard Act or regulations indicates that only one entity can be involved in "the operation of" a cafeteria or that the priority applies only if the blind licensee is involved in food preparation. As another district court held, "Had Congress wished to limit the RSA's applicability to contracts where the vendor operated an **entire** cafeteria, it could have specified so." *Tex. Workforce Comm'n*, 2018 WL 8619799 at *7.

A. Multiple entities may conduct the operation of a cafeteria, and all (if contracted for) are eligible for the Randolph-Sheppard priority.

In other contexts, courts have recognized that a facility may have multiple operators. For example, a hazardous waste facility "may indeed have more than one operator for RCRA purposes, despite the apparent limitations of the definitional language." *United States v. Conservation Chem. Co.*, 733 F. Supp. 1215, 1221 (N.D. Ind. 1989). And more than one person can "operate" a single aircraft, including the owner, the lessee, and the pilot. 14 C.F.R. § 1.1.

It is common practice for more than one person or entity to operate a restaurant or cafeteria. For example, Ruth Fertel, the founder of Ruth's Chris Steak House, never cooked a steak or handled any aspect of food preparation. Nonetheless, she was well known as an operator of that restaurant chain. At the other end of the hierarchy, it would surprise anyone who has worked as a waiter,

waitress, or busboy to learn that his or her job was not part of the operation of the restaurant.

The Fort Riley dining facilities cannot be operated without employees to wash the dishes, pots, pans, and equipment, and clean the kitchens and dining halls. All of those tasks are part of, indeed indispensable to, food service at Fort Riley. The arbitration panel described a variety of aspects of food service required by the Performance Work Statement and concluded that "these tasks constitute an integral element of providing [food] service, pertain to the operation of a cafeteria, and without which the cafeterias at Fort Riley would not be able to function." Findings of Fact at 25–26, 6 J.A. 2218–19. As the DFA contract would not exist without the cafeterias and the cafeterias cannot exist without the DFA contractor, the DFA contract must be part of the operation of those dining facilities. In short, absent the services specified in the Solicitation, a large number of functions integral to the operation of the dining facilities at Fort Riley would not be fulfilled, and therefore these dining facilities could not operate.

Other courts have agreed that a military base may not evade the RSA priority by asserting that DFA contractors are not the sole operators of the facility. *See, e.g., Tex. Workforce Comm'n v. U.S. Dep't of Educ.*, 354 F. Supp. 3d 722, 736 (W.D. Tex. 2018) (holding that "[i]t is possible that multiple vendors could collaborate to fulfill the cafeteria's purpose of providing food"); *Johnson v. United*

States, No. EP-14-CV-00317-DCG, 2014 WL 1250469, at *15 (W.D. Tex. Sept. 12, 2014). Several recent Randolph-Sheppard arbitration panel majorities have also declined to read the statute and regulations so narrowly and have found that the RSA priority applies to contracts that include what DOD calls "DFA" services. *See, e.g., Cal. Dep't of Rehab. v. U.S. Dep't of the Navy,* R/S 15-20 (2018) (San Diego Bases); *Okla. Dep't of Rehab. Servs. v. U.S. Dep't of the Army*, R/S 15-10 (2016) (Fort Sill); *Ga. Vocational Rehab. Agency v. U.S. Dep't of Defense*, R/S 13-09 (2016) (Fort Stewart); *Kentucky Educ. and Workforce Dev. Cabinet v. United States Dep't of the Army*, R/S ___ (Feb. 14, 2014) (Fort Campbell).[6]

The district court's holding to the contrary – that "the vendor must exercise control or management over the functioning of the vending facility as a whole" for the priority to apply, 368 F. Supp. 3d at 992, places that court in the decided, and erroneous, minority.

B. A Randolph-Sheppard blind licensee can provide food service without being involved in food preparation.

The Randolph-Sheppard Act does not require that the blind licensee or her employees be involved in food preparation or serve food in order to receive the priority for the operation of a cafeteria. The regulations' requirements to assure

[6] Some, but not all, of these opinions are available in the Rehabilitation Services Administration's on-line library of significant arbitration opinions: *Decisions of Arbitration Panels,* ED/OSERS/RSA Rehabilitation Services Administration, https://rsa.ed.gov/display.cfm?pageid=595 (last visited July 22, 2019). Amici have included all of them in the attachment to their brief.

that food quality and price are not compromised do not require each entity involved in the operation of a cafeteria to prepare or serve food. Again, washing pots and cleaning tables are part of food service at a cafeteria.

The Army's attempt to render the Fort Riley cafeteria contract into a "dining facility attendant" contract by eliminating the remnants of food preparation had no effect on the application of the Randolph-Sheppard priority. The Randolph-Sheppard Act and regulations do not recognize a distinction between "full food service" contracts and "dining facility attendant" contracts. *Tex. Workforce Comm'n v. U.S. Dep't of Educ., Rehab. Servs. Admin.*, No. EP-17-CV-00026-FM, 2018 WL 8619799, at *7 (W.D. Tex. Mar. 28, 2018). Those are simply terms used by the military for two types of service contracts it issues, one of which includes food preparation and one of which does not, both of which pertain to the operation of cafeterias.

However, 34 C.F.R. §395.33 provides that "priority in the operation of cafeterias by blind vendors on Federal property shall be afforded…," and that the RSA priority applies to "[a]ll contracts . . . pertaining to the operation of cafeterias," so long as the provision of cafeteria-related services by a blind vendor does not compromise the quality of the food or raise the price of the contract out of the competitive range. 34 C.F.R § 395.33(a), (c).

The Comptroller General has long found that DFA services are "directly related" to providing cafeteria services. In *In re Department of the Air Force – Reconsideration*, a bid protest was launched after the award of a contract at Keesler Air Force Base. The protester argued that the dining facility contract contained services that were not primarily related to food. But the GAO found that these are all services which relate to the operation of that cafeteria, and so rejected the protest. The Comptroller General stated:

> While there are many tasks and responsibilities under the contract that are not mentioned in the regulatory definition of cafeteria, it is apparent that, for the most part, they are **directly related to providing cafeteria services**. For example, while housekeeping and grounds maintenance (around the dining facilities) services are not food-dispensing tasks per se, **to the extent that such services are necessary to assure a clean environment for preparing and serving food, they clearly are related to operating a cafeteria facility. [W]e see no reason why a contract containing services related to cafeteria operation would be excluded from the Act**.

72 Comp. Gen. 241, 246 (Comp. Gen. June 4, 1993), 1993 WL 212641, at *4 (emphasis added).

Here, as the arbitration panel found, notwithstanding the Army's attempts to remove food preparation from the contract, all of the duties to be assigned to the contractor specified in the Performance Work Statement pertain to the operation of cafeterias at Fort Riley and involve food service there. Findings of Fact at 26.

III. Secretary DeVos's letter interpreting her department's regulation regarding the scope of the Randolph-Sheppard Act's priority for the operation of cafeterias is persuasive and should be afforded deference.

While the Randolph-Sheppard regulations facial application to all contracts pertaining to the operation of cafeterias should suffice to require that the priority apply to "dining facility attendant" contracts such as the one at issue here, some courts have found that the regulations' application to DFA contracts is ambiguous. *Tex. Workforce Comm'n*, 2018 WL 8619799 at *7–11; *Wash. State Dep't of Servs. for the Blind v. United States*, 58 Fed. Cl. 781, 789–92 (2003). The latter opinion contains an exhaustive discussion of the meanings of the words "operate" and "operation," but ultimately concludes that the phrases "to operate vending facilities" and "operation of cafeterias" in the Randolph-Sheppard Act are ambiguous with respect to their application to dining facilities attendant contracts. *Id.*

To the extent that the regulations are ambiguous (and their ambiguity is not resolved by the intent of the Act and the regulations to maximize opportunities for the blind), any ambiguity was resolved last year by an official letter from the Secretary of Education offering the department's opinion on the application of the Randolph-Sheppard priority to DFA contracts in general, and citing with approval the arbitration panel's application of the priority to the DFA contract at Fort Riley.

In 2018, responding to frustration from elected officials and amici, the Secretary of Education published a written response to an inquiry from Congressman Pete Sessions about the applicability of the RSA to DFA and FFS contracts on military bases. Letter from Betsy DeVos, Secretary of Education, United States Department of Education, to Pete Sessions, Representative, House of Representatives (Mar. 5, 2018). In that letter, the Secretary notes that there has been some dispute over the "types of contracts to which the priority applies" – FFS or DFA. She then unequivocally states that "[t]he Education Department believes that the Randolph-Sheppard Act priority applies to both types of cafeteria contracts." *Id.* The District Court erroneously held that the Secretary's letter is not entitled to any deference. *SourceAmerica*, 368 F. Supp. 3d at 994–95.

Because Secretary DeVos's letter reflects the Department of Education's interpretation of its own regulation, it should be given *Auer* deference. *Kisor v. Wilkie*, 588 U.S. ___, 139 S. Ct. 2400, 2408 (2019), interpreting *Auer v. Robbins*, 519 U.S. 452 (1997). *See also Dickenson-Russell Coal Co. v. Sec'y of Labor*, 747 F.3d 251, 256 (4th Cir. 2014) (noting that because the court was asked to "review an agency's interpretation of its own regulations," the court's analysis proceeded under *Auer*, rather than *Chevron*).

Auer deference dictates that the Department of Education's interpretation of its Randolph-Sheppard cafeteria regulation (effectuating Congressional mandate

that the Department effectuate the priority through regulations, *see* 20 U.S.C. § 107d-3(g)) should be considered controlling "unless plainly erroneous or inconsistent with the regulation." *See Shipbuilders Council of America v. U.S. Coast Guard*, 578 F.3d 234, 242 (4th Cir. 2009); *cf. Humanoids Grp. v. Rogan,* 375 F.3d 301, 306 (4th Cir. 2004) ("[A]gency interpretations that lack the force of law (such as those embodied in opinion letters and policy statements) do not warrant *Chevron*-style deference when they interpret ambiguous statutes but do receive deference under *Auer* when interpreting ambiguous regulations." (quoting *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Rev. Comm'n,* 212 F.3d 1301, 1304 (D.C. Cir. 2000)). *Auer* deference is appropriate where the language of a regulation is ambiguous, and the interpretation reflects the official position of the agency, implicates its substantive expertise, and reflects "fair and considered judgment." *See Kisor*, 588 U.S. ___, 139 S. Ct. at 2417.

Secretary DeVos's letter meets these criteria: it is not an "ad hoc" statement, but rather an official pronouncement of the Secretary herself. *See id.* at 2416 (recognizing that documents in the name of the Secretary reflect "authoritative action"). The letter is also rooted in the agency's relevant expertise on the subject as administrator of the Randolph-Sheppard Act, and it was drafted with care and formality, after a personal meeting with the congressman and including citations to recent arbitration panel determinations (including the one in this case).

At a minimum, *Skidmore* deference applies, entitling the letter to respect. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (finding that "[i]nterpretations such as those in opinion letters … do not warrant Chevron-style deference," but are "entitled to respect" under *Skidmore*). Under *Skidmore* deference, a court must consider "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Oliva v. Lynch*, 807 F.3d 53, 58 (4th Cir. 2015) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). *See Tex. Workforce Comm'n.,* 354 F. Supp. 3d at 737–38 (finding that "[a]lthough the Opinion Letter does not carry the 'force of law' under *Chevron*, the Opinion Letter is entitled to a level of *Skidmore* deference based on the thoroughness and the validity of its reasoning, as well as its consistency with other pronouncements").

In rejecting DOD's bifurcation of military dining facility contracts as FFS or DFA, the Secretary's letter cites the Fort Riley arbitration panel's 2016 decision with approval in support of the simplest and fullest interpretation of the RSA – that priority applies to contracts that "pertain to the operation of a cafeteria." That letter should weigh heavily in favor of reversing the District Court's decision and finding that the RSA priority should apply to the contract in question.

Conclusion

This case presents this Court an opportunity to ensure that one of the most successful employment programs ever created by Congress continues to provide opportunities for blind entrepreneurs in the coming decades at military bases around the country. Application of the Randolph-Sheppard Act to all contracts – including "dining facility attendant" contracts – that "pertain to the operation" of a cafeteria both reflects Congress's intent and gives deference to the interpretation of the Department of Education's regulation by the Secretary of Education, the official charged by Congress with implementing the Act and promulgating that regulation. Failure to adopt this interpretation would not only reject the majority of holdings by arbitration panels and the opinions of state administrators of these programs (*amici* here) but would also encourage the Army and other military departments hostile to the Randolph-Sheppard priority to manipulate their cafeteria contracts to significantly curtail opportunities available to blind and visually-impaired Americans. Therefore, the National Federation of the Blind and the National Council of State Agencies for the Blind urge the Court to reverse the District Court holding that the RSA priority does not apply to the solicitation at Fort Riley and remand with instructions to affirm the arbitration panel's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with type-volume limits because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this brief contains 6,462 words.

2. This brief complies with the typeface and spaced typeface using Microsoft Word for Office 365 ProPlus in 14-point Times New Roman.

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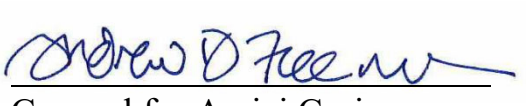

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 22, 2019, I caused this *Brief of Amici Curiae* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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