APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY POWERS; DEAVIN SESSOM; LAURIEANN WRIGHT; JOSEPH FIELDS; LAVON JOHNSON; JOSHUA ROBERT PETITT; NATIONAL VETERANS FOUNDATION, *Plaintiffs - Appellees*, BRIDGELAND RESOURCES, LLC, *Intervenor-Plaintiff - Appellee*, v. DENIS RICHARD MCDONOUGH; STEVEN BRAVERMAN; KEITH HARRIS; MARCIA L. FUDGE; DOUGLAS GUTHRIE, *Defendants - Appellees*, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA,	No. 24-6338 D.C. No. 2:22-cv-08357-DOC-KS OPINION

Not Party in Lower Court - Appellant.

JEFFREY POWERS; DEAVIN SESSOM; LAURIEANN WRIGHT; JOSEPH FIELDS; LAVON JOHNSON; JOSHUA ROBERT PETITT; NATIONAL VETERANS FOUNDATION,

Plaintiffs - Appellees,

and

SAMUEL CASTELLANOS, SHARDAY ANYADIEGWU, BILLY EDWARDS, JESSICA MILES, GLENN SURRETTE, NARYAN STIBBIE, DOES 1-10,

Plaintiffs,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellee,

v.

DENIS RICHARD MCDONOUGH; STEVEN BRAVERMAN; KEITH HARRIS; MARCIA L. FUDGE,

No. 24-6576

D.C. No. 2:22-cv-08357-DOC-KS

OPINION

Defendants - Appellants,

and

DOUGLAS GUTHRIE,

Defendant - Appellee,

BRENTWOOD SCHOOL,

Intervenor.

JEFFREY POWERS; DEAVIN SESSOM; LAURIEANN WRIGHT; JOSEPH FIELDS; LAVON JOHNSON; JOSHUA ROBERT PETITT; NATIONAL VETERANS FOUNDATION,

Plaintiffs - Appellees,

and

SAMUEL CASTELLANOS, SHARDAY ANYADIEGWU, BILLY EDWARDS, JESSICA MILES, GLENN SURRETTE, NARYAN STIBBIE, DOES 1-10,

No. 24-6578

D.C. No. 2:22-cv-08357-DOC-KS

OPINION

Plaintiffs,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellant,

v.

DENIS RICHARD MCDONOUGH; STEVEN BRAVERMAN; KEITH HARRIS; MARCIA L. FUDGE; DOUGLAS GUTHRIE,

Defendants - Appellees.

JEFFREY POWERS; DEAVIN SESSOM; LAURIEANN WRIGHT; JOSEPH FIELDS; LAVON JOHNSON; JOSHUA ROBERT PETITT; NATIONAL VETERANS FOUNDATION,

Plaintiffs - Appellees,

and

SAMUEL CASTELLANOS, SHARDAY ANYADIEGWU, BILLY EDWARDS, JESSICA MILES, GLENN SURRETTE, NARYAN STIBBIE, DOES 1-10,

No. 24-6603

D.C. No. 2:22-cv-08357-DOC-KS

Plaintiffs,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellee,

v.

DENIS RICHARD MCDONOUGH; STEVEN BRAVERMAN; KEITH HARRIS; MARCIA L. FUDGE; DOUGLAS GUTHRIE,

Defendants - Appellees,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Not Party in Lower Court - Appellant.

JEFFREY POWERS; DEAVIN SESSOM; LAURIEANN WRIGHT; JOSEPH FIELDS; LAVON JOHNSON; JOSHUA ROBERT PETITT; NATIONAL VETERANS FOUNDATION,

No. 24-6888

D.C. No. 2:22-cv-08357-DOC-KS

Plaintiffs - Appellees,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellee,

v.

DENIS RICHARD MCDONOUGH; STEVEN BRAVERMAN; KEITH HARRIS; MARCIA L. FUDGE; DOUGLAS GUTHRIE,

Defendants - Appellees,

v.

BRENTWOOD SCHOOL, Proposed Intervenor,

Movant - Appellant.

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted April 8, 2025
Pasadena, California

Filed December 23, 2025

Before: Consuelo M. Callahan, Roopali H. Desai, and Ana de Alba, Circuit Judges.

Opinion by Judge de Alba

SUMMARY[*]

Veterans Affairs

The panel affirmed in part, reversed in part, vacated in part, and remanded to the district court to enter judgment in a class action brought by unhoused veterans with severe disabilities and mental illnesses against the United States Department of Veterans Affairs (VA) and the Department of Housing and Urban Development (HUD), seeking to return the West Los Angeles VA Grounds to its intended use of housing disabled veterans.

After a four-week bench trial, the district court found that the land-use leases the VA had with the Regents of the University of California, Los Angeles, Brentwood School, and Bridgeland Resources, LLC, were unlawful; voided these leases; and enjoined the VA from renegotiating them. The district court also ordered the VA to build supportive housing for veterans on the West Los Angeles VA Grounds.

Plaintiffs argued that the VA and HUD violated Section 504 of the Rehabilitation Act because (1) the VA's lack of supportive housing denies unhoused veterans with serious

[*] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

mental illness or traumatic brain injury meaningful access to the VA's healthcare services; (2) under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the VA failed to provide class members their disability benefits "in the most integrated setting appropriate to their needs," placing them at a "serious risk of institutionalization"; and (3) the VA's policy of contracting with housing developers who impose Average Median Income (AMI) limitations is facially discriminatory because it discriminates based on disability by counting veterans' benefits as income. Next, Plaintiffs claimed that the 1888 Deed that created the VA Grounds created a charitable trust and that the VA breached enforceable fiduciary duties to Plaintiffs. Last, Plaintiffs claimed that certain land-use agreements violated the Administrative Procedures Act.

The panel held that the Veterans Judicial Review Act did not strip federal courts of jurisdiction to hear Plaintiffs' Rehabilitation Act claims because Plaintiffs are not collaterally attacking the VA's individual benefits determinations.

Next, the panel held that the district court did not abuse its discretion in certifying Plaintiffs' class for the meaningful access and *Olmstead* claims, rejecting the VA's argument that Plaintiffs did not meet the commonality element.

On the merits, the panel held that the district court did not err in finding that the VA denied Plaintiffs "meaningful access" to their healthcare, in finding in Plaintiffs' favor on their *Olmstead* claim, and finding that the VA's policy of contracting with third-party housing developers who impose income limitations and count veterans' disability benefits as income is facially discriminatory under the Rehabilitation Act. However, the district court erred in entering judgment

against HUD on Plaintiffs' meaningful access, *Olmstead*, and AMI claims.

Addressing the charitable trust claim, the panel held that Plaintiffs had special interest standing to sue. On the merits, the panel held that the district court erred in finding that the West Los Angeles Leasing Act of 2016 and its 2021 Amendment imposed judicially enforceable fiduciary duties on the VA, and therefore reversed the district court's judgment in favor of Plaintiffs on their charitable trust claim. Because judgment on Plaintiffs' charitable trust claim was the only basis for which the district court invalidated a UCLA lease on the VA Grounds and enjoined UCLA, the panel dismissed UCLA's consolidated appeals as moot, and vacated any injunctive relief with respect to UCLA's lease and services. To the extent that the district court voided Brentwood School leases and Bridgeland Resources, LLC's licenses on the VA Grounds and ordered injunctive relief based on Plaintiffs' charitable trust claim, the panel vacated that part of the district court's judgment as well.

Next, the panel held that Brentwood's lease violated the Leasing Act and the APA. Because the lease principally benefited Brentwood's students, not veterans, it violated the Leasing Act. Since Brentwood's lease was contrary to statutory authority, it was in violation of the APA. Similarly, Bridgeland's revocable license violated the Leasing Act and the APA.

Addressing the propriety of the district court's permanent injunction with respect to the Rehabilitation Act claims, the panel held that the district court did not abuse its discretion by ordering the VA to construct 1,800 permanent housing units and 750 temporary housing units to remedy its

discrimination as relief for the meaningful access and *Olmstead* violations, and by ordering the VA to build housing itself if it could not find developers willing to refrain from discrimination as relief for the AMI claim.

However, with respect to the APA claims, the district court abused its discretion in the scope of its injunction when the district court not only voided the unlawful leases with Brentwood and Bridgeland but also prohibited the VA from renegotiating them and, later, ordered the VA to enter into a settlement agreement with Brentwood.

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OPINION

DE ALBA, Circuit Judge:

The United States Department of Veterans Affairs' ("VA") mission is "[t]o fulfill President Lincon's promise to care for those who have served in our nation's military and for their families, caregivers, and survivors."[1] This class action lawsuit, and its numerous appeals, demonstrates just how far the VA has strayed from its mission. There are now scores of unhoused veterans trying to survive in and around the greater Los Angeles area despite the acres of land deeded to the VA for their care. Rather than use the West Los Angeles VA Grounds as President Lincoln intended, the VA has leased the land to third party commercial interests that do little to benefit the veterans.

[1] *See* U.S. Department of Veterans Affairs, https://department.va.gov/about/ (last visited May 19, 2025).

Through this plethora of litigation, Plaintiffs seek to return the West Los Angeles VA Grounds to its intended use: housing disabled veterans. The class of Plaintiffs consists of unhoused veterans who have severe disabilities and mental illnesses. After a four-week bench trial, the district court ruled in Plaintiffs' favor and found, *inter alia*, that the land-use leases the VA had with the Regents of the University of California, Los Angeles ("UCLA"), Brentwood School, and Bridgeland Resources, LLC, were unlawful. The district court voided these leases and enjoined the VA from renegotiating them. The district court also ordered the VA to build supportive housing for veterans on the West Los Angeles VA Grounds. The VA, the Department of Housing and Urban Development ("HUD"), and the third-party lessees appeal different parts of the district court's rulings. We have jurisdiction pursuant to 28 U.S.C. § 1291. For the reasons explained below, we affirm in part, reverse in part, vacate in part, and remand to the district court to enter judgment accordingly.

I. Background

A. History of the West Los Angeles VA Grounds

In 1888, Senator John P. Jones and Arcadia B. de Baker deeded 300 acres of land between Santa Monica and Los Angeles, California to the United States Government (the "1888 Deed"). "[I]n consideration" of the deed, the land was to be used to "locate, establish, construct, and permanently maintain a branch of [the] National Home for Disabled Volunteer Soldiers." Later in her life, Ms. de Baker donated an additional 300 acres to the Government for the same purpose. The West Los Angeles VA Grounds consists of these 600 acres (the "Campus"), whose intended use was to create a community for the benefit of disabled veterans.

After Ms. de Baker's donation, the development of the Campus commenced. In the 1930s, at the Campus's peak, approximately 5,000 veterans resided there and received educational and vocational services.

In the 1970s, however, the Campus transitioned from primarily providing housing and educational services to serving as a condensed healthcare and research Campus, thereby leaving land, housing, and amenities unused and in disrepair. Notwithstanding the influx of veterans returning from the Vietnam war, the VA stopped accepting new residents and, instead, began selling off parts of the Campus to private parties until only about half of the 600 acres remained. This practice ended in 2007 when Congress expressly prohibited it. *See* Pub. L. No. 110–161 § 224.

As private commercial interests moved into the Campus, unhoused (or any) veterans were no longer a priority. As the VA described it in its 2022 Master Plan for the Campus:

> In the 70s, residential use declined, and the [Campus] began the practice of leasing land . . . to private commercial interests, including the UCLA baseball stadium, the Brentwood School athletic complex, Marriott Hotel Laundry, Enterprises car rentals, and rare bird sanctuary . . . . **The [Campus] generated millions of dollars from this leasing policy that provided little direct benefit to Veterans** (emphasis added).

Today the Campus consists of 388 acres and sits in one of the most expensive and exclusive neighborhoods in Los Angeles—Brentwood. The Campus also houses the VA's Greater LA Medical Center (the "Medical Center"): the

centerpiece of the VA's Greater Los Angeles Healthcare System ("VAGLAHS"), providing some of the best treatment for serious mental illness, traumatic brain injury, and post-traumatic stress disorder.

Today, the Medical Center remains the premier healthcare facility for veterans in Southern California and is often described as the best of its kind in the nation. It houses a main hospital, research facilities, and two nursing homes. The Medical Center provides "the bulk of the specialty care" available to veterans in Los Angeles and acts as "a referral center for [other] clinics" that lack specialty care capabilities. The Medical Center also hosts a domiciliary for unhoused veterans in substance-abuse treatment. In short, the Medical Center provides specialized and critical services that veterans in the greater Los Angeles area can only access at that facility.

B. The 2011 *Valentini* Lawsuit

In 2011, ten unhoused "severely disabled veterans with mental disabilities" and/or "brain injuries" sued the VA, alleging mismanagement of the Campus. *Valentini v. Shinseki*, 860 F. Supp. 2d 1079 (C.D. Cal. 2012). The claims in that lawsuit are almost identical to the claims Plaintiffs raised in this case, which, as in *Valentini*, fall into three main categories. *Id.* at 1087. First, the *Valentini* plaintiffs raised claims under Section 504 of the Rehabilitation Act, arguing that "without permanent supportive housing, veterans with severe mental illness are unable to access the" health benefits that the VA provides on the Campus. *Id.* at 1116. Second, the *Valentini* plaintiffs argued that the 1888 Deed created a judicially enforceable charitable trust and that the VA breached its fiduciary duties when it entered Campus-related land-use contracts with third parties that did not

benefit veterans. *Id.* Third, the *Valentini* plaintiffs claimed that these land-use contracts also violated the Administrative Procedures Act ("APA"). *Id.* at 1088.

The *Valentini* district court dismissed the plaintiffs' Rehabilitation Act and charitable trust claims. *Id.* at 1117; *Valentini v. Shinseki*, 2012 WL 12882704, at *6 (C.D. Cal. June 19, 2012). As for plaintiffs' APA claims, the district court held that the challenged land-use contracts were "unauthorized by law" and, therefore, void. *Valentini v. Shinseki,* 2013 WL 12121981, at *14 (C.D. Cal. Aug. 29, 2013). The VA, nonetheless, subsequently renewed some of those agreements, including those with UCLA and Brentwood School.

C. The Master Plan and the West L.A. Leasing Act

In January 2015, while *Valentini* was on appeal, the VA settled with the plaintiffs, pledging to draft and implement a Master Plan that would provide permanent supportive housing and supportive services for veterans on the Campus.[2]

1. The Master Plan

After public notice and comment, the VA issued a Draft Master Plan for the Campus in 2016 (the "2016 Plan"). The 2016 Plan stated that the key objective was to "[r]evitalize the [Campus] to its intended purpose as a home; a vibrant community that includes the development of high-quality housing tailored to priority Veteran subpopulations." In the 2016 Plan, the VA committed to building 1,200 units of permanent supportive housing on the Campus by 2030, with 770 units to be completed by 2022. New housing was to

[2] The settlement agreement was not judicially enforceable.

include "robust supports that promote wellbeing and holistic, strength-based services to augment [the VA's] existing structure of healthcare services." Recognizing that veterans living on the Campus would often require "ongoing and proactive case management" for their "serious and persistent mental illness," the 2016 Plan recommended locating case managers and for "certain supportive services . . . in the same buildings or neighborhoods as the residences . . . to be easily accessible."

The 2016 Plan also discussed whether pre-existing land-use agreements could fit within the plans to renovate the Campus. The VA committed to reviewing and renegotiating some contracts the court found unlawful by seeking "fair market value rent" from those parties and "in-kind consideration" that would provide for veterans' needs. The 2016 Plan reiterated that the VA was committed to making the land-use agreements "veteran focused."

2. West Los Angeles Leasing Act

Immediately after the VA developed the 2016 Plan, Congress passed the West Los Angeles Leasing Act of 2016 (the "Leasing Act"), *see* Pub. L. No. 114-226, 130 Stat. 926, "[t]o assist VA in carrying out" the 2016 Plan's goals to create permanent supportive housing. H. Rep. No. 114-570, at 6. The Leasing Act authorized the VA to enter into three types of leases on the Campus: (1) "enhanced-use lease . . . for purposes of providing supportive housing . . . that principally benefit[s] veterans and their families[;]" (2) "lease[s] to a third party to provide services that principally benefit veterans and their families . . . [;]" and (3) a lease to the "Regents of the University of California, . . . on behalf of its [UCLA] campus[,]" subject to specific enumerated requirements. Leasing Act § 2(b).

In 2021, Congress amended the Leasing Act, expanding the permissible uses of lease revenue to include, *inter alia*, "[s]upporting construction, maintenance, and services at the Campus relating to temporary or permanent supportive housing for homeless or at-risk veterans and their families." West Los Angeles VA Campus Improvement Act of 2021, Pub. L. No. 117-18, § (2)(a).

That same year, the VA Office of Inspector General ("VA OIG") reported to Congress that "the VA has not constructed a single new unit of [permanent supportive housing] pursuant to the [*Valentini*] settlement," and "fail[ed] even to make essential infrastructure upgrades for utilities like water, sewer, and stormwater systems[.]"[3] In April 2022, the VA released an updated Master Plan, which finalized its plan for building housing on the Campus and stated that all permanent supportive housing will not be completed until 2030.

3. Land-Use Agreements on the Campus

a. Brentwood School

Brentwood School ("Brentwood") is a private school and a 501(c)(3) nonprofit organization in West Los Angeles, with approximately 1,100 students in kindergarten through twelfth grade. It has an endowment of $30 million and tuition ranging from $45,000 to $53,000 per student per year depending on grade level. Brentwood has been present on the Campus since the 1970s, when the VA allowed Brentwood to use its property for student parking and school

[3] The Leasing Act directed the VA OIG to submit to Congress, after two and five years, "a report on all leases carried out at the Campus," including the VA's 2016 Plan implementation. Leasing Act § 2(j)(3).

and athletic events. For the first two decades of the agreement, Brentwood used the land for free.

In 1999, the VA and Brentwood entered into an agreement for Brentwood to build its athletic facilities on 22 acres of the Campus. Brentwood subsequently spent $15 million developing its athletic facilities, which now include a football field, a track stadium, an aquatic center, three baseball fields, a soccer field, a basketball court, a lacrosse field, a volleyball and fencing pavilion, six tennis courts, a softball field, and a workout and weights facility. The aquatic center includes an Olympic-sized swimming pool.

Brentwood fields athletic teams in all the sports listed above, and it regularly schedules games, meets, and tournaments with other schools which take place at these facilities. It also charges fees for students across the city to attend summer camps utilizing the aquatic center and tennis courts. Brentwood also uses these athletic facilities and programs as part of their student recruitment efforts.

In November 2016, after the *Valentini* settlement, the VA entered into a new agreement with Brentwood. Pursuant to the agreement, the VA allowed Brentwood to continue using the 22 acres in exchange for an annual payment of $850,000 and $918,000 in in-kind annual consideration, consisting primarily of upkeeping and maintaining the 22 acres and providing services to veterans. Brentwood provides veterans with access to its facilities, but Brentwood decides when and how to grant access. For example, Brentwood allows veterans access to the swimming pool on Mondays, Wednesdays, and Fridays from 5:30 a.m. to 7:30 a.m., and on the weekends from 11:00 a.m. to 3:00 p.m.; veterans may use the track every weekday from 5:00 a.m. to 11:00 a.m. Also, Brentwood operates a shuttle every day

from 9:00 a.m. to 2:00 p.m. to transport veterans from other areas of the Campus to the athletic facilities.

In 2018 and 2021, pursuant to the Leasing Act, the VA OIG audited Brentwood's lease, and concluded, in relevant part, that the lease violated the Leasing Act because it did not principally benefit veterans. It also found that the in-kind services Brentwood provided were not authorized by law and that the accepted consideration for the 22 acres was below the appraised rental price for the land. The VA OIG instructed the VA to terminate the lease, but the VA refused, stating that the VA OIG was misinterpreting the Leasing Act.

b. Bridgeland Resources, LLC

Bridgeland Resources, LLC ("Bridgeland") is an oil company that operates oil and gas wells and associated infrastructure on a three-acre portion on the Campus ("Sawtelle-2"). In the 1950s and 1960s, the U.S. Bureau of Land Management ("BLM")[4] entered leases with Bridgeland's predecessor in interest, allowing them to produce oil and gas from 670 acres of federally owned land beneath the Campus. Bridgeland's oil and gas production leases and subsurface rights are relevant here because the company slant-drills for oil in wells that pass through the subsurface of the Campus. In 2017, the VA renewed a revocable license that had expired in 2002 for Bridgeland to continue extracting oil and gas from below the Campus. In return, Bridgeland agreed to "donate a 2.5 percent royalty on the proceeds that is generate[d] from slant-drilling to the Los Angeles Chapter of the Disabled American Veterans." The

[4] The BLM is not a party to this case, and Bridgeland's leases with the BLM are not at issue.

charity organization would then use the royalties to provide transportation to veterans on and around the Campus. This royalty "hovered in the $75,000-$125,000 range." Private parties and Bridgeland retained the rest of the revenue from the drill site, which is over $6 million dollars per year.

In 2018 and 2022, the VA OIG audited this revocable license and concluded that it also violated the Leasing Act. Neither the VA nor Bridgeland took any steps to remedy the violations.

c. UCLA

UCLA has a long-standing relationship with the Campus. Beginning in 1963, UCLA has leased a 10-acre parcel, which today includes UCLA's Jackie Robinson Stadium, its practice infield, and an adjacent parking lot. Since then, UCLA's baseball team has played its home games at the stadium and trains, holds meetings, and hosts recruitment efforts in these facilities.

After the *Valentini* settlement, Congress approved UCLA's land-use lease pursuant to specific requirements. *See* Leasing Act § 2(b)(3). In December 2016, the VA and UCLA entered into a new agreement that expires in 2026. In exchange for using the 10-acres, UCLA pays an annual rent of $300,000 and $1,350,000 in recorded in-kind services. Although, as of 2015, the appraised annual rental value of the property was approximately $2.7 million, the 2018 and 2021 VA OIG reports have found the lease compliant with the Leasing Act.

Notwithstanding the VA OIG's findings, the district court questioned the value of the in-kind donations UCLA provides to veterans, as well as UCLA's commitment to providing veteran focused services. For example, trial

evidence shows that one of the main lease commitments—to establish and operate a UCLA Veterans' Legal Clinic on the Campus at a cost to UCLA of $4,000,000 over ten years—is unfulfilled. The clinic only enrolled six to eight students per semester and none over the summer, provided a very limited range of direct civil legal services, did not offer consistent office hours, and provided no civil rights or criminal defense services. Additionally, during the COVID-19 pandemic, UCLA refused to make the parking lot adjacent to its practice infield available for emergency housing for unhoused veterans because it would interfere with UCLA's home game schedule. There was also evidence that the VA and UCLA secretly amended their leasing agreement to enable UCLA to accept a two-million donation to make improvements to its baseball complex.

D. Unhoused Veterans in the L.A. Area and Housing

1. Unhoused Veterans in the Los Angeles Area

Beginning in May 2020, unhoused veterans that were turned away from the Campus due to lack of housing availability began to create their own community, known as "Veterans Row." Veterans Row was a collection of tents—many of which were draped with the United States flag to signal that a veteran lived there—on San Vicente Boulevard right outside the Campus. At the height of the COVID-19 pandemic, the VA declined to provide Veterans Row residents with food, shelter, masks, sanitizers, bedding, bathrooms, or dumpsters. This prompted the local community to try to support the unhoused veterans in place of the VA. Notably, permanent supportive housing is not a "benefit" provided to veterans "under laws administered by the [VA]." *See* 38 U.S.C. § 20.3. In November 2021, law enforcement cleared out the Veterans Row encampment.

Since the clearing of Veterans Row, more veterans have moved into the Campus, and the VA's efforts in reducing the number of unhoused veterans has resulted in some slight improvements. Nonetheless, at the time of trial, there were approximately 3,000 unhoused veterans in the greater Los Angeles area. By the VA's own estimate, most of the unhoused veterans have serious mental illness ("SMI")[5] or traumatic brain injury ("TBI"). These disabilities frequently arise from veterans' military service, often in combat.

2. Temporary Shelters and Permanent Housing

The VA created the Care, Treatment, and Rehabilitation Services ("CTRS") program at the height of the COVID-19 pandemic, after community advocates pushed the VA to accept donated tents to help unhoused veterans living on Veterans Row. At first, the VA provided "child-size pup tents in a parking lot." However, after law enforcement cleared Veterans Row, the VA switched from tents to Tiny Sheds. Tiny Sheds are 8-by-10-foot sheds with no restroom or kitchen of their own, though there are communal showers and bathroom facilities in the area. Although the VA's intent is to transition veterans in the CTRS program to permanent housing within sixty to ninety days, some veterans have lived in these sheds for months and even years. Currently there are 147 sheds on the Campus.

Regarding permanent housing, there were 233 privately-operated units of permanent supportive housing on the Campus at the time of trial — all of which were occupied. Some of these units are reserved for veterans over the age of

[5] SMI is "a collection of psychological disorders like schizophrenia, bipolar disorders, severe forms of depression, anxiety, and other psychoses."

62 with SMI, and all of them have income eligibility requirements. In addition to these units, there are 535 permanent units under construction. The remaining 479 supportive units projected for construction under the 2016 Plan will not be completed until 2030; none of these remaining units have a set date for occupancy, nor has construction started.

3. Area Median Income Eligibility Requirements

The VA and HUD offer a specific housing voucher program to subsidize housing for veterans, provided primarily through the HUD-Veterans Affairs Supportive Housing ("HUD-VASH") program. HUD allocates vouchers, and public housing agencies ("PHAs") distribute them to qualifying veterans. This system is "use it or lose it," which means that if a PHA does not use at least 70% of the vouchers allocated to it, the PHA is generally unable to obtain additional vouchers. In Los Angeles, these vouchers were underused even though the city has one of the largest populations of unhoused veterans in the country.

The program generally groups the housing opportunities into two categories: tenant-based housing and project-based housing. Tenant-based vouchers are tied to a tenant, which means that veterans can use them to subsidize their rent on the private market. Project-based vouchers are tied to a specific unit or building.

The housing on the Campus uses project-based vouchers. All permanent housing units developed according to the 2016 Plan are subject to Enhanced Use Leases between the VA and third-party housing developers who build and lease housing on the Campus. These developers can impose additional qualifying requirements to veterans beyond those requirements under the voucher program.

Most permanent housing available for veterans outside the Campus is also distributed through the HUD-VASH program.

The process to obtain permanent housing consists of two steps. First, the VA refers a veteran to a PHA requiring the veteran to demonstrate eligibility by filing a lengthy application that generally requires detailed financial information and documentation.[6] If the PHA deems the veteran eligible, the veteran receives a voucher. Second, the veteran takes the voucher to a landlord and must demonstrate that he or she meets any additional requirements that particular landlord imposes. If the veteran complies with both steps, and housing is available, housing is provided.

Step two creates a major obstacle for veterans with significant service-connected disability ratings to obtain housing. Both HUD and private developers count disability benefits as income. Roughly 70% of the HUD-VASH project-based buildings in Los Angeles set aside for veterans require that the veteran make less than 30% of the Area Median Income ("AMI") to qualify for a unit. A single veteran with no dependents and a 100% disability rating receives approximately $40,000 in disability benefits, which exceeds the Los Angeles' 30% AMI threshold of $25,000. Veterans with lower service-connected disability ratings, but who receive additional benefits like Social Security, generally have a total income over 30% AMI. The VA

[6] Historically, PHAs have complained that the VA is not sending enough referrals—they have vouchers to distribute, but not enough veterans to receive them. For example, although the referral rate of one of the biggest PHA has increased from four per week in 2023 to thirteen per week in 2024, it still falls short of the twenty-five the PHA wants to reach.

estimates that one in four veterans receives disability compensation and other benefits that place them over the threshold and disqualifies them from obtaining housing.

In an attempt to remedy this income illegibility problem, on the third day of trial, HUD announced a policy change: an alternative definition of annual income that excludes veterans' service-connected disability benefits as income. Despite this administrative change, the statutory definition of income continued to include disability compensation. The requirements for federal, state, and local tax credits also use the statutory definition of income. Since the eligibility requirements third-party developers impose typically mirror those imposed by federal, state, and local tax credits, veterans with significant service-connected disability ratings remain less likely to fall below the 30% AMI threshold. This problem is not limited to housing on the Campus; of the 46 buildings in Los Angeles providing permanent supportive housing for veterans, 38 have either some or all their units capped at 30 % AMI, significantly reducing the housing supply available to disabled veterans.

E. Proceedings Below

In November 2022, a putative class of unhoused veterans with severe disabilities sued the VA and HUD. The putative class is defined as "[a]ll homeless veterans with [SMI] or [TBI], who reside in Los Angeles County." Plaintiffs asserted that the VA and HUD violated Section 504 of the Rehabilitation Act because (1) the VA's lack of supportive housing denies unhoused veterans with SMI or TBI meaningful access to the VA's healthcare services ("meaningful access claim"); (2) under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999), the VA failed to provide class members their disability benefits "in the most

integrated setting appropriate to their needs," placing them at a "serious risk of institutionalization" ("*Olmstead* claim"); and (3) the VA's policy of contracting with housing developers who impose AMI limitations is facially discriminatory ("AMI claim") because it discriminates based on disability by counting veterans' benefits as income. Further, Plaintiffs claimed that the 1888 Deed created a charitable trust and that the VA breached enforceable fiduciary duties to Plaintiffs ("charitable trust claim"). Last, Plaintiffs claimed that certain land-use agreements violated the APA ("APA claim").[7]

1. The Bench Trial and Relevant Rulings

In December 2023, the district court denied the VA and HUD's motion to dismiss, which argued that the Veterans Judicial Review Act ("VJRA") bars jurisdiction over Plaintiffs' Rehabilitation Act claims. The district court reasoned that the VJRA bars review of only issues the VA Secretary has actually "considered and decided," which is not the case here. In May 2024, the district court granted Plaintiffs' class certification motion. In July 2024, the district court granted summary judgment in Plaintiffs' favor on their AMI claim and denied the VA and HUD's motion for summary judgment on Plaintiffs' meaningful access and *Olmstead* claims, permitting those claims to proceed to trial. Additionally, the court granted partial summary judgment in Plaintiffs' favor on their charitable trust claim, finding that the VA assumed "enforceable fiduciary dut[ies]" but leaving the question of breach to proceed to trial.

[7] The charitable trust claim and the APA claim were only raised against the VA.

In August 2024, the district court presided over a four-week bench trial. After trial, as it relates to Plaintiffs' meaningful access and *Olmstead* claims, the district court entered judgment against the VA and HUD. It found that by not providing supportive housing on or near the Campus, the VA "denies veterans with [SMI] or [TBI] meaningful access to the community-based VA healthcare, mental healthcare, and other critical supportive services they need and for which they are eligible," and "places unhoused veterans at risk of institutionalization." Regarding the charitable trust claim, the court found that "each of the challenged land-use agreements are in violation of the Leasing Act, and therefore, are a breach of the VA's fiduciary duty." The court also found in Plaintiffs' favor on the APA claim.

As relief for Plaintiffs' meaningful access and *Olmstead* claims, the district court ordered the VA to construct additional temporary and permanent supportive housing on the Campus, to be overseen by a Special Monitor and adjusted according to need. Specifically, the district court ordered the construction of "1,800 additional permanent supportive housing units" beyond those contemplated by the 2016 Plan, "as well as 750 temporary supportive units to be used [while] permanent housing is constructed."

Regarding the AMI claim, the district court entered judgment against the VA and HUD holding that AMI restrictions on housing are discriminatory and ordered the VA to ensure that "a sufficient number of housing units at the [Campus] are free from discriminatory income restrictions[.]" The court stated that the VA could "contract with developers who rely on . . . conventional financing" rather than Government programs that require income restrictions on the housing they fund. The district court further noted that if that does not cover the entire costs of the

housing units, then the VA "can directly fund or subsidize permanent supportive housing[.]"

Additionally, as relevant here, the district court voided the VA's leases with Bridgeland and Brentwood School pursuant to the charitable trust and the APA claims. The court also voided UCLA's lease but solely on the charitable trust theory. Further, the court enjoined the VA from renegotiating those leases.

2. Injunctive Relief Hearings

After the district court issued its trial opinion, it held a series of additional hearings regarding the details and scope of its injunctive relief. The district court, the Special Monitor, and the parties worked together to identify suitable sites on the Campus for the building of temporary supportive housing, as well as vendors that could timely provide such housing at a reasonable cost. Additionally, the district court held hearings with intervenor Bridgeland and invited non-party leaseholders—such as Brentwood and UCLA—to the hearings to help plan an exit strategy. Concurrently, Brentwood and Plaintiffs began settlement discussions and ultimately reached one, which the district court preliminarily approved over the VA's objection.

Initially, the district court barred UCLA from using the baseball stadium and ordered Bridgeland to cap its oil well. After further discussions, however, the court modified its injunction, allowing UCLA to use the stadium through the end of the baseball season: July 4, 2025. Additionally, instead of capping the oil well, the district court modified its injunction to prohibit Bridgeland from slant drilling oil on the Campus.

3. Appeal

These appeals followed. In its appeal, the VA challenges (1) the district court's jurisdiction to review Plaintiffs' Rehabilitation Act claims; (2) the district court's grant of class certification; (3) the judgment in Plaintiffs' favor on the meaningful access, *Olmstead*, AMI, and charitable trust claims;[8] and (4) the scope of the district court's injunctive relief.[9] HUD challenges the district court's judgment against it on the meaningful access, *Olmstead*, and AMI claims. In separate appeals, Bridgeland and Brentwood challenge the district court's invalidation of their leases. Bridgeland also challenges the district court's order enjoining it from slant-drilling. In two consolidated appeals, non-party UCLA challenges the district court's invalidation of its lease under the charitable trust claim, and the scope of the district court's injunction. We address these challenges in turn.

II. Standards of Review

We review statutory construction de novo. *In re Mitchell*, 977 F.2d 1318, 1320 (9th Cir. 1992). A district court's class certification order is reviewed for abuse of discretion. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1164 (9th Cir. 2014). Following a bench trial, we review the district court's findings of fact for clear error and its conclusions of law de novo. *Yu v. Idaho State Univ.*, 15 F.4th 1236, 1241–42 (9th Cir. 2021). The district court's

[8] The VA and HUD obtained a partial stay pending appeal on the charitable trust and Rehabilitation Act claims.

[9] Notably, the VA does not challenge the district court's judgment voiding the land-use agreements under the APA. Nor does it challenge the grant of class certification relating to the AMI claim.

grant of permanent injunctive relief is subject to three separate standards of review: "we review the legal conclusions de novo, the factual findings for clear error, and the decision to grant a permanent injunction, as well as its scope, for an abuse of discretion." *Oracle USA, Inc. v. Rimini St., Inc.*, 879 F.3d 948, 964 (9th Cir. 2018) (citation omitted), *rev'd in part on other grounds*, 586 U.S. 334 (2019).

III. Discussion

A. The VA and HUD's Appeal

1. Rehabilitation Act Claims

a. Veterans Judicial Review Act and Jurisdiction

Upon the VA's creation, Congress enacted legislation that precluded judicial review of the VA's benefits determinations. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1020–23 (9th Cir. 2012) (en banc) ("*VCS*") (explaining in detail the history of judicial review of the VA's decision making and the VJRA effect on the scope of that review). After the Supreme Court interpreted the preclusion provision as permitting certain constitutional and legal challenges against the VA to be brought in federal courts, *see Traynor v. Turnage*, 485 U.S. 535 (1988), Congress enacted the VJRA establishing procedures for judicial review of the VA decisions, *VCS*, 678 F.3d at 1020–23; *see also* VJRA § 301, 102 Stat. 4105, 4113 (1988), codified at Title 38 of the U.S. Code.

With the enactment of the VJRA, Congress also broadened the scope of the preclusion provision to limit federal court intervention in the VA's decision-making

process codified at Section 511. *See VCS*, 678 F.3d at 1022. Section 511 states:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

38 U.S.C. § 511(a). In other words, the VJRA created a jurisdictional channel over *certain claims* that must follow an administrative process and are kept away from federal courts. But not *all claims* fall within this jurisdictional constraint. For the following reasons, Plaintiffs' Rehabilitation Act claims fall outside Section 511's jurisdictional bar.

First, we construe jurisdiction-stripping statutes narrowly. "[E]xpress instructions of the Supreme Court, our precedent, and common sense" all prescribe a narrow construction of jurisdiction-stripping statutes except where their meaning is clear and unequivocal. *Acre v. United States*, 899 F.3d 796, 800–01 (9th Cir. 2018); *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 298 (2001) (noting that when Congress creates legislation, there is a "strong presumption in favor of judicial review of administrative action").

The VA argues that the VJRA strips jurisdiction from any action that "affect[s] the provision of benefits."

Adopting this interpretation would mean that the VA has exclusive and final authority to review *all* possible laws and statutes that conceivably touch veterans' benefits. This cannot be the case. *See Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) (noting that Section 511 "does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits"). We decline to adopt the VA's broad reading of the statute.

Second, in *VCS*, we analyzed the scope of Section 511 and its jurisdictional limitations. 678 F.3d at 1022. We held "that § 511 precludes jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions, including any decision made by the Secretary in the course of making benefits determinations." *Id.* at 1025 (internal quotation marks omitted) (quoting *Beamon v. Brown*, 125 F.3d 966, 971 (6th Cir. 1997) and *Broudy*, 460 F.3d at 115). "This preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases." *Id.* (citing cases from various sister circuits). Important here, we explained in *VCS* that if adjudicating a claim "would not possibly have any effect on the benefits [the Plaintiffs] ha[ve] already been awarded," the VJRA's jurisdictional preclusion does not apply. *Id.* at 1023 (internal quotation marks and citation omitted).

In *VCS*, we considered whether we had jurisdiction over class-wide claims that veterans' advocacy groups brought against the VA challenging the length of time veterans had to wait to receive mental health treatment or to receive

disability benefits determinations. *Id.* at 1017. We also considered whether we had jurisdiction over the VA's internal agency procedures on due process grounds. *Id.* As to the first issue, we held that we did not have jurisdiction over the "claim that the VA unreasonably delayed mental health care" because "there is no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly." *Id.* at 1026, 1028.

However, we determined that we had jurisdiction over the due process claim, which challenged the VA's lack of procedural safeguards when evaluating veterans' claims for service-related disability benefits. *Id.* at 1033–34. Unlike the first claim, this claim would not require us to review decisions affecting the provision of benefits to individual claimants, and thus we had jurisdiction to hear it. *Id.* at 1034. To support our reasoning, we highlighted our own institutional competence evaluating due process claims relative to the VA's competence by pointing out the VJRA's failure to "provide a mechanism" for plaintiffs to bring the claim through its exclusive administrative review. *Id.* at 1034 n.25, 1035.

Here, we have jurisdiction over Plaintiffs' Rehabilitation Act claims, and Section 511 does not strip us our power to review the claim. Plaintiffs allege that the absence of permanent supportive housing on or near the Campus constitutes discrimination based on disability. Plaintiffs do not argue that housing is a benefit, nor have Plaintiffs requested housing from the Secretary through an administrative process. Rather, Plaintiffs contend that housing is a reasonable accommodation that is necessary for

them to access the benefits the VA has already conferred to them. Thus, reviewing Plaintiffs' Rehabilitation Act claims does "not require the district court to decide whether any veterans whose claims the Secretary rejected were entitled to benefits or to revisit any decisions made by the Secretary in the course of making benefits determinations." *Id.* at 1030 n.21 (internal quotations and citations omitted). In other words, the district court's adjudication of Plaintiffs' Rehabilitation Act claims did not require it to second-guess the VA's previous benefits determinations. Rather, the district court took the VA's previous determination of "law and fact" about veterans' individual benefits determinations as a given and analyzed the Plaintiffs' ability to *reach* those previously awarded benefits by looking at Plaintiffs' rights under a separate and distinct statutory framework that is not under the VA's purview: the Rehabilitation Act.

Third, the VA argues that Congress enacted the VJRA to overrule *Traynor*'s holding that federal courts could review a claim that the "VA's regulation conflicted with § 504 of the Rehabilitation Act." *Traynor* is distinguishable. In *Traynor*, the plaintiffs sought benefits under the G.I. Bill, a statute that the VA administered. *See Traynor*, 485 U.S. at 538–39. Here, however, Plaintiffs assert claims under the Rehabilitation Act, a law of general applicability. Congress immediately reacted to *Traynor* because it viewed the Supreme Court as second-guessing the Secretary's determinations, thereby breaching the jurisdictional restraints prescribed by Section 511. That is not the case here. In this case, Plaintiffs are not challenging the Secretary's prior benefits determinations because no such request for supportive housing was, or could be, made by the veterans.

Fourth, if we were to hold that the VJRA strips us and the district court of jurisdiction in this case, we would leave veterans without judicial recourse to enforce their rights under the Rehabilitation Act. Neither the VJRA nor its implementing regulatory framework authorizes the VA to review veterans' Rehabilitation Act claims. In fact, the Veterans Court has recognized that "neither the Board nor [the Veterans Court] is authorized to hear actions brought under" the Rehabilitation Act or the American with Disabilities Act ("ADA"). *Camacho v. Nicholson*, 21 Vet. App. 360, 366 (2007). The VA suggests that veterans should submit claims requesting housing through the VA's ordinary benefits determination process yet fails to offer support demonstrating that this avenue for redress is indeed available to veterans. It is difficult to imagine how the VA would be able to provide veterans with permanent housing through an administrative process when housing is not a designated benefit under the VA's governing laws. *See* 38 U.S.C. § 20.3. Moreover, unlike federal courts, the VA's administrative claims-processing structure lacks the ability to produce an expansive and detailed judicial record that would otherwise provide the Federal Circuit Court a sufficient record for meaningful review. *See Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 185 (2023) (noting that when Congress creates a special process that directs judicial review of agency decisions into special channels, it does so in a manner that makes sure agencies are equipped to effectively "fill[] in for the district court['s]" job).

In sum, because Plaintiffs are not collaterally attacking the VA's individual benefits determinations, the VJRA does not strip federal courts of jurisdiction to hear Plaintiffs' Rehabilitation Act claims.

b. Class Certification

The VA challenges the district court's class certification for Plaintiffs' Rehabilitation Act claims. Specifically, the VA challenges the commonality of Plaintiffs' meaningful access and *Olmstead* claims. We address these claims only and do not reach the issue of class certification for the remaining claims.

The commonality requirement in class certification is satisfied when class members' claims "depend upon a common contention . . . . of such a nature that is capable of class-wide resolution." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). In other words, "[w]hat matters to class certification . . . is not the raising of common 'questions' . . . but, rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* at 350 (citations omitted). Commonality does not require that "every question in the case, or even a preponderance of questions, is capable of class-wide resolution. So long as there is 'even a single common question,' a would-be class can satisfy the commonality requirement." *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013) (internal quotation marks and citations omitted). We have held that the commonality requirement is satisfied "where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001), *overruled on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

The VA argues that Plaintiffs failed to meet the commonality element for their meaningful access and *Olmstead* claims because these claims turn on each veteran's individual circumstances and thus cannot generate common

answers that will resolve the litigation. We disagree. Plaintiffs' class is defined as homeless veterans with SMI or TBI, and they allege that the VA's failure to provide supportive housing on or near the Campus results in systemic discrimination against them. As a result, members of Plaintiffs' putative class are denied meaningful access to necessary healthcare services and placed at serious risk of institutionalization. *See Payan v. Los Angeles Cmty. Coll. Dist.*, 11 F.4th 729, 733–35 (9th Cir. 2021) (noting that a meaningful access claim may challenge "systemic failures"); *Arc of Washington State Inc. v. Braddock*, 427 F.3d 615, 618 (9th Cir. 2005) (highlighting that, with respect to integration claims under *Olmstead*, "states are required to provide care in integrated environments for as many disabled persons as is reasonably feasible"). Plaintiffs' claim that the VA's "past and current practice" of not providing permanent housing to the class of veterans represents discrimination based on disability, placing them squarely within the "system-wide practice or policy" requirement for commonality. *Armstrong*, 275 F.3d at 868.

The VA's contention that to adjudicate these claims, the court will have to analyze every single Plaintiffs' situation individually is unavailing. We have held that in civil-rights suits challenging system-wide practices or policies, "individual factual differences among the individual litigants or groups of litigants will not preclude a finding of commonality." *Id.* (citations omitted); *see also Gonzalez v. United States Immigr. & Customs Enf't*, 975 F.3d 788, 807 (9th Cir. 2020) ("The existence of shared legal issues with divergent factual predicates is sufficient." (citation omitted)).

In *Armstrong*, we affirmed class certification of a group of prisoners and parolees who suffered from six different

categories of disability. *Armstrong*, 275 F.3d at 854. The plaintiffs claimed that California's policies and practices for parole and parole-revocation discriminated against class members based on their disabilities. *Id.* at 854–55. Like the VA here, the defendant in *Armstrong* argued that the wide variation in the nature of the particular class members' disabilities precluded a finding of commonality. *Id.* at 868. We disagreed, holding that individual factual differences among the class members are not sufficient to negate a finding of commonality. *Id.* Because class members suffered a "similar harm" from the defendant's "failure to accommodate their disabilities, ... [t]he commonality requirement [wa]s met." *Id.*

So, too, here. Plaintiffs challenge the VA's failure to provide permanent housing on or near the Campus, a system-wide practice that Plaintiffs claim is discriminatory and that affects all of the putative class members. This suffices for commonality purposes.[10] *See id.* Accordingly, the district court did not abuse its discretion in certifying Plaintiffs' class for the meaningful access and *Olmstead* claims.

c. Meaningful Access Claim

The Rehabilitation Act guarantees "meaningful access" to programs or activities receiving federal financial assistance for otherwise qualified handicapped individuals. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). Any recipient of federal financial assistance, and any federal agency in conducting programs or activities under the Act, generally must "operate each program or activity so that the

[10] To be sure, individual veterans in the class have different needs according to their respective disabilities; but those differences merely relate to the *degree* to which each class member was denied meaningful access to healthcare and their risk of institutionalization.

program or activity, when viewed in its entirety, is readily accessible to and usable by [persons with disabilities]." 28 C.F.R. §§ 39.150(a), 41.57(a). "[T]o assure meaningful access, reasonable accommodations in the . . . program or benefit may have to be made." *Alexander*, 469 U.S. at 301.

Here, the district court found that Plaintiffs—disabled veterans with SMI or TBI—require access to on-site healthcare at the Campus; yet without permanent supportive housing on or near the Campus, Plaintiffs are unable to access such treatment. Accordingly, the district court concluded that the VA denied Plaintiffs "meaningful access" to their healthcare.

As with the *Olmstead* and AMI claims, the VA raises only factual challenges to the district court's judgment on this claim. The VA contends that while housing on or near the Campus may make it easier for veterans to access healthcare facilities, Plaintiffs do not *lack* "meaningful access." Although this may be one interpretation of the evidence, that is not the standard on appeal. We must determine whether the district court's findings of fact are "illogical, implausible, or without support in inferences from the record." *Yu*, 15 F.4th at 1241–42. They are not.

The evidence in the record supports the district court's findings. For example, Dr. Steven Edward Braverman, former VAGLAHS Director, testified that the bulk of specialty care for veterans is only located on the Campus and that the Campus is the referral point for veterans' specialty care, which is often what the class of veterans require. Dr. Benjamin Henwood, professor of Social Work and Director of the Homelessness Center at the University of Southern California, testified that unhoused veterans have "difficulty accessing healthcare when they don't have a stable place to

live." Dr. Jonathan Edward Sherin, former Medical Center's Chief of Psychiatry and Mental Health Programs, testified that there needs to be permanent housing for veterans on or near the Campus to allow veterans to have more meaningful engagement with the healthcare system. Plaintiff Laurieann Wright testified that, due to her disabilities, she requires specialty care that is only provided on the Campus and that without housing on the Campus, she cannot access her healthcare benefits because it is very difficult for her to commute. Plaintiff Lavon Johnson testified that since living on the Campus, he gets regular visits from his nurse, doctors, and healthcare workers who could not find him when he was unhoused.

Because the district court's findings of fact are not "illogical, implausible, or without support in inferences from the record," the court did not err in its interpretation of the record. *Id*.

d. *Olmstead* Claim

The Rehabilitation Act's integration mandate states that "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). In 1999, the Supreme Court addressed this mandate in *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999)[11] and held that covered entities "are required to provide community-based treatment for persons with mental disabilities when . . . treatment professionals determine that such placement is appropriate, the affected person does not

[11] Although the *Olmstead* case decided an issue related to the ADA, courts interpret the Rehabilitation Act and the ADA similarly. *See Zukle v. Regents of Univ. of California*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the [agency] and the needs of others with mental disabilities." *Id.* at 607. To prove an *Olmstead* claim, "a plaintiff need only show that the challenged [agency] action creates a serious risk of institutionalization." *M.R. v. Dreyfus*, 697 F.3d 706, 734 (9th Cir. 2012).

Here, the district court properly held that the VA violated the Rehabilitation Act by not providing class members their disability healthcare benefits "in the most integrated setting appropriate to their needs," placing "unhoused veterans at risk of institutionalization." There is sufficient supporting evidence in the record for this conclusion. For instance, Plaintiff Fields testified that the VA's failure to provide supportive housing puts veterans in a never-ending cycle of jail and hospitalization. Dr. Henwood also testified that the absence of stable housing places veterans with certain disabilities in an "institutional circuit" because they use a lot of "institutional care on and off," including hospitals, jails and prisons, and treatment programs. Likewise, Dr. Sherin acknowledge that there are "too many veterans . . . cycling in between homelessness and jails and the hospitals." The record also shows that the Medical Center on the Campus is one of the most well-equipped in the nation, if not the best, and often the only one in the greater Los Angeles area that can provide the necessary care for the class of veterans. The evidence shows that without supportive housing near or at the Campus, veterans are forced to either accept institutionalization or go without services. *See Olmstead*, 527 U.S. at 597 (holding that "[u]njustified isolation . . . is properly regarded as discrimination based on disability").

The VA argues that *Olmstead* has no place in Plaintiffs' claims because if the VA provides supportive housing on the

Campus, the veterans would arguably be more segregated from the broader community, not less. The record shows otherwise. First, Plaintiffs are requesting supportive housing "on or near the Campus," not just on the Campus. Second, Plaintiffs Petitt and Wright testified that they want to live on or near the Campus because other veterans live there, and they would be integrated into a community. Dr. Sherin testified that the goal of permanent supportive housing is to create a "connective tissue of community" for veterans, which includes "places to recreate, places to socialize, [and] places for opportunities and self-governance." As these Plaintiffs testified, they want to live in a community where they can harvest a sense of belonging while surrounded by other veterans who understand their struggles and where healthcare is readily available. Homelessness provides the opposite and places the class of veterans at serious risk of institutionalization. *See Olmstead*, 257 U.S. at 600 (noting that unnecessary segregation "perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life"). Thus, the district court did not err in finding in Plaintiffs' favor on their *Olmstead* claim.

e. AMI Claim

The VA also challenges the district court's finding that the VA's policy of contracting with third-party housing developers who impose income limitations and count veterans' disability benefits as income is facially discriminatory under the Rehabilitation Act.

"A facially discriminatory policy is one which on its face applies less favorably to a protected group." *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1048 (9th Cir. 2007). A facially discriminatory policy is a per se violation of the

Rehabilitation Act. *Bay Area Addiction Rsch. & Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 735 (9th Cir. 1999); *see also Lovell v. Chandler*, 303 F.3d 1039, 1054 (9th Cir. 2002).

The VA does not dispute that under its current system, the most disabled veterans may be priced out of housing. A VA senior executive homelessness agent admitted as much. Rather, it argues that since the system treats all income equally, it is not per se discriminatory. Regardless of whether income is treated equally, disability is used as a basis to discriminate against veterans. Disability benefits are directly correlated to a veteran's disabilities—the more disabled a veteran is, the more disability benefits he or she receives. A veteran with 100% disability rating does not qualify for most housing under this program because they receive more than 30% AMI in disability benefits, but a less disabled veteran who received less in disability benefits does. This constitutes facial discrimination. *See Townsend v. Quasim*, 328 F.3d 511, 517–18 (9th Cir. 2003) (holding that defendant's failure to provide long term care services in a particular setting to one group of disabled individuals but not another, solely on the basis of income, was discrimination in violation of the ADA).

* * * *

The district court did, however, err in entering judgment against HUD for Plaintiffs' meaningful access, *Olmstead*, and AMI claims. The meaningful access and the *Olmstead* claims are rooted in Plaintiffs' healthcare benefits, which the VA is responsible for administering. *See* 38 U.S.C. § 303. HUD has no say in the way the VA administers its laws. As to the AMI claim, the claim is moot after HUD announced a policy change excluding veterans' service-connected

disability benefits as income when determining supportive housing eligibility, and Plaintiffs concede as much. Thus, judgment against HUD is vacated.

2. Charitable Trust Claim

a. Standing

The Attorney General has primary, though not exclusive, responsibility for the supervision and enforcement of charitable trusts. In California, "[a] suit for the enforcement of a charitable trust may be maintained only by the Attorney General or other appropriate public officers or by a co-trustee or successor trustee, by a settlor, or by another person who has a special interest in the enforcement of the trust." *Autonomous Region of Narcotics Anonymous v. Narcotics Anonymous World Servs., Inc.*, 292 Cal. Rptr. 3d 851, 861 (Ct. App. 2022) ("*ARNA*") (quoting Restatement (Third) of Trust § 94) (emphasis removed); *see also Holt v. Coll. of Osteopathic Physicians & Surgeons*, 394 P.2d 932, 934–37 (Cal. 1964) (creating the special interest standing and allowing minority trustees to sue majority trustees); *L.B. Rsch. & Educ. Found. v. UCLA Found.*, 29 Cal. Rptr. 3d 710, 716–17 (Ct. App. 2005) (relying on *Holt*, allowed a donor to sue where the charitable gift came with a reversionary interest); *Patton v. Sherwood*, 61 Cal. Rptr. 3d 289, 291 (Ct. App. 2007) (allowing a settler to sue because he had reserved the power to object to an accounting in the trust instrument). Thus, an intended beneficiary, such as a disabled veteran, would typically not have standing to sue for breach of fiduciary duties of the charitable trust unless he has a *special interest* in the trust.

In adopting, and later applying, special interest standing, courts have emphasized that its application "involve[s] a balancing of policy concerns and objectives." *ARNA*, 292

Cal. Rptr. 3d at 861 (citation omitted). The limited application of this concept "arises from the need to protect the trustee from vexatious litigation," by a large, changing, and uncertain class of the public to be benefitted. *Patton*, 61 Cal. Rptr. 3d. at 291. But there is also the concern that due to the Attorney General's "limitations (of information and resources, plus other responsibilities and influence)" charitable trusts will have no oversight which means they can "lapse into inactivity and neglect and can be victimized by trustee breaches of trust." *ARNA*, 292 Cal. Rptr. 3d at 861. Thus, allowing others with a special interest to sue can "bring to light conduct detrimental to a charitable trust so that remedial action may be taken." *Holt*, 394 P.2d at 935–36.

Here, the VA argues that Plaintiffs do not have special interest standing[12] as any trust created under the 1888 Deed would benefit a "vast, ill-defined population—roughly speaking, all Veterans in the Western United States." Although this is true, the critical question is whether this class of veterans who are suing have a sufficient special interest to "enforce the trust on their own behalf." *ARNA*, 292 Cal. Rptr. 3d at 861. Here, the intended beneficiaries of the trust are veterans with disabilities. But the putative class is more specific—unhoused veterans with severe disabilities and mental illnesses for whom receipt of the trust's benefits (i.e., supportive housing and healthcare) can make the difference between life and death. We have difficulty imagining a more special interest than that.

[12] The VA and Plaintiffs cite *He Depu v. Yahoo! Inc.*, 950 F.3d 897 (D.C. Cir. 2020), which is not controlling authority, and neither party engages with California's common law application of special interest standing.

Additionally, balancing the policy concerns and objectives supports finding special interest standing in this specific case. *See ARNA*, 292 Cal. Rptr. 3d at 861. The record shows that the VA has mismanaged the Campus for decades by first selling off the Campus's land to third parties until only about half of the donated land was left. The VA only stopped this practice because Congress prohibited it. Then, the VA leased the Campus's land to third parties for well below the appraised market value and in certain cases even leased it for free. Also, as explained *infra*, the VA's current leases with third parties violate the Leasing Act because those leases do not principally benefit veterans. Plaintiffs have complained about the VA's deficiencies for more than a decade and notwithstanding the *Valentini* settlement, the VA has consistently failed to comply with its pledge to return the Campus to its intended purpose of benefitting disabled veterans. Further, this and the *Valentini* litigations have been widely and publicly covered, and the Attorney General has not taken any steps to ensure the charitable trust is being properly managed. Thus, bringing these problems to light, along with trying to address the issues unhoused veterans face, is beneficial for the public and confers a special interest sufficient to allow this class of veterans to sue to enforce this charitable trust. *See ARNA*, 292 Cal. Rptr. 3d at 861 ("When charitable trusts are badly or corruptly managed, underenforcement of the original charitable purpose disserves the public interest in furthering social betterment.").

Having found that Plaintiffs have special interest standing to sue, we now address the charitable trust claim on the merits.

b. Judicially Enforceable Fiduciary Duties[13]

"The United States or a State has capacity to take and hold property in trust, but in the absence of a statute otherwise providing the trust is unenforceable against the United States or a State." Restatement (Second) of Trusts § 95. The Government owes judicially enforceable duties "only to the extent it expressly accepts those responsibilities." *Arizona v. Navajo Nation*, 599 U.S. 555, 564 (2023) (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 164, 177 (2011)). "Whether the Government has expressly accepted such obligations 'must train on specific rights-creating or duty-imposing' language in a treaty, statute, or regulation." *Id.* (citation omitted)

Plaintiffs allege, and the district court ruled, that the VA accepted judicially enforceable fiduciary duties through the Leasing Act and its 2021 Amendment. By its terms, the Leasing Act "authorize[s] the Secretary of [VA] to enter into certain leases at the [Campus], to make certain improvements to the enhanced-use lease authority of the Department, and for other purposes." Further, the Leasing Act prohibits the VA from entering leases that do not provide "supportive housing . . . that principally benefit[s] veterans and their families," and requires that "the provision of services to veterans [be] the predominant focus of the activities . . . during the term of the lease." Leasing Act §§ 2(b). Contrary to Plaintiffs' assertion, the aforementioned language does not demonstrate that the

[13] The parties dispute whether the 1888 Deed created a charitable trust. But we need not reach this issue because even if it did, the VA does not owe judicially enforceable fiduciary duties, and therefore Plaintiffs cannot succeed on the merits of this claim.

United States unambiguously and expressly accepted judicially enforceable trust responsibilities.

While the United States was free to accept the land gifted to it by the 1888 Deed, *see United States v. Burnison*, 339 U.S. 87, 89 (1950), the Leasing Act does "not unambiguously provide that the United States has undertaken full fiduciary responsibilities" as to management of the Campus, *see United States v. Mitchell*, 445 U.S. 535, 542 (1980). Plaintiffs fail to identify provisions in the Leasing Act that include "specific rights-creating or duty-imposing language." *Navajo Nation*, 599 U.S. at 564. What is more, nothing in the Leasing Act suggests that any such duty is judicially enforceable. To the contrary, the Leasing Act expressly contemplates administrative and political remedies if the VA is found to be noncompliant "with all Federal laws relating to leases and land use at the Campus." *See, e.g.*, Leasing Act § 2(h)(1) (charging the VA OIG with determining the VA's compliance with the Leasing Act); *id.* (providing that if the VA is found not in compliance, the VA "may not enter into any lease or land-sharing agreement at the Campus, or renew any" non-compliant lease until the Secretary of the VA certifies to Congress that all of the VA OIG's recommendations have been implemented"); *but see* 2 U.S.C. § 159 (providing that the Library of Congress Trust Fund Board shall have "all the usual powers and obligations of a trustee" and that the Board "may be sued" in the district court "for the purpose of enforcing the provisions of any trust accepted by it").

Plaintiffs alternatively argue that because the Leasing Act creates duties that mirror those created by a trust at common law that is sufficient to impose enforceable fiduciary duties. Not so. The Supreme Court expressly rejected Plaintiffs' argument in *Navajo Nation*, holding that

the United States's trust obligations are "established and governed by treaty, statute, or regulation, rather than by the common law of trusts." 599 U.S. at 564 n.1 ("[T]he trust obligations of the United States . . . are established by Congress and the Executive, not created by the Judiciary.").

The district court thus erred in finding that the Leasing Act and its 2021 Amendment imposed judicially enforceable fiduciary duties on the VA. We therefore reverse the district court's judgment in favor of Plaintiffs on their charitable trust claim.

Additionally, the parties agree that judgment on Plaintiffs' charitable trust claim was the only basis for which the district court invalidated UCLA's lease and enjoined UCLA. Because we are reversing judgment on Plaintiffs' charitable trust claim, we dismiss UCLA's consolidated appeals as moot and vacate any injunctive relief with respect to UCLA's lease and services.[14] [15] *See Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy*, 232 F.3d 1300, 1303 (9th Cir. 2000).

To the extent the district court voided Brentwood and Bridgeland's leases and ordered injunctive relief based on Plaintiffs' charitable trust claim, we vacate that part of the district court's judgment as well.

B. Brentwood School's Appeal

1. Interpretation of the Leasing Act

Brentwood School challenges the district court's order voiding its lease and asserts that the district court

[14] UCLA's motion for a stay pending appeal is denied as moot. Dkt. 30.

[15] We express no opinion as to the impact of our opinion on the relationships between Plaintiffs, the VA, and UCLA.

misinterpreted the Leasing Act.[16] "The APA specifies that courts, not agencies, will decide '*all* relevant questions of law' arising on review of agency action . . . even those involving ambiguous laws." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 371 (2024). Thus, agency interpretation of statutes "are *not* entitled to deference." *Id.* at 392. In interpreting statutes, "the [c]ourt relies on traditional rules of statutory interpretation." *POM Wonderful LLC v. Coca-Cola Co.*, 573 U.S. 102, 112 (2014). The analysis begins and ends with the statutory text. *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010).

As relevant here, the Leasing Act states that the VA Secretary may carry out,

> Any lease of real property for a term not to exceed 50 years to a third party *to provide services that principally benefit veterans and their families* and that are limited to one or more of the following purposes:
>
> (A) The promotion of health and wellness, including (B) nutrition and spiritual wellness. (B) Education. (C) Vocational training, skills building, or other training related to employment. (D) Peer activities, socialization, or physical recreation. (E) Assistance with legal issues and Federal

[16] We reject Plaintiffs' argument that Brentwood is judicially estopped from bringing this appeal. We find Brentwood did not misrepresent its intentions below and its position is consistent on appeal. *See Perez v. Discover Bank*, 74 F.4th 1003, 1008 (9th Cir. 2023) ("A party's current position is clearly inconsistent with its previous position if the current position contradict[s] the previous position." (internal quotation marks omitted)).

> benefits. (F) Volunteerism. (G) Family support services, including child care. (H) Transportation. (I) Services in support of one or more of the purposes specified in subparagraphs (A) through (H).

Leasing Act § 2(b)(2) (emphasis added). It defines "principally benefits veterans and their families" as,

> [S]ervices (A) provided exclusively to veterans and their families; or (B) that are designed for the particular needs of veterans and their families, as opposed to the general public, and any benefits of those services to the general public is distinct from the intended benefit to veterans and their families.

Id. at § 2(I)(1)(A)–(B). Services that "principally benefit veterans" excludes those "services in which the only benefit to veterans and their families is the generation of revenue for the [VA]." *Id.* § 2(I)(2).

The district court ruled that the plain text of the Leasing Act is unambiguous and found that the phrase "principally benefit veterans and their families" refers to and modifies the sentence's subject, "lease," and not "services." Thus, the district court concluded that "Section 2(b)(2) of the Leasing Act, by its plain text, requires that the underlying lease's predominant purpose is to provide services that principally benefit veterans and their families." Brentwood argues that the district court erred in its interpretation because the phrase "principally benefit veterans and their families" clearly

modifies the word "services" by explaining which "services" are required.

Beginning with the text, both parties are correct that the text is plain and unambiguous. "The rules of grammar govern statutory interpretation unless they contradict legislative intent or purpose." *Nielsen v. Preap*, 586 U.S. 392, 408 (2019) (cleaned up). Here the question is whether the restrictive clause "principally benefit veterans and their families" modifies "lease" or "services." *See United States v. Nishiie*, 996 F.3d 1013, 1021–22 (9th Cir. 2021) (noting that the word "that" is often used to introduce restrictive or limiting clauses which are essential to the meaning of the sentence and are not set off by commas). Since here the restrictive clause is not set off by commas, "common grammar rules suggest that Congress intentionally tied it to the last antecedent," *id.* at 1022, thus modifying "services," not "leases." This supports Brentwood's reading of the statute which would mean that the lessees' services, not the lease, principally benefit veterans.

But this reading would create an absurd result. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 536 (2004) (noting that if the plain meaning of the text would create an absurd result, the court would have to treat the statute as ambiguous). Under this reading, Congress would have authorized the VA to enter into *any* land-use lease with third parties as long as the leaseholder provides *some* services that principally benefit veterans. For example, given that the Campus sits on one of the most exclusive and expensive areas in Los Angeles, the VA would be authorized to enter into a land-use lease agreement with a luxurious hotel to build a resort for private use so long as they provide *some* services that principally benefit veterans. That cannot be the case; especially considering the legislative context of the Leasing

Act. *See Nishiie*, 996 F.3d at 1024 ("In addition to exploring the text of the statute itself, we examine the relevant statutory context." (citation omitted)).

Congress created the Leasing Act in response to the *Valentini* lawsuit and the VA's 2016 Plan to refocus the Campus to provide services to veterans. *See* H.R. Rep. 114–570, 6 ("To assist VA in carrying out the tenets of the [2016 Plan], Section 2 of the bill would authorize VA to carry out the certain leases on the [Campus]"). The Congressional Committee Report, under a section called "Background and Need for Legislation," described the leases the *Valentini* court had found unlawful—which included Brentwood's previous lease—as "providing services primarily to the general public" and that "any use or benefit of the leased space by veterans or their families was ancillary." *Id.* at 5. The report further stated that the Committee believed that if the [2016 Plan] was fully implemented, it would "correct the years of neglect, misuse, and mismanagement" of the Campus and would refocus the VA's efforts at the Campus "on veterans in need of services—particularly those who are homeless or at risk of homelessness." *Id.* at 6. This makes clear that the force that drove Congress to create the Leasing Act was to assist the VA to refocus the Campus to its historic intended use—authorizing specific land-use agreements only when they principally benefit veterans and their families. Adopting Brentwood's interpretation would potentially allow for leases that, although providing some services that benefit veterans, are really "ancillary" to the services provided to the general public or others, which is the case under Brentwood's current lease. Congress could not have intended to allow land-use agreements that principally benefit nonveterans overall and only provide

ancillary services to veterans. Brentwood's arguments to the contrary are ineffective.

Thus, the district court correctly interpreted the Leasing Act as requiring that the underlying lease's predominant purpose is to provide services that principally benefit veterans and their families.

2. Brentwood's Lease Violates the Leasing Act and the APA

To comply with the Leasing Act, a land-use agreement must (1) be for real property, (2) be shorter than 50 years, (3) be to a third party, and (4) provide services that principally benefit veterans and their families. Leasing Act § 2(b)(2). The parties only contest element number four.

The record shows that Brentwood's lease violates the Leasing Act because the underlying predominant purpose of the lease does not "principally benefit veterans." Brentwood allows veterans to use its athletic facilities, but Brentwood, not the VA, decides the time and manner veterans are to use them. Not surprisingly, Brentwood allows veterans to use its facilities only when it is more convenient for its students. For example, veterans are allowed to use the pool on Mondays, Wednesdays, and Fridays from 5:30 a.m. to 7:30 a.m. and on Saturdays and Sundays from 11:00 a.m. to 3:00 p.m. Brentwood also allows veterans to use its track on Wednesdays from 5:00 a.m. to 11:00 a.m. As the district court correctly found, this results in highly restricted access for veterans in favor of access for students during school hours and times for team practices and competitions.

Likewise, although Brentwood provides shuttle transportation to the athletic facilities for veterans on the Campus, the hours of shuttle operation—from 9:00 a.m. to

2:00 p.m.—do not align with the times Brentwood allows veterans access to its facilities. Considering the restricted times Brentwood allows veterans to access its facilities and the lack of adequate transportation, veterans' access to Brentwood's athletic facilities is de minimis compared to the access Brentwood students enjoy. Since the lease principally benefits Brentwood's students, not veterans, it violates the Leasing Act.

As a result, the lease also violates the APA. The APA requires a court "to set aside agency action" that is "not in accordance with law" or that is "in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706. Pursuant to the APA, an agency's final action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706(2)(A). Since Brentwood's lease is contrary to statutory authority, it is in violation of the APA. Thus, the district court correctly voided Brentwood's lease under the APA.

C. Bridgeland Resources, LLC's Appeal

Making very similar arguments to those Brentwood made, Bridgeland also argues that the district court erred in its interpretation of the Leasing Act. But as explained above, the district court did not err in determining that the Leasing Act requires that the land-use agreement's predominant purpose is to provide services that principally benefit veterans. *See* Leasing Act § 2(b)(2).

Under this interpretation, Bridgeland's revocable license violates the Leasing Act. Bridgeland argues that the revocable license is veteran-focused because they do not need the license to slant drill oil—they *may* get the license through the BLM—"the Government and veterans give up virtually nothing in exchange for a 'generous' royalty." That

is not so. As Bridgeland conceded, they entered into the revocable licensing agreement with the VA because it protects them from the danger of future litigation. Thus, the license is quite valuable to Bridgeland. In any event, the test is whether the revocable license's purpose is to "principally benefit" veterans. The record shows it is not. The revocable license's purpose is to allow Bridgeland to pass underneath the Campus's grounds to slant drill oil. The only thing veterans receive in return is a 2.5 percent royalty donated to a nonprofit who later uses that donation to provide transportation services to veterans; thus, the transportation services veterans receive are ancillary to drilling oil and gas.

As a result, the revocable license violates the Leasing Act. Likewise, since the revocable license is contrary to statutory authority, it also violates the APA. Accordingly, the district court correctly voided Bridgeland's revocable license under the APA.

D. Scope of Injunctive Relief

Having discussed the merits of the parties' claims above, now we turn into the propriety of the district court's permanent injunction.

1. Relief for Rehabilitation Act Claims

a. Relief for Meaningful Access and *Olmstead* Claims

As relief for the meaningful access and *Olmstead* violations, the district court ordered the VA to construct 1,800 permanent housing units and 750 temporary housing units to remedy its discrimination. The VA, however, may be excused from discrimination if it can demonstrate that making the modifications the district court ordered would fundamentally alter the nature of its services, programs, or

activities. *See Townsend*, 328 F.3d at 518. *Olmstead* makes clear that the regulatory language only requires entities to make reasonable changes in existing policies to accommodate an individual's disabilities. *Olmstead*, 527 U.S. at 603. In evaluating this defense, we "must take into account financial and other logistical limitations on a[n agency]'s capacity to provide integrated services to the disabled." *Townsend*, 328 F.3d at 519.

The VA argues that constructing housing on the Campus would fundamentally change its program by forcing it to provide one single type of housing, thereby limiting veterans' options to decide where to live. According to the VA, this would harm the community of veterans the VA serves. We disagree.

The district court's order to build additional housing units simply expands—not alters—the program. There are approximately 3,000 veterans who do not have *any* type of housing. Constructing additional housing would not "limit" veterans' choices, it would expand them. Similarly, housing veterans on the Campus would not harm other veterans or create a "less hospitable" environment on the Campus because, as the record shows, many veterans want to live in a community with other veterans because they understand each other's struggles. Most importantly, the record supports the district court's finding that it is the *absence* of housing that creates a dangerous and inhospitable environment for veterans on or near the Campus. *See L.A. All. for Hum. Rts. v. Cnty. of L.A.*, 14 F.4th 947, 955 (9th Cir. 2021) (noting that L.A.'s homelessness crisis has resulted in "rising deaths of [the] unhoused, . . . unaddressed mental health disorders, . . . and the spread of uncommon diseases due to lack of sanitation").

As for budgetary constraints, the VA has not shown how building the 1,800 permanent housing units and the 750 temporary units is financially unreasonable. Building the temporary housing has been estimated to cost $100 million, which is only 0.02% of the VA's $407 billion annual budget for 2024. Notably, the VA failed to request any funding from Congress to construct supportive housing for veterans notwithstanding its pledge to provide housing for veterans' pursuant to the *Valentini* lawsuit, and ended Fiscal Year 2024 "with unspent, carryover funds."

The district court properly considered the VA's financial limitations. It found that the necessary investment in this construction would be "sequenced throughout [a] period" of years to allow the VA to administer its funding. The district court also found that the reduction in costs homelessness caused may "entirely offset" the construction costs. Additionally, the VA had recently "invested over $100 million to upgrade and expand . . . infrastructure" on the Campus to support the construction of housing according to the VA's 2016 Plan. Lastly, the district court retained jurisdiction to adjust the amount of housing the VA is required to construct to make sure that the number coincides with housing needs. In short, the VA fails to show that complying with the district court's order would fundamentally alter its programs.

b. Relief for AMI Claims

The VA also contends that the district court abused its discretion by ordering the VA to build housing itself if it could not find developers willing to refrain from

discrimination.[17] Contrary to the VA's assertion, the district court did not "order" the VA to directly fund or subsidize housing. Instead, the district court merely suggested that it was an option available to the VA to remedy the discrimination. The district court instead ordered the VA to "ensure a sufficient number of housing units at [the Campus] are free from income restrictions." It also ordered the VA, Plaintiffs, and the Special Monitor to determine the precise number of necessary units. After further hearings regarding the scope of the injunction, the district court instructed the VA to contract with developers that rely on conventional financing—free from income restrictions. Then, the district court suggested that only if traditional financing could not cover the entire cost, the VA could directly fund or subsidize the housing.[18] Thus, there is no abuse of discretion in pointing out to the VA the various tools it can utilize to refrain from discriminating any further against this class of veterans.

2. Relief for the APA Claims

a. Renegotiation of Unlawful Land-Use Agreements

For the reasons explained *supra*, the district court correctly concluded that the VA's land-use agreements with Brentwood, Safety Park,[19] and Bridgeland violated the Leasing Act and, therefore, were invalid under the APA. As

[17] As a facial discrimination claim, "the fundamental alteration test has no application" to Plaintiffs' AMI claim. *Lovell*, 303 F.3d at 1054.

[18] The VA's argument that it does not have the expertise to build housing conflicts with record evidence showing it has successfully built on the Campus before.

[19] Safety Park is not a party to these appeals.

relief, the district court voided these leases and further enjoined the VA from entering into new leases with the entities in question, finding that the VA persistently made unlawful leasing decisions and that allowing renegotiation of the leases would be "futile." Subsequently, in a series of hearings, the district court backtracked its injunction on lease renegotiation as to Brentwood. Notably, the VA does not appeal the district court's conclusion that these leases violate the APA. Rather, the VA challenges the scope of the district court's injunctive relief, arguing that the court abused its discretion by enjoining the VA from entering new leases with the entities in question and then stepping into the VA's shoes to decide with whom to renegotiate and under what terms.

A district court, "as a court of equity conducting judicial review under the APA, has broad powers to order mandatory affirmative relief . . . if such relief is necessary to accomplish complete justice." *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 680–81 (9th Cir. 2007) (cleaned up). "[D]istrict court[s] ha[ve] broad latitude in fashioning equitable relief when necessary to remedy an established wrong." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 (9th Cir. 2008) (internal quotations mark omitted). In determining the scope of injunctive relief, "[t]he district court must weigh the competing claims of injury . . . and the effect on each party of granting or withholding of the requested relief." *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (internal quotation marks and citation omitted).

Here, the district court abused its discretion in the scope of its injunction relating to the APA judgment. The district court found that the leases in question violated the APA and, as a remedy, the district court not only voided the unlawful

leases but also prohibited the VA from renegotiating them and, later, ordered the VA to enter into a settlement agreement with Brentwood. These actions went beyond remedying any injury to Plaintiffs. By ordering the VA with whom and under what terms it should negotiate land-use contracts on the Campus, the district court impermissibly intruded into the VA's expressed powers to manage the Campus in accordance with the Leasing Act. *See Galvez v. Jaddou*, 52 F.4th 821, 834 (9th Cir. 2022) (noting that the "district court must act within the bounds of . . . statute and without intruding upon the administrative province [of agency action.]" (internal quotation marks and citation omitted)).

The district court's reasoning for imposing such a broad injunction is certainly understandable because the VA maintained the position, throughout the trial, that there was no available space for the construction of housing on the Campus. *See Gill v. Whitford*, 585 U.S. 48, 72–73 (2018) (an injunction "must be tailored to redress the plaintiff's particular injury"). Also, the VA failed to construct housing according to the 2016 Plan for almost a decade. Thus, the court believed that ordering Brentwood and the VA to settle with one-year contract and with a plan to return the leased land to the VA was necessary. But Plaintiffs' harms are remedied by voiding the leases and allowing the VA to renegotiate them, if they can be brought into compliance with the Leasing Act. This creates the right balance between remedying Plaintiff's injuries and not limiting the VA's options.

We find that the district court abused its discretion in prohibiting the VA to renegotiate the land-use agreements in question and in ordering the VA to settle with Brentwood. Instead, the right balance for the competing claims of the

parties and the effects of the requested relief is that the VA is free to renegotiate the leases if they can be brought into compliance with the Leasing Act. Thus, the land-use agreements are void unless and until renegotiated to comply with the Leasing Act.

b. Bridgeland's Injunction

Bridgeland challenges the district court's power to enjoin it. Bridgeland alleges that the district court lacked jurisdiction in issuing the modified injunction because no party sued Bridgeland and because the injunction does not remedy any claims asserted by any party. Not so. As the Supreme Court has stated, "district courts whose equity powers have been properly invoked . . . have discretion in fashioning injunctive relief . . . . [W]hen district courts are properly acting as courts of equity, they have discretion unless a statute provides otherwise." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 495–96 (2001). Here, the Leasing Act does not have textual restraints or restrict injunctive relief. Also, the fact that no party sued Bridgeland does not strip the district court of equitable jurisdiction because Bridgeland was in privity with the VA. *See Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (noting that an "injunction not only binds the party defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control"). The question is whether the district court abused its discretion in enjoining Bridgeland by prohibiting it to slant drill oil. We find that it did.

Here, similarly to Brentwood, the harm caused to Plaintiffs will be remedied by voiding the lease unless and until the VA can demonstrate that it is compliant with the Leasing Act. *See Gill v. Whitford*, 585 U.S. 48, 73 (2018)

("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). But the district court abused its discretion when it went beyond the required remedy by improperly enjoining Bridgeland from slant drilling which exceeded the bounds of its injunctive power. Thus, the injunction prohibiting Bridgeland "to slant drilling private oil leases from the [Campus]" is vacated.

IV. Conclusion

For the reasons explained *supra*, we affirm in part, reverse in part, vacate in part, and remand to the district court to enter judgment in accordance with this opinion.[20] Thus, we affirm the district court's grant of class certification; the APA judgment in Plaintiffs' favor; and the judgment in Plaintiffs' favor on their meaningful access, *Olmstead*, and AMI claims, and the equitable relief granted for these claims. We reverse the district court's judgment in Plaintiffs' favor on their charitable trust claim. We dismiss UCLA's consolidated appeals as moot and vacate any injunctive relief with respect to UCLA's lease and services. We vacate the judgment against HUD for the meaningful access, *Olmstead*, and AMI claims; and vacate the equitable relief granted for the APA claims. The parties shall bear their own costs on appeal.

[20] Appellees' motion for judicial notice, Dkt. No. 104, is granted. Appellants' motion for judicial notice, Dkt. No. 116, is granted. Appellees' motion to lift the stay of proceedings, Dkt. No. 119, is denied as moot.

Case: 24-6576, 09/11/2026, DktEntry: 140.1, (1 of 57)

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY POWERS; DEAVIN SESSOM; LAURIEANN WRIGHT; JOSEPH FIELDS; LAVON JOHNSON; JOSHUA ROBERT PETITT; NATIONAL VETERANS FOUNDATION,

Plaintiffs - Appellees,

and

SAMUEL CASTELLANOS, SHARDAY ANYADIEGWU, BILLY EDWARDS, JESSICA MILES, GLENN SURRETTE, NARYAN STIBBIE, DOES 1-10,

Plaintiffs,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellee,

v.

DENIS RICHARD MCDONOUGH; STEVEN BRAVERMAN; KEITH HARRIS; MARCIA L. FUDGE,

No. 24-6576

D.C. No. 2:22-cv-08357-DOC-KS
Central District of California, Los Angeles

ORDER

Case: 24-6576, 09/11/2026, DktEntry: 140.1, (2 of 57)

Defendants - Appellants,

and

DOUGLAS GUTHRIE,

Defendant - Appellee,

BRENTWOOD SCHOOL,

Intervenor.

Filed September 11, 2026

Before: Consuelo M. Callahan, Roopali H. Desai, and Ana de Alba, Circuit Judges;

Order;
Dissent by Judge Collins;
Dissent by Judge Bumatay.

Case: 24-6576, 09/11/2026, DktEntry: 140.1, (3 of 57)

SUMMARY*

Veterans Affairs

The panel denied rehearing en banc in a case in which the panel affirmed in part, reversed in part, vacated in part, and remanded to the district court to enter judgment in a class action brought by unhoused veterans with severe disabilities and mental illnesses seeking to return the West Los Angeles Veterans Affairs grounds to its intended use of housing disabled veterans.

Dissenting from the denial of rehearing en banc, Judge Collins, joined by Judges Bress, Bumatay, and Tung, wrote that the panel's decision, which upheld the district court's judgment and injunction requiring the Department of Veterans Affairs to construct housing for the class members based on § 504 of the Rehabilitation Act, disregards the limitations that the Supreme Court has placed on disability discrimination claims asserted under § 504 of the Rehabilitation Act. The district court's decision was based on a deeply flawed legal foundation, and on an equally flawed certification of a class action.

Dissenting from the denial of rehearing en banc, Judge Bumatay, joined by Judges VanDyke and Tung, wrote that while Judge Collins provided a persuasive explanation as to why Plaintiffs-Appellees' claims should fail on the merits, the panel's errors were even more fundamental. First, in affirming the district court's expansive injunction, the panel wrongly took as given that the Rehabilitation Act includes

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

an implied right of action. Second, the panel reduced the class-action commonality requirement under Fed. R. Civ. P. 23(a)(2) to a mere pleading exercise.

ORDER

The panel unanimously voted to deny Appellants' petition for rehearing en banc. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 40. Judges Gould and Rawlinson did not participate in the deliberations or vote in this case.

The petition for rehearing en banc (Dkt. No. 127) is **DENIED**. Judge Collins's and Judge Bumatay's dissents from the denial of rehearing en banc are filed concurrently herewith. No further petitions for rehearing will be entertained.

COLLINS, Circuit Judge, joined by BRESS, BUMATAY, and TUNG, Circuit Judges, dissenting from the denial of rehearing en banc:

The panel's decision in this case confirms that sympathetic facts make bad law. By all accounts, the Department of Veterans Affairs ("VA") has not done a good job of providing for veterans in Los Angeles, particularly homeless veterans. Its failures have drawn the scrutiny of Congress, which has twice passed (in 2016 and 2021) legislation specifically concerning homeless veterans in Los Angeles, as well as the attention of the President, who last

year issued an Executive Order that likewise focuses on the VA's west Los Angeles campus. But the answer to this complex problem does not lie in the remarkable decree upheld by the panel here.

That decree is based on the extraordinary theory that the VA's administration of its statutory program for providing *medical care* to veterans unlawfully discriminates against disabled veterans in violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794, *unless* the VA *also affirmatively provides housing* for those disabled veterans who are homeless. *See Powers v. McDonough*, 163 F.4th 1162, 1186–88, 1194–96 (9th Cir. 2025). This attempt to use the Rehabilitation Act to judicially engineer a dramatic expansion in the scope of a federal benefits program violates well-settled Supreme Court and Ninth Circuit precedent. Based on that deeply flawed legal foundation, and on an equally flawed certification of a class action, the district court has decreed that the VA must undertake a judicially micromanaged program of housing construction at the VA's west Los Angeles campus that (for now) will include 1,800 permanent and 750 temporary housing units for the homeless, at a cost well exceeding $100 million. *Id*. at 1195. Perhaps such a program should be adopted and funded by Congress to address the suffering of homeless veterans in southern California. But such judgments do not belong to the courts, and disregard of settled law, even in the service of worthy aims, should not be countenanced. We should have reheard this case en banc, and I dissent from our failure to do so.

I

In its current posture, this case involves a certified class action pursued by six individual plaintiffs and one

organizational plaintiff (the National Veterans Foundation) on behalf of "[a]ll homeless veterans with Serious Mental Illness [SMI] or Traumatic Brain Injuries [TBI], who reside in Los Angeles County." Plaintiffs named various defendants, but the only relevant defendants under the panel's decision are three VA officials who are sued in their official capacities (hereinafter, collectively, the "VA").[1] Plaintiffs' core allegation is that, in administering its statutory obligation to "provide a complete medical and hospital service for the medical care and treatment of veterans," 38 U.S.C. § 7301(b), the VA "do[es] not provide adequate Permanent Supportive Housing to ensure that . . . [Plaintiffs can] access the medical treatment and other services for which they are eligible." Specifically, Plaintiffs contend that, in order to avoid discriminating against disabled veterans in the provision of VA *medical care* in violation of § 504 of the Rehabilitation Act,[2] the VA must

[1] The district court's judgment had also applied to the Secretary of Housing and Urban Development ("HUD"), but the panel held that, with respect to the relevant claims that remain at issue, there was no legal basis for extending the judgment against the VA to HUD. *See Powers*, 163 F.4th at 1188. The panel therefore directed that the judgment against HUD be vacated in its entirety. *Id*. I do not question the correctness of that holding.

[2] As relevant here, § 504 of the Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected 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.

construct both permanent and temporary *housing* for veterans on the campus that contains the VA's West Los Angeles Medical Center (respectively, the "Campus" and the "Center").

Plaintiffs asserted two distinct claims under § 504 of the Rehabilitation Act, and these two claims provide the sole basis on which the panel upheld the district court's housing-construction injunction. First, in what the panel referred to as Plaintiffs' "meaningful access claim," Plaintiffs alleged (1) that the VA's failure to affirmatively provide permanent supportive housing on or near the Campus amounted to unlawful discrimination against the disabled because it deprives Plaintiffs of "meaningful access" to the medical care to which they are entitled; and (2) that providing such housing would be a "reasonable accommodation." *Powers*, 163 F.4th at 1186, 1194–95.

Second, Plaintiffs alleged that, by failing to provide such housing, the VA administers medical benefits "in a manner that denies veterans the benefits of . . . services, programs, or activities in the most integrated setting appropriate to their needs"; that the VA's "denial of appropriate integrated services to Plaintiffs is solely because of their disabilities"; and that "Plaintiffs are institutionalized or placed at risk of institutionalization because of [the VA's] discrimination." The panel referred to this as an "*Olmstead*" claim, *Powers*, 163 F.4th at 1187, referring to *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999).[3]

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29 U.S.C. § 794(a).

[3] In a third claim under § 504 of the Rehabilitation Act, Plaintiffs challenged as discriminatory certain actions that the VA took with respect to the income qualifications for receiving housing that was

After certifying a class as described earlier, the district court held a bench trial in August 2024. In its post-trial decision, the district court ruled for Plaintiffs on all of their § 504 claims. As a remedy for Plaintiffs' meaningful access and *Olmstead* claims, the district court "enjoined [the VA] from failing to provide Plaintiffs and the Class they represent with appropriate permanent supportive housing on or near the [Campus] so they can reasonably access the health care benefits for which they are eligible in the most integrated setting appropriate to their needs." The district court ordered the VA, "[w]ithin six (6) months of this Court's order," to "develop a plan for the construction of an additional 1,800 units of permanent supportive housing . . . to address veteran homelessness," which "shall be built and operational within six (6) years of this order." At the time, there were 233 permanent housing units on the West Los Angeles VA Grounds.

The panel upheld the district court's grant of class certification, and it affirmed the judgment and housing injunction against the VA based solely on the meaningful access and *Olmstead* claims. *Powers*, 163 F.4th at 1184–86, 1194–96. In holding that Plaintiffs had been discriminatorily denied meaningful access to VA healthcare, the panel relied on the district court's finding that "Plaintiffs . . . require access to on-site healthcare at the Campus; yet without permanent supportive housing on or near the Campus, Plaintiffs are unable to access such treatment." *Id.* at 1186. As to the *Olmstead* claim, the panel concluded that

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otherwise being provided by private developers under VA authority. Because this third claim does not undergird the district court's housing-construction injunction, I do not address whether the panel correctly affirmed any independent relief that the district court ordered with respect to that separate claim. *See Powers*, 163 F.4th at 1188, 1195–96.

"the district court properly held that the VA violated the Rehabilitation Act by not providing class members their disability healthcare benefits" in the "most integrated setting appropriate to their needs, placing unhoused veterans at risk of institutionalization." *Id*. at 1187 (simplified). In upholding the certification of a class, the panel rejected the VA's argument that the merits of the meaningful access and *Olmstead* claims "turn on each veteran's individual circumstances"; instead, the panel held, the commonality requirement of Federal Rule of Civil Procedure 23 was satisfied because Plaintiffs sought relief from a "system-wide practice or policy." *Id*. at 1185.

II

The panel's decision upholding the district court's judgment and injunction requiring the VA to construct housing for the class members rests solely on the theory that, under § 504 of the Rehabilitation Act, the failure to affirmatively supply such housing constitutes discrimination against disabled persons in the provision of healthcare by the VA. By construing § 504 to require this sort of "fundamental alteration in the nature" of the VA's healthcare program, *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (citation omitted), the panel's decision contravenes the limitations the Supreme Court has established concerning claims under § 504. The panel's deeply flawed decision warranted rehearing en banc.

A

Section 504 of the Rehabilitation Act provides, as relevant here, that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination

. . . under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). As the Supreme Court has held, "[a]n otherwise qualified person is one who is able to meet all of a program's requirements in spite of his [disability]." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979). The *Davis* Court also acknowledged, however, that an agency's structuring of a program may present practical obstacles to participation by otherwise qualified disabled persons and that, in some situations, the agency's "refusal to *modify*" such a program to accommodate such persons "might become unreasonable and discriminatory." *Id*. at 412–13 (emphasis added). The general scope of § 504's prohibition on discrimination, and the circumstances in which § 504 might require such accommodating modifications, were subsequently addressed in the Supreme Court's seminal decision in *Choate*, and I therefore begin by reviewing that decision at some length before addressing how the panel's decision contravenes the settled construction of § 504.

In *Choate*, disabled Medicaid recipients sued under the Rehabilitation Act to enjoin a change to a state Medicaid program that "reduc[ed] from 20 to 14 . . . the number of inpatient hospital days per fiscal year that [state] Medicaid would pay hospitals on behalf of a Medicaid recipient." 469 U.S. at 289. The plaintiffs argued that the "proposed 14-day limitation on inpatient coverage would have a discriminatory effect on the handicapped," principally because "[s]tatistical evidence . . . indicated that . . . 27.4% of all handicapped users of hospital services who received Medicaid required more than 14 days of care, while only 7.8% of nonhandicapped users required more than 14 days of inpatient care." *Id*. at 289–90. The Court unanimously rejected this claim.

The Court first addressed the question of "whether proof of discriminatory animus is always required to establish a violation of § 504 and its implementing regulations, or whether federal law also reaches action by a recipient of federal funding that discriminates against the handicapped by effect rather than by design." *Choate*, 469 U.S. at 292. In considering these contrasting interpretations of § 504, the Court noted that there were substantial difficulties with both of them.

On the one hand, the Court noted that the authorities cited by the defendants did "not support [their] blanket proposition that federal law proscribes only intentional discrimination against the handicapped." *Choate*, 469 U.S. at 294. As the Court explained, the defendants' reading of § 504 was hard to square with what the Court understood to be the objectives of that provision. The Court stated that "[d]iscrimination against the handicapped was perceived by Congress to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Id*. at 295.[4] Moreover, the Court noted, "much of the conduct that Congress sought to alter in passing the Rehabilitation Act would be difficult if not impossible to reach were the Act construed to proscribe only conduct fueled by a discriminatory intent." *Id*. at 296–97. In particular, the Court noted that "elimination of architectural barriers was one of the central aims of the Act, yet such barriers were clearly not erected with the aim or intent of

[4] Although the Court's analysis on this score was largely based on legislative history, rather than on any purpose declared in, or discernible from, the statutory text, I am bound by "controlling Supreme Court precedent telling us what the purpose of [the statute] is, even if that precedent relies on legislative history." *Rojas v. FAA*, 989 F.3d 666, 681 n.6 (9th Cir. 2021) (en banc) (Collins, J., concurring).

excluding the handicapped." *Id*. at 297 (simplified). The same concerns were present, the Court explained, with respect to "discrimination in access to public transportation," "the discriminatory effect of job qualification procedures," and discrimination through "the denial of special educational assistance for handicapped children." *Id*. (simplified). The Court concluded that Congress's intention to remedy such discrimination "would ring hollow if the resulting legislation could not rectify the harms resulting from action that discriminated by effect as well as by design." *Id*.

On the other hand, the Court was also "troubl[ed]" by the competing argument that § 504 should be interpreted "to reach all action disparately affecting the handicapped." *Choate*, 469 U.S. at 298. "Because the handicapped typically are not similarly situated to the nonhandicapped," that position would "in essence require each recipient of federal funds first to evaluate the effect on the handicapped of every proposed action that might touch the interests of the handicapped, and then to consider alternatives for achieving the same objectives with less severe disadvantage." *Id*. The Court concluded that there was no statutory evidence that "Congress intended § 504 to be a National Environmental Policy Act for the handicapped, requiring the preparation of 'Handicapped Impact Statements' before any action was taken by a grantee that affected the handicapped." *Id*. at 298–99. The Court thus concluded that, "just as there is reason to question whether Congress intended § 504 to reach only intentional discrimination, there is similarly reason to question whether Congress intended § 504 to embrace all claims of disparate-impact discrimination." *Id*. at 299.

The Court accordingly held that "[a]ny interpretation of § 504 must . . . be responsive to two powerful but countervailing considerations—the need to give effect to the

statutory objectives and the desire to keep § 504 within manageable bounds." *Choate*, 469 U.S. at 299. The Court therefore explicitly "reject[ed] the boundless notion that all disparate-impact showings constitute prima facie cases under § 504." *Id*. Although the Court had strongly suggested that the converse position was also wrong, and that § 504 was not limited merely to intentional discrimination, the Court found it unnecessary to address that issue. That was true, the Court stated, because even "assum[ing] without deciding that § 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped," the § 504 claim asserted in that case failed. *Id*.

On the assumption that § 504 reached some disparate impacts, the Court proceeded to consider "which disparate impacts § 504 might make actionable." *Choate*, 469 U.S. at 299. The "proper starting point," the Court stated, was its prior decision in *Davis*, where the plaintiff's Rehabilitation Act claim was properly rejected "because the further modifications [the plaintiff] sought would have compromised the essential nature of the [nursing] program" to which she sought admittance. *Id*. at 300. This analysis in *Davis*, the *Choate* Court explained, established the following governing rule: "[W]hile a [defendant] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Id*. Put another way, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the [defendant] offers," and "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id*. at 301. But the Court reiterated that the "reasonable accommodations" needed to provide

"meaningful access" do *not* require fundamental modifications to the program. *Id*. at 300–01.

Applying these principles, the Court concluded that "[t]he 14-day limitation [did] not deny [the plaintiffs] meaningful access to [state] Medicaid services or exclude them from those services." *Choate*, 469 U.S. at 302. As the Court explained, "it cannot be argued that 'meaningful access' to state Medicaid services will be denied by the 14-day limitation on inpatient coverage," because "[t]he reduction in inpatient coverage will leave both handicapped and nonhandicapped Medicaid users with identical and effective hospital services fully available for their use, with both classes of users subject to the same durational limitation." *Id*. The Court also regarded as "simply unsound" the plaintiffs' argument that "their greater need for prolonged inpatient care means that, to provide meaningful access to Medicaid services, [the State] must single out the handicapped for *more* than 14 days of coverage." *Id*. at 302–03. As the Court put it, "[s]ection 504 does not require the State to alter [the] definition of the benefit being offered simply to meet the reality that the handicapped have greater medical needs." *Id*. at 303. At bottom, the plaintiffs sought to "redefine" the program, which went "well beyond the accommodations that are required under *Davis*." *Id*. at 308.

Consistent with *Choate*, this court has recognized that a "meaningful access" claim is simply one form of a "reasonable accommodation" claim and that "[r]easonable accommodation does not require an organization to make fundamental or substantial alterations to its programs." *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010). "[E]ntities are required only to make reasonable changes in *existing* policies in order to accommodate individuals' disabilities" and "are not required to create new programs

that provide heretofore unprovided services to assist disabled persons." *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003) (emphasis altered). "In no event is the entity required to undertake measures that would impose an undue financial or administrative burden or effect a fundamental alteration in the nature of the service." *Where Do We Go Berkeley v. California Dep't of Transportation*, 32 F.4th 852, 862 (9th Cir. 2022) (simplified) (quoting *Tennessee v. Lane*, 541 U.S. 509, 532 (2004)).

B

Under these settled principles, the panel's upholding of Plaintiffs' "meaningful access" claim and of the district court's resulting injunction squarely contravenes Supreme Court and Ninth Circuit precedent.

1

As noted, Plaintiffs' theory is that the absence of VA *housing* in the vicinity of the VA Center amounts to a discriminatory failure to accommodate their disabilities in the VA's provision of *medical care*, and their requested remedy—which the district court granted—is for the VA to undertake affirmative efforts to construct housing for them. *Powers*, 163 F.4th at 1180. The panel concluded that this unprecedented decree does not require the VA to "fundamentally alter its programs," but instead "simply expands—not alters—the program." *Id*. at 1195. This holding is legally erroneous and contrary to precedent.

"Under the test outlined in *Choate*," the court must "first consider the nature of the *benefit* [the plaintiffs] were allegedly denied." *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1210 (9th Cir. 2020) (emphasis added), *cert. dismissed*, 142 S. Ct. 480 (2021). The benefit that Plaintiffs

were allegedly discriminatorily denied here is the "medical care and treatment" provided to them by the VA. 38 U.S.C. § 7301(b); *see also* 38 C.F.R. § 17.38(a). As the panel correctly noted, *see Powers*, 163 F.4th at 1183, Plaintiffs expressly concede that the "permanent supportive housing" they seek is *not* among the "benefits" to which they are entitled under the medical program at issue. As set forth in the applicable regulations, the "medical benefits package" at issue includes "[o]utpatient medical, surgical, and mental healthcare," "[i]npatient hospital, medical, surgical, and mental healthcare," "[p]rescription drugs," and "[e]mergency care in VA facilities," and it does not include permanent supportive housing. 38 C.F.R. § 17.38(a). [5] Rather, as the panel explained, Plaintiffs' argument is that "housing is a *reasonable accommodation* that is necessary for them to access the benefits" to which they are entitled under the VA's medical program. *Powers*, 163 F.4th at 1183 (emphasis added).

Under Plaintiffs' and the panel's own view of the case, Plaintiffs' "meaningful access" claim is that the VA—in order to avoid discriminating against them in violation of § 504—must not only provide them with the medical care that the program at issue comprises, but *also* must undertake a more than $100 million project to build permanent supportive housing for them. It is unfathomable how the panel can characterize the requirement to add a completely different ancillary benefit as not "alter[ing]" the medical care program, but "simply expand[ing] it." *Powers*, 163 F.4th at

[5] The majority correctly did not rely on the view that the permanent supportive housing Plaintiffs seek counts as "domiciliary care" authorized to be provided under 38 U.S.C. § 1710(b); *see also id.* § 1701(7); 38 C.F.R. §§ 17.30(b), 17.46(b).

1195. Under any conceivable standard, the creation of this sort of new ancillary benefit program is a "fundamental or substantial modification[]" of the existing program, and is "far more than the reasonable modifications" required by § 504. *Choate*, 469 U.S. at 300; *see also Townsend*, 328 F.3d at 518 (stating that a "fundamental alteration" includes "creat[ing] new programs that provide heretofore unprovided services to assist disabled persons"). If seeking to prevent a "reduction from 20 to 14 in the number of [funded] inpatient hospital days per fiscal year," *Choate*, 469 U.S. at 289, amounted to a fundamental alteration of the underlying program in *Choate* (and therefore could not be required as an accommodation), it follows *a fortiori* that creating an obligation to provide permanent housing, where no such obligation existed before, likewise cannot properly be considered a reasonable accommodation. *See Where Do We Go*, 32 F.4th at 862–63 (holding that Caltrans program to clear homeless encampments and connect homeless persons with services would be fundamentally altered, and not merely subject to a "reasonable modification[]," by an injunction that "effectively asked Caltrans to house Plaintiffs on its property until Plaintiffs found new housing").

2

To the extent that the panel's "reasonable accommodation" holding implicitly rests on the VA's management of *other* programs for veterans, including programs involving the provision of housing, that too is legal error.

As the panel noted, the VA has undertaken the construction of supportive housing for veterans on the Campus under other authorities, including the West Los Angeles Leasing Act of 2016 ("WLALA"), Pub. L. No. 114-

226, 130 Stat. 926 (2016), as amended by the West Los Angeles VA Campus Improvement Act of 2021, Pub. L. No. 117-18, 135 Stat. 288 (2021). *See Powers*, 163 F.4th at 1174–75. The panel opinion suggests that, in light of this separate VA housing program, the district court's judgment is within the range of "reasonable modifications" that may be required by § 504 under *Choate*, 469 U.S. at 300. *See Powers*, 163 F.4th at 1195 (holding that the district court's housing injunction would not "fundamentally change [the VA's] program"). This contention fails for two main reasons.

First, as explained earlier, the relevant program here for purposes of determining whether Plaintiffs are being discriminatorily excluded from "the benefits of . . . any program or activity conducted by" the VA, 29 U.S.C. § 794(a), is the VA's *medical* program, not its separate housing program. *See supra* at 13–14. Plaintiffs do not contend that they are being discriminatorily excluded from any housing program; rather, their contention is that they need "permanent supportive housing on or near the Campus" in order to avoid being discriminatorily excluded from receiving *medical care* at the Campus. *Powers*, 163 F.4th at 1183. Indeed, in holding that Plaintiffs' claims were not barred by the jurisdiction-stripping provisions of the Veterans Judicial Review Act, 38 U.S.C. § 511, the panel placed loadbearing weight on the fact that the relevant "benefits" were medical benefits, and not housing: "Plaintiffs do *not* argue that housing is a benefit, nor have Plaintiffs requested housing from the [VA] Secretary through an administrative process. Rather, Plaintiffs contend that housing is a reasonable accommodation that is necessary for them to access the benefits the VA has already conferred to them," *i.e.*, their *medical* benefits. *Powers*, 163

F.4th at 1183 (emphasis added). On top of that, the panel (correctly) held that the "the Leasing Act and its 2021 Amendment" did not create any "judicially enforceable fiduciary duties on the VA" to build housing. *Id*. at 1991. Any housing efforts that are separately undertaken by the VA are simply not the relevant "program" for purposes of analyzing Plaintiffs' claim that, in violation of § 504, they are being discriminatorily excluded from accessing their medical benefits. And given that the relevant program is the medical program, the district court's injunction obviously effects—in violation of *Choate*'s limitations—an impermissible "fundamental or substantial modification" of that medical program by adding an ancillary housing benefit to it. *Choate*, 469 U.S. at 300.

Second, even assuming *arguendo* that the two programs could properly be considered together for purposes of assessing whether the medical program violates § 504, the panel's decision still upholds a substantial alteration of the *housing* program that unquestionably counts as a "fundamental" or "substantial" modification, and that therefore exceeds what can be required under § 504. The district court greatly expanded the size of the housing program and the funding that must be allocated to it, which further confirms that it effectuates a fundamental alteration. *See Arc of Wash. State Inc. v. Braddock*, 427 F.3d 615, 620–22 (9th Cir. 2005) (holding that requiring an expansion in the number of persons served by a state program providing certain services to the disabled would constitute an impermissible fundamental alteration).[6] Once again, if an

[6] The panel's decision wrongly downplays the amount of the expenditures ordered by the district court, noting that the "$100 million" minimum projected price tag was "only 0.02% of the VA's $407 billion

increase from 14 to 20 days of inpatient coverage counted as a fundamental change in *Choate*, *see* 469 U.S. at 301–06, then an expansion of the housing program on the scale ordered here certainly does as well.

* * *

The panel decision's extraordinary holding that a failure to provide an ancillary benefit (housing) amounts to discrimination against disabled persons with respect to the provision of medical care, is squarely contrary to Supreme Court and Ninth Circuit precedent. On that basis alone, rehearing en banc should have been granted.

III

The panel opinion's treatment of Plaintiffs' so-called *Olmstead* claim under § 504 is also deeply flawed and warranted en banc rehearing.

"In *Olmstead*, the Supreme Court interpreted the failure to provide . . . services in a community-based setting as a form of discrimination on the basis of disability . . . in violation of [Title II of] the ADA." *Townsend*, 328 F.3d at 516–17. (Although *Olmstead* was an ADA case, the panel correctly recognized that its analysis would also apply to the

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annual budget for 2024." *See Powers*, 163 F.4th at 1195. The panel's use of this all-budget-percentage benchmark directly contravenes Supreme Court authority. *See Olmstead*, 527 U.S. at 603 (plurality) ("If the expense entailed . . . is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail."). Moreover, the $100 million figure covers, not the cost of the entire injunction, but only the component involving *temporary supportive housing*, which is a fraction of the overall project. As the VA noted in its reply brief, that $100 million dollar figure alone "would consume nearly the entire annual homelessness budget" of the VA.

similarly worded provisions of the Rehabilitation Act. *Powers*, 163 F.4th at 1187 n.11.) Under certain circumstances, failing to provide such community-based care "contraven[es] the . . . ADA's 'integration regulation,' which require[s] that public entities administer services 'in the most integrated setting appropriate to the needs of qualified individuals with disabilities.'" *Townsend*, 328 F.3d at 515 (quoting 28 C.F.R. § 35.130(d)); *see also* 38 C.F.R. § 15.130(d) (imposing a similar requirement on the VA under the Rehabilitation Act); 28 C.F.R. § 41.51(d) (same for general Rehabilitation Act regulations).[7] In other words, a failure to "administer services in the most integrated setting appropriate," *Townsend*, 328 F.3d at 515 (simplified), can supply grounds for a plaintiff's claim that he or she was denied benefits based on disability in violation of the ADA, 42 U.S.C. § 12132, and the Rehabilitation Act, 29 U.S.C. § 794. The *Olmstead* Court referred to this form of discrimination as both "unjustified isolation" and "unjustified institutionalization" "of individuals with disabilities." *Olmstead*, 527 U.S. at 597.

As the Supreme Court made clear, an *Olmstead* claim is simply another species of "reasonable accommodation" claim. The liability-creating discrimination arises because, "[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given *reasonable accommodations*." *Olmstead*, 527 U.S. at 601 (emphasis added). And, as with a *Choate* meaningful access claim, an *Olmstead* claim cannot be invoked to

[7] The panel therefore erred to the extent that it concluded that the relevant integration regulation here was 28 C.F.R. § 35.130(d). *See Powers*, 163 F.4th at 1187.

require a "fundamental alteration" of the relevant program. *Id*. at 603 (four-Justice plurality); *id*. at 607 (Stevens, J., concurring in part and in the judgment) (agreeing with the plurality on this point).

For the same reasons discussed earlier, Plaintiffs' housing-construction theory entails a fundamental alteration of the relevant medical-benefits program, and it therefore cannot be sustained under *Olmstead* either. *See Townsend*, 328 F.3d at 518 (holding that *Olmstead* does not require "public entities . . . to create new programs that provide heretofore unprovided services").

But there is a further respect in which Plaintiffs' *Olmstead* claim fails as a matter of law. The panel's decision improperly extends *Olmstead* to address an entirely different category of institutionalization risks from those underlying an *Olmstead* claim. The gravamen of an *Olmstead* claim is that, because the agency only provides the relevant services in an institutional setting, "[i]n order to receive needed medical services, persons with mental disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodation." *Olmstead*, 527 U.S. at 601. The risk of institutionalization underlying an *Olmstead* claim is thus the institutionalization *associated with receiving the services offered by the agency*. But that is not the "risk of institutionalization" on which the panel relied. Instead, the panel grounded the *Olmstead* claim in the *extrinsic* risk of institutionalization associated with the "never-ending cycle of jail and hospitalization" *resulting from their homelessness*. *Powers*, 163 F.4th at 1187; *see also id*. (relying on evidence that homelessness leads to an "institutional circuit" in which persons end up in "hospitals, jails and prisons"). Because Plaintiffs' *Olmstead* claim does

not involve a claim that the VA will institutionalize them in the course of providing services, but instead relies on extrinsic risks of institutionalization by others, that claim lacks the essential ingredient of an *Olmstead* claim and fails as a matter of law for that additional reason.

IV

There is a further respect in which both Plaintiffs' meaningful access claim and their *Olmstead* claim contravene settled law. On its face, § 504(a) of the Rehabilitation Act's prohibition requires a showing that the plaintiff was denied a federal benefit "*solely* by reason of her or his disability." 29 U.S.C. § 794(a) (emphasis added). Plaintiffs' housing-construction claims plainly fail this requirement as a matter of law.

We have recognized that "[t]he causal standard for the Rehabilitation Act is . . . strict[], demanding that [a plaintiff] show that she was denied services 'solely by reason of' her disability." *Martin v. California Dep't of Veterans Affs.*, 560 F.3d 1042, 1049 (9th Cir. 2009); *see also*, *e.g.*, *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013) ("The causal standard for the Rehabilitation Act is even stricter [than that contained in Title II of the ADA], requiring a plaintiff to show a denial of services 'solely by reason of' disability." (simplified)). Here, the multiple programmatic considerations that inhere in any decision whether to undertake additional forms of housing construction, together with the wide variety of life circumstances that confront the class members, refute any notion that the VA's failure to undertake such a program can be said to be caused "*solely* by reason of [Plaintiffs'] disabilit[ies]." 29 U.S.C. § 794(a) (emphasis added).

Plaintiffs' meaningful access and *Olmstead* claims both fail as a matter of law for lack of the requisite causal link.

Our decision in *Weinreich v. Los Angeles County Metropolitan Transportation Authority*, 114 F.3d 976 (9th Cir. 1997), confirms this conclusion. In that case, the plaintiff, Robert Weinreich, sought exemption from a rule of the Los Angeles County Metropolitan Transportation Authority ("MTA") requiring him to continually recertify his disability in order to participate in a fare-reduction program. *Id*. at 978. Weinreich argued that the recertification requirement violated § 504 "on the ground that he is indigent and cannot afford to pay a private doctor to recertify his disability." *Id*. We rejected Weinreich's § 504 claim, reasoning that he did not show discrimination "solely by reason of [his] disability." *Id*. at 978–79 (citation omitted). Rather, Weinreich's exclusion from the fare-reduction program was based at least in part on "his inability to satisfy a condition of eligibility because of his financial circumstances." *Id*. at 979. Since Weinreich could not satisfy § 504's "sole[]" causation requirement, the MTA was "not required under the . . . Rehabilitation Act to make reasonable modifications to the Program's eligibility requirements." *Id*. Similar reasoning applies here. Plaintiffs allege that they have "difficulty accessing healthcare when they don't have a stable place to live," *Powers*, 163 F.4th at 1186, because homelessness makes tasks like keeping appointments and staying in contact with doctors more difficult. As in *Weinreich*, Plaintiffs' inability to access the VA Center does not flow "solely" from the VA's failure to build the desired housing, but from the many individualized problems that each class member confronts. *See also Martin*, 560 F.3d at 1048–49 (upholding verdict rejecting Rehabilitation Act § 504 claim where the denial of services was attributable to multiple

factors, including a "lack of resources and space to provide the level of care that [the plaintiffs' decedent] required").

V

For reasons that should be apparent from the foregoing discussion, the panel also erred in upholding the district court's certification of a class under Federal Rule of Civil Procedure 23(b)(2).

The irreducible minimum of a valid class is "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (citation omitted). This requirement, referred to as commonality, "requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Id*. at 349–50 (citation omitted). It is from the class members' shared injury that "the capacity of a class-wide proceeding to generate common answers" arises. *Id*. at 350 (citation omitted) (emphasis altered). Correspondingly, "[d]issimilarities within the proposed class are what have the potential to impede the generation of common answers." *Id*. (citation omitted).

The district court certified a Rule 23(b)(2) class defined as "[a]ll homeless veterans with Serious Mental Illness [SMI] or Traumatic Brain Injuries [TBI], who reside in Los Angeles County." In upholding the district court's conclusion that this class satisfied the commonality requirement, the panel relied on the assertedly common question of whether, as a result of the "VA's failure to provide supportive housing on or near the Campus," "members of Plaintiffs' putative class are denied meaningful access to necessary healthcare services and placed at serious risk of institutionalization." *Powers*, 163 F.4th at 1185. But whether any individual class member needs permanent

supportive housing as a *reasonable accommodation* in connection with the VA's provision of medical services plainly entails an individualized inquiry into the particular circumstances of each class member. *See*, *e.g.*, *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999) ("Whether a particular accommodation is reasonable depends on the circumstances of the individual case." (citation omitted)).

Indeed, a cursory survey of even the *named* Plaintiffs reveals sharp dissimilarities among class members, as well as direct admissions that Plaintiffs have not "suffered the same injury." *Dukes*, 564 U.S. at 350. Most fundamentally, although the class definition focuses on shared mental-health conditions, many Plaintiffs have distinct medical conditions that seem likely to require tailored treatment. By way of a few brief examples, one named Plaintiff has the disability of "PTSD, a result of . . . trauma experienced during his Army service," as well as "service-connected [] sleep apnea and tinnitus"; another named Plaintiff's disabilities include "multiple sclerosis," in addition to "Bipolar II, PTSD, polysubstance use disorder, anxiety, and depression"; and another unnamed Plaintiff has the disability of "severe migraine headaches and tinnitus."

Additionally, multiple named Plaintiffs lived on the Campus at the time of trial—including one who had elected to cease his medical treatment with the VA despite his continued residence there—while others did not. Two Plaintiffs "leas[ed] a housing unit with assistance from" a VA-provided voucher, while the others did not. And moving beyond the named Plaintiffs, the VA has other medical facilities within the class-defining Los Angeles County, near which some class members may currently reside.

It is evident that not every individual class member will require, as a reasonable accommodation, permanent housing next to the Center to the same extent, or in the same fashion, in order to have "meaningful access" to VA-provided healthcare. Under the class definition the panel approved, one class member might have "severe migraine headaches and tinnitus," receive a VA-provided housing voucher, and live near another VA medical facility, while another might have "multiple sclerosis" and "Bipolar II" and live far from any VA facility. Although both would equally fall under the approved class definition, it is obvious that the inquiry into what is required to provide each class member with "meaningful access" to healthcare will "depend[] on the individual circumstances of each case, and require[] a fact-specific, individualized analysis." *Mark H.*, 620 F.3d at 1098 (simplified).

* * *

For the foregoing reasons, the panel's decision disregards the limitations that the Supreme Court has placed on disability discrimination claims asserted under § 504 of the Rehabilitation Act. We should have reheard this important case en banc. I dissent from our failure to do so.

BUMATAY, Circuit Judge, joined by VANDYKE and TUNG, Circuit Judges, dissenting from denial of rehearing en banc:

Judges cannot replace their black robes with yellow hard hats, bulldozing over the clear dictates of the law. Defying plain text and class action procedure, the district court here ordered an injunction that requires an unrecognizable, large-scale transformation of the Department of Veterans Affairs' ("VA") provision of medical services to disabled veterans on its West Los Angeles Campus. *See Powers v. McDonough*, 163 F.4th 1162, 1180 (9th Cir. 2025). Under the injunction's unprecedented terms, the VA must build *thousands* of housing units and spend *$100 million*—nearly all of the money it had budgeted to tackle homelessness in the greater Los Angeles area. *See id.* at 1195. All this to comply with a district court's whims as to how to provide "meaningful access" to the VA's services for *every* homeless veteran with severe mental illness or traumatic brain injuries in the most populous county in the nation. *Id.* at 1186–88.

And the VA must build this housing under the district court's continuing micromanagement—dictating everything from where to place portable toilets to where to install a new pickleball court. *See* Hr'g on Inj. Relief Tr. at 15:9–16, Dkt. 349, *Powers v. McDonough*, No. 22-cv-08357 (C.D. Cal. Oct. 8, 2024) ("[T]here's no reason that I even have to hook up to sewer. I can run portable toilets in and showers in and I prefer to do that on a temporary basis and get people off the streets. . . . [I]f we can put 40 or 50 or 60 modular 400-square-foot on that acreage, then there's no reason that we can't bring in temporary showers and temporary toilets and get these folks out of the rain and then we can worry about the sewer problem."); *see also* Hr'g on Inj. Relief Tr. at 10:9–12, Dkt. 327, *Powers*, No. 22-cv-08357 (C.D. Cal.

Oct. 2, 2024) ("Over the weekend, I've had some thoughts whether [certain tennis courts] might be converted to one pickleball court [because] maybe the veterans are a lot older and they can't play tennis[.]"). Simply, this is preposterous. Courts are not "roving commissions whose aim is to 'do the right thing.'" John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 Calif. L. Rev. 1121, 1140–41 (1996).

Judge Collins provides a persuasive explanation as to why Plaintiff-Appellees' claims should fail on the merits. But the panel's errors are even more fundamental. First, in affirming the district court's expansive injunction, the panel took as given that the Rehabilitation Act includes an implied right of action. *See Powers*, 163 F.4th at 1186–88 (approving a so-called "Meaningful Access Claim" and other claims under the Rehabilitation Act without any reference to statutory text). But no such right exists under the plain text of the law—instead, we created one out of whole cloth. *See Doe v. Att'y Gen.*, 941 F.2d 780, 786–87 (9th Cir. 1991), *abrogated in part by Lane v. Pena*, 518 U.S. 187 (1996). We should have taken this opportunity to correct that error. Second, the panel reduced the class-action commonality requirement under Rule 23(a)(2) to a mere pleading exercise. The panel affirmed commonality by simply asking whether the VA's actions "affect[]" the putative class members, *Powers*, 163 F.4th at 1185—no matter the significant differences in medical, economic, personal, and geographic circumstances among the homeless individuals making up the class. That violated Article III, not just Rule 23(a)(2).

To begin, the Rehabilitation Act includes no private right of action to compel federal agencies to provide disabled persons "meaningful access" to federal programs and

activities, whether express or implied. The Rehabilitation Act prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). In turn, the Act establishes that 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 any recipient of Federal assistance or Federal provider of such assistance." *Id.* § 794a(a)(2). So the plain text of the Rehabilitation Act limits remedies in two important ways. First, while the Act broadly establishes liability for actions "by any Executive agency," *id.* § 794(a), it narrows remedies against the federal government only to instances when it acts as a "Federal provider of [funding] assistance," *id.* § 794a(a)(2). Second, the Act restricts remedies to those found in Title VI of the Civil Rights Act of 1964. *Id.* But Title VI only *creates* remedies that extend to federal agencies' decisions "to terminat[e] or refus[e] to grant or to continue financial assistance." 42 U.S.C. § 2000d-2. Thus, "[a]lthough the Rehabilitation Act prohibits discrimination by executive agencies acting as both grant providers and regulators, it authorizes an express private right of action to enforce only the grant-making provision." *Moya v. U.S. Dep't of Homeland Sec.*, 975 F.3d 120, 128 (2d Cir. 2020) (citing 29 U.S.C. § 794a). On top of this, Congress provided other methods to enforce the Rehabilitation Act's anti-discrimination aims—(1) by directing agency heads to "promulgate such regulations as may be necessary to carry out the" prohibition, 29 U.S.C. § 794(a), and (2) by allowing suits against executive agencies to proceed under the Administrative Procedure Act ("APA"). *See Moya*, 975 F.3d at 128. That Congress failed to provide a cause of

action for alleged discrimination in federal agencies' operation of federal programs, but *did* expressly do so for agencies' funding decisions, makes clear that courts shouldn't imply such a remedy from the statute. *See FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd*, 146 S. Ct. 1546, 1553 (2026).

Relying heavily on legislative history and the apparent purpose of the Rehabilitation Act, however, the Ninth Circuit has enacted what Congress did not—a private right of action against allegedly discriminatory federal programs. *Doe*, 941 F.2d at 785–87. But the Supreme Court has repeatedly "rejected the practice of fashioning rights of action as we see fit." *Cisco Sys., Inc. v. Doe I*, 146 S. Ct. 1882, 1890 (2026) (simplified). And whatever the use of legislative history, it "is not the law." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). It can never supersede the plain meaning of statutory text. *See id.* No wonder every other circuit court that has reviewed this issue has rejected a private right of action against federal programs under the Rehabilitation Act. *See Moya*, 975 F.3d at 127–28; *Clark v. Skinner*, 937 F.2d 123, 126 (4th Cir. 1991); *Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 610–11 (1st Cir. 1989) (en banc) (Breyer, J.); *cf. Smith v. Mich. Dep't of Corr.*, 159 F.4th 1067, 1082 (6th Cir. 2025) (rejecting an implied cause of action for retaliation under the Rehabilitation Act). We should have overruled our incorrect precedent and gotten out of the sordid business of judicial lawmaking. The era of judicially manufactured causes of action is over.

Second, expanding on a single sentence of an outdated and little-reasoned circuit precedent, the panel short-circuited any meaningful analysis of the class-action commonality requirement. *See Powers*, 163 F.4th at 1185

(relying on *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *abrogated in part on other grounds by Johnson v. California*, 543 U.S. 499 (2005)). *Armstrong* dealt with a class of disabled prisoners and parolees suing a state parole authority for disability accommodations during their parole proceedings. 275 F.3d at 855–57. In a fly-by-night analysis, the *Armstrong* panel decided that Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement was satisfied because the plaintiff class had made a civil-rights challenge to a "system-wide practice or policy that affect[ed] all of the putative class members." *Id.* at 868 (simplified). By doing so, the *Armstrong* panel made quick work of any "individual factual differences among the individual litigants" that might have existed. *Id.*

Armstrong's thin reasoning allowed this panel to dodge any real analysis as to whether this putative class actually satisfied Rule 23 commonality. Here, the putative class is defined as "[a]ll homeless veterans with [serious mental illness] or [traumatic brain injuries], who reside in Los Angeles County." And it sought permanent supportive housing on the VA's West Los Angeles campus to accommodate its members' medical needs. The panel parroted *Armstrong* and upheld certification on the grounds that, "in civil-rights suits," commonality "is satisfied 'where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members.'" *Powers*, 163 F.4th at 1185 (quoting *Armstrong*, 275 F.3d at 868). The panel then made the bare assertion that the VA's failure to build housing on its West L.A. Campus was such a "system-wide practice or policy." *See id.* The panel called it a day without considering that the members of this expansive class would require vastly different reasonable accommodations under the Rehabilitation Act.

This can't be right. It would defy reason to assert that thousands of disabled homeless veterans in Los Angeles County each lacked "meaningful access" to the West L.A. Campus for the same reason—if they lacked access at all. For each plaintiff, was it discrimination against disability that prevented them from accessing the VA's services (as Plaintiff-Appellees contend)? Or was it something else—such as the hours-long bus ride to get to the West L.A. Campus from some parts of Los Angeles? All these differences are buried under the panel's approach—just label a government action "a system-wide practice or policy," read "affects" as broadly as possible, and voilà, a class appears. The result—Rule 23 commonality is satisfied whenever any diverse set of individuals is "affected" by a policy, no matter how remotely, tenuously, or abstractly. This rule flouts basic principles of Article III standing, violates the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and ignores *Armstrong*'s distinctive factual context.

Each of these errors is sufficient to require reversal. Because we should leave the creation of private causes of action to Congress, and because we must strictly adhere to the commonality requirement for class actions, I respectfully dissent from the denial of rehearing en banc.

I.

Private Right of Action

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 *et seq.*), is a landmark piece of civil rights legislation. One of the Rehabilitation Act's many laudable purposes is to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and

integration into society." 29 U.S.C. § 701(b)(1). The Rehabilitation Act promises that Americans will not be denied access to programs on the basis of disability:

> No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected 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.

Id. § 794(a). The Rehabilitation Act expressly tasks federal agencies with promulgating regulations to carry out its anti-discrimination mandates, *id.*, authorizes the Secretary of Education to offer technical funds or assistance to public agencies and nonprofits to remove barriers confronted by those with disabilities, *see id.* §§ 705(33), 794b(a), (c), and provides "aggrieved" employees and other persons with private causes of action for disability-based discrimination in employment, *see id.* 794a(a)(1).

But the Rehabilitation Act does *not* create a private right of action that would allow litigants to sue federal agencies for disability discrimination where those agencies are running their own operations or providing other services. That much is clear from an examination of the section of the Rehabilitation Act that expressly deals with remedies. That section creates a remedial scheme against entities receiving federal funds, as well as against federal agencies in their *funding* capacities:

> 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 794 of this title.

29 U.S.C. § 794a(a)(2). Nothing in the text permits a litigant to sue the federal government for alleged discrimination where the government itself provides the services.

That's decisive. In our system of separated powers, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001). After all, only "the people's elected representatives" are suited to the "job of resolving how best to weigh th[e] competing costs and benefits" of private enforcement actions. *Medina v. Planned Parenthood S. Atl.*, 606 U.S. 357, 369 (2025). As with other laws, a court's task is to interpret these provisions, not to amend them. *See Hernandez v. Mesa*, 589 U.S. 93, 100–01 (2020).

The key inquiry is whether the statute itself grants "a private remedy." *Alexander*, 532 U.S. at 286. That's an exercise in statutory interpretation: If a statute "does not displa[y] an intent to create a private remedy, then a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Ziglar v. Abbasi*, 582 U.S. 120, 133 (2017) (simplified). "When Congress creates a private right of action, it usually does so expressly." *FS Credit*

Opportunities Corp., 146 S. Ct. at 1552. And given that courts are no longer permitted to conjure up remedies by gesturing at statutory purpose, *see Alexander*, 532 U.S. at 287, any private right of action that is not explicitly granted must be fairly implied by the statute's text.

Here, no one argues that the Rehabilitation Act contains an express right of action against the federal government for discrimination in running its programs. So Plaintiff-Appellees' only hope is to demonstrate that the statutory text reveals an implied right of action. But that's a particularly steep showing given that the Rehabilitation Act was enacted under the Spending Clause, *see Barnes v. Gorman*, 536 U.S. 181, 189 n.3 (2002), which means it is "especially unlikely" to "confer an enforceable right," *Medina*, 606 U.S. at 369.

In fact, the Rehabilitation Act's text shows Congress intended to confine private remedies to limited circumstances. Where the Rehabilitation Act *does* provide express private rights of action, it does so for *only* two specific types of discrimination. The first relates to employment discrimination. *See* 29 U.S.C. § 794a(a)(1). Notably, the provision applies sweepingly to "*any* complaint" by "*any* employee or applicant for employment." *Id.* (emphasis added). The second applies to persons aggrieved by funding decisions. *See id.* § 794a(a)(2). Unlike the employment provision contained in § 794a(a)(1), the funding provision is circumscribed. As stated above, under § 794a(a)(2), persons aggrieved "by any recipient of Federal assistance or Federal provider of such assistance" can invoke "[t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act."

We know that § 794a(a)(2)'s private right of action is limited to the federal government's funding decisions—not

its general programs and activities—for two reasons. First, in contrast to § 794(a), which broadly prohibits discrimination in "any program or activity conducted by any Executive agency," § 794a(a)(2)'s remedies apply narrowly to only the federal government's role as "Federal provider of such assistance." This difference in language means something. As the Supreme Court has said in the context of the waiver of sovereign immunity,

> The language of § [794a](a)(2), the remedies provision, is telling. In that section, Congress decreed that the remedies available for violations of Title VI would be similarly available for violations of § [794](a) "by any recipient of Federal assistance or Federal provider of such assistance." 29 U.S.C. § 794a(a)(2). This provision makes no mention whatsoever of "programs or activities conducted by any Executive agency," the plainly more far-reaching language Congress employed in § [794](a) itself. Whatever might be said about the somewhat curious structure of the liability and remedy provisions, it cannot be disputed that a reference to "Federal providers" of financial assistance in § [794a](a)(2) does not, without more, establish that Congress has waived the Federal Government's immunity against monetary damages awards beyond the narrow category of § [794](a) violations committed by federal funding

> agencies acting as such—that is, by "Federal providers."

Lane, 518 U.S. at 192–93 (simplified). Simply, if Congress wanted remedies for all § 794(a) violations by the federal government, it could have easily adopted the sweeping language of § 794a(a)(1) or the broader description of the federal government in § 794(a). *See id.* at 193. Instead, we have a narrow provision of claims against the federal government as "Federal provider" of funds. Thus, the Court interpreted § 794a(a)(2) as applying only to the federal government's "*funding activities*." *Id.* at 195.

Second, § 794a(a)(2) only grants the remedies of "title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq*)." 29 U.S.C. § 794a(a)(2). Title VI "preserves whatever general right to judicial review other laws provide," *Dorsey v. U.S. Dep't of Lab.*, 41 F.3d 1551, 1554 (D.C. Cir. 1994), but it otherwise only extends judicial review to agency actions "terminating or refusing to grant or to continue financial assistance." 42 U.S.C. § 2000d-2. That's it. It creates no private rights of action for other government activities. *Cf. Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 191 (4th Cir. 1999) (holding that 42 U.S.C. § 2000d-1 does not create a private right of action); *Dorsey*, 41 F.3d at 1554 (holding that 42 U.S.C. § 2000d does not waive sovereign immunity for money damages claims). In short, nothing in Title VI creates a remedy against the federal government for its programs, activities, and operations unrelated to its grant-making function.

And the text of the Rehabilitation Act gives another indication that there's no such private right of action. Recall that when Congress creates a detailed remedial scheme, that

strongly suggests courts should not recognize remedies that were not expressly provided for, even where there is substantive rights-creating language. *Alexander*, 532 U.S. at 290. That makes sense—while the Supreme Court has instructed us to assess whether "a statute use[s] 'rights-creating language' aimed at protecting 'a particular class of persons,'" *FS Credit Opportunities Corp.*, 146 S. Ct. at 1553 (simplified), such language is "necessary" but not "sufficient" to infer congressional intent to create a private judicial remedy, *In re Wild*, 994 F.3d 1244, 1255 n.11 (11th Cir. 2021) (en banc) (Newsom, J.) (simplified); *accord Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 71 (1st Cir. 2017).

Such a remedial scheme is present here. For one thing, the Rehabilitation Act creates a regulatory framework for federal agencies to comply with its anti-discrimination mandates. 29 U.S.C. § 794(a); *see, e.g.*, 28 C.F.R. § 35.130(d) (requiring public entities to provide their services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities"). So Congress wanted the Executive branch to police itself and others in enforcing the Act's anti-discrimination design. Next, Congress provided a vehicle to sue Executive agencies through the APA, allowing aggrieved persons to challenge agency actions contrary to law. *See* 5 U.S.C. § 706. And Congress allows the Secretary of Education to offer technical expertise and funding to States, agencies, and non-profits to reduce "barriers" faced by disabled persons. 29 U.S.C. § 794b(a), (c). Thus, while the Rehabilitation Act contains rights-granting language, *see id.* § 794(a), those rights are channeled through a separate remedial scheme.

It's a given in statutory interpretation that "to express or include one thing implies the exclusion of the other."

Expressio unius est exclusio alterius, Black's Law Dictionary (12th ed. 2024). So the fact that Congress contemplated multiple enforcement mechanisms for the Rehabilitation Act, including express causes of action for two specific scenarios (discrimination in employment and funding), reinforces that Congress did not create a private cause of action for discrimination when the government operates federal programs. And the Court has instructed us that "language establishing an express remedial scheme elsewhere in the statute may foreclose a private cause of action to enforce even those statutes that admittedly create substantive private rights." *FS Credit Opportunities Corp.*, 146 S. Ct. at 1553 (simplified). So, "[i]n the absence of strong indicia of a contrary congressional intent," we must "conclude that Congress provided precisely the remedies it considered appropriate"—no more, no less. *Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). The statute is clear. Its remedies do not include a private right of action for disability discrimination against federal agencies administering federal programs.

Many circuits have come to a similar conclusion. More than 35 years ago, then-Judge Stephen Breyer held for the First Circuit—sitting en banc for good measure—that the Rehabilitation Act's text precluded a private cause of action against the Department of Transportation's "refusal to amend, modify, or waive its regulation preventing [the deaf plaintiff] from driving a truck." *Cousins,* 880 F.2d at 605. Then-Judge Breyer observed that the Rehabilitation Act "is silent about whether and how a person injured by the government *as regulator* is to enforce the Act against the government." *Id.* In concluding that the Rehabilitation Act contains no implied private right of action for such circumstances, he reasoned that since judicial review is

already generally available against federal agencies under the APA, there was no need to "strain" to find an implied cause of action in the Rehabilitation Act. *Id.* at 610.

A few years later, the Fourth Circuit ruled similarly. As in *Cousins*, the Fourth Circuit dealt with the issue in the context of a suit brought by a disabled truck driver against the Department of Transportation. *Clark*, 937 F.2d at 124–25. And, again like the First Circuit, the Fourth Circuit rejected finding an implied cause of action under the Rehabilitation Act. It concluded that plaintiffs cannot sue for non-employment discrimination claims against the federal government where the government acts as a regulator. *Id.* at 125. It reasoned that the APA provided sufficient judicial review for claimants who first exhausted their administrative remedies. *Id.* at 126.

More recently, the Second Circuit ruled that two applicants for citizenship could not sue the government under the Rehabilitation Act for disability exemptions from their civics and English testing requirements. *Moya*, 975 F.3d at 124. The Second Circuit started with the principle that whether an implied cause of action exists is a matter of statutory text. *Id.* at 128. It then considered the lack of a general cause of action against federal agencies in the Rehabilitation Act, the existence of alternative remedies (including express causes of action against federal agencies as to their "grant-making" capacities), and the availability of judicial review under the APA against federal agencies. *Id.* Considering all this, the Second Circuit concluded that the "Rehabilitation Act does not evince a 'clear manifestation of congressional intent' to create a private right of action against executive agencies acting in their regulatory capacity." *Id.* (simplified).

We are on the wrong side of this lopsided circuit split. In 1991, we held that a physician had a cause of action under the Rehabilitation Act against the Justice Department and the FBI when they refused to send agents to him for examinations after it was discovered he had AIDS. *Doe*, 941 F.2d at 782, 794–95. We recognized that no statutory text expressly established a cause of action. *See id.* at 787. And elsewhere in *Doe*, we even acknowledged that sovereign immunity erects a higher bar for implying a private right of action. *Id.* at 789. But we did not know when to give up—we charged forward, wielding floor statements by individual legislators to assert that "Congress knew" some courts had interpreted the Act to provide an implied private cause of action. *Id.* at 786–87. We also relied on a single question asked by one Senator to similarly decide that Congress had intended for the Act to offer a broad remedy for all instances of disability discrimination. *Id.* at 787 ("In the congressional debates on section [794a], Senator Bayh asked and Senator Cranston confirmed that 'section [794a] merely extends to the handicapped the same remedies, procedures and rights already extended' through Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972." (simplified)). We then rode this swell of assumptions and legislative history to conclude that "the most reasonable interpretation" of the Rehabilitation Act was to make the federal government just as liable as private individuals. *Id.* at 791; *see also id.* at 791–93 (extensively examining House and Senate floor debates among individual legislators). But "at the very best," this legislative history was "ambiguous." *Dorsey*, 41 F.3d at 1555 (criticizing the Ninth Circuit's analysis). We even admitted that "the debates do not state outright that [§ 794(a)] subjects federal agencies to private actions for

money damages," *Doe*, 941 F.2d at 792, despite reasoning that the debates "unequivocally express Congress's intent to do precisely that," *id.* at 793.

Doe's reading of the Rehabilitation Act flies in the face of the Supreme Court's repeated admonitions not to imply causes of action where the text does not provide for them, *Cisco Sys.*, 146 S. Ct. at 1890, and not to rely on individual legislators' statements to change the plain meaning of statutes, *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017) ("[F]loor statements by individual legislators rank among the least illuminating forms of legislative history." (simplified)). So while the Supreme Court has sometimes heard cases considering implied Rehabilitation Act suits against private or state entities, *see, e.g.*, *Cummings v. Premier Rehab Keller, P.L.L.C.*, 596 U.S. 212, 217–18 (2022), we should not extend precedent beyond what the Court has expressly recognized. Given that "judicially created causes of action offend the separation of powers in almost every circumstance," *Cisco Sys.*, 146 S. Ct. at 1891, the better course is always to follow the plain text of the law. *See Cummings*, 596 U.S. at 230–31 (Kavanaugh, J., concurring) ("Congress, not this Court, creates new causes of action. And with respect to existing implied causes of action, Congress, not this Court, should extend those implied causes of action and expand available remedies." (simplified)). To do otherwise would aggrandize courts at the expense of the legislature. It would also undermine Congress's carefully crafted remedial schemes, which balance accountability and sovereignty. The Rehabilitation Act's text simply does not permit a private cause of action against federal agencies operating federal programs. Our precedent to the contrary should be overruled.

Plaintiff-Appellees ask us to ignore this wall of authority, claiming that *Cousins*, *Clark*, and *Moya* involved the government acting as a "regulator" rather than as a provider of services, as here. Similarly, *Doe* tried to brush off *Cousins* by claiming that a distinction exists under the Rehabilitation Act when the government acts in its "propriety capacity" rather than in its "administrative or regulatory capacities." *See* 941 F.2d at 793. But this distinction was created out of thin air. Nothing in the text of the Rehabilitation Act supports this dividing line: just as § 794a(a)(2) says nothing about agencies acting in their "regulatory" capacities, it says nothing about agencies acting in their "proprietary" capacities. And in pressing its distinction, *Doe* doubled down on the idea that the Rehabilitation Act was meant to provide for *damages* claims against the federal government. *See* 941 F.2d at 793. That conclusion—again rooted in freewheeling legislative history, *see id.* at 794—was rejected by the Supreme Court only a few years later. *See Lane*, 518 U.S. at 197. And for what it's worth, our court largely abandoned the proprietary/regulatory distinction almost immediately. *See J.L. v. Soc. Sec. Admin.*, 971 F.2d 260, 269 (9th Cir. 1992), *overruled in part by Lane*, 518 U.S. 187 ("*Doe*'s conclusion that Congress intended to permit private suits against the government did not turn on the proprietary/regulatory distinction.").

Finally, Plaintiff-Appellees argue that the federal government waived this argument by not pressing it before the panel. But the federal government sufficiently preserved this issue for review. While it primarily focused on whether the Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4113 (codified as amended at 38 U.S.C. § 7251 *et seq.*), stripped us of subject-matter jurisdiction, the

federal government made clear in its opening brief an intent to challenge in "an appropriate case" this court's precedent holding that the Rehabilitation Act provides an implied private right of action against federal programs. *See* Opening Br. 30 n.2 (citing *Doe*, 941 F.2d at 787). And in its petition for rehearing en banc, the federal government confirmed that this is now "an appropriate case." That's because we could not have reconsidered *Doe* at the panel stage, so the government's request to do so would have been "futile." *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc). In any event, "we have the authority and discretion to decide questions first raised in a petition for rehearing en banc" and "we have done so at the government's request." *Id.* at 1159–60 (simplified). Both parties addressed this pure question of law in their en banc petition briefing, so nothing bars us from considering the question as an en banc court. *See Lee v. Fisher*, 70 F.4th 1129, 1154 (9th Cir. 2023) (en banc). Indeed, when the issue is of great "importance" (as this one no doubt is), we should feel obliged to do so. *Id.*

II.

Class-Action Commonality

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 564 U.S. at 348 (simplified). Though class actions can create efficiencies for courts and parties, they also raise distinct dangers. *See, e.g.*, *Kincannon v. United Airlines, Inc.*, 168 F.4th 713, 735 (5th Cir. 2026) (Willett, J., concurring in part and concurring in the judgment). Opportunistic litigants hungry for damages may assert themselves as leaders of classes that didn't ask to be led, creating undue pressures on defendants to settle for

fear of a ruinous judgment. *See, e.g.*, *id.*; *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (en banc) (Lee, J., dissenting) ("If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses."). The prospect of injunctive relief against the government on behalf of large classes can convert courts into quasi-legislators, effectively allowing judges to make policy choices on behalf of thousands—or even millions—of people. *See Trump v. CASA, Inc.*, 606 U.S. 831, 867–68 (2025) (Alito, J., concurring). To that end, we must treat class certification with care.

So we must meticulously enforce the prerequisites for maintaining class actions set forth in Federal Rule of Civil Procedure 23(a). One of those prerequisites is commonality: class plaintiffs must show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). This means that there must be a "common contention" whereby the "determination of its truth or falsity will resolve an issue . . . in one stroke." *Wal-Mart*, 564 U.S. at 350 (simplified). So, to satisfy commonality, the issue isn't just whether class plaintiffs raise "common questions," but whether they have shown "the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (simplified).

In this case, the certified class was defined as all "homeless veterans" with serious mental illness or traumatic brain injuries residing in Los Angeles County. *Powers*, 163 F.4th at 1179. The putative class asserted that the VA's failure to provide housing near its West L.A. Campus resulted in systematic discrimination against the putative class members in violation of the Rehabilitation Act. *Id.* at

1185; *see also id.* at 1179–80. The VA argued that the class definition failed commonality under Rule 23(a)(2) because the Rehabilitation Act claims necessarily turned on each veteran's individual circumstances and thus the class action couldn't generate common answers to resolve the litigation. *Id.* at 1184–85. Relying on *Armstrong*, the panel approved of the class because "Plaintiffs challenge the VA's failure to provide permanent housing on or near the Campus, a system-wide practice that Plaintiff-Appellees claim is discriminatory and that affects all of the putative class members." *Id.* (simplified). According to the panel, that was enough. *Id.* Any differences between the individual veterans, the panel said, "merely relate to the *degree* to which each class member was denied meaningful access to healthcare and their risk of institutionalization." *Id.* at 1185 n.10.

The panel's ruling missed the mark in three different ways. First, it allowed the district court to exceed its own jurisdiction by certifying a class action in which the class members did not share common Article III injuries. Second, it conflicted with the Supreme Court's clear instructions in *Wal-Mart* about how to interpret Rule 23(a)(2). And third, it expanded *Armstrong*'s broad language invoking "system-wide" effects so that the commonality requirement was stretched beyond its limits. I discuss each in turn.

A.

Article III Standing

The greatest flaw with the panel's expansive view of class actions is that it created commonality between injured and uninjured class members. Two of the most important checks on our powers as federal judges are that we can only decide "concrete disputes between an injured plaintiff and a

defendant according to the law," *Washington v. Trump*, 145 F.4th 1013, 1041 (9th Cir. 2025) (Bumatay, J., concurring in part and dissenting in part), and "that we may only grant party-specific relief," *id.* at 1040. These checks "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (simplified). At the end of the day, "[t]he Founders left non-particularized challenges to disfavored policy to the ballot box—not the courts." *Washington v. Trump*, 145 F.4th at 1041 (Bumatay, J., concurring in part and dissenting in part). So "we must resist the temptation to expand our authority by . . . allowing . . . jurisdictional end-runs." *Id.*

"The federal court system is reserved only for those that have suffered an injury" cognizable under Article III. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 791 n.7 (9th Cir. 2021), *vacated on reh'g en banc*, 31 F.4th 651 (9th Cir. 2022); *see FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). A class action is no different. *See Olean Wholesale Grocery Coop.*, 993 F.3d at 791 n.7; *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 446 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."); *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 352 (6th Cir. 2025) (en banc) (Nalbandian, J., concurring) (determining, after surveying historical practice, that a district judge who "certifies a class containing individuals who lack Article III standing" risks committing an ultra vires act). That's why "[t]he presence of uninjured parties in a certified class . . . raises serious standing implications under Article III." *Olean Wholesale Grocery Coop.*, 993 F.3d at 791 n.7. After all, "if there are members of a class that aren't even

injured, they can't share the same injury with the other class members." *Lab'y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 332 (2025) (Kavanaugh, J., dissenting) (simplified). In sum, Article III places limits on commonality under Rule 23 and prohibits us from approving an expansive class like the one here.

The class definition of all Los Angeles County disabled homeless veterans exceeded what Article III permits. The class necessarily swept in veterans who would refuse permanent supportive housing if offered or who don't seek medical treatment at the West L.A. Campus at all. Also included were veterans who don't require any accommodations because they already reside at or near the West L.A. Campus.

Take plaintiff Lavon Johnson, a veteran with PTSD (and other conditions). Mr. Johnson *already* lives on the grounds of the West L.A. Campus. He receives regular medical care at his unit. When asked if living on Campus made it easier to access healthcare services, he responded that his housing "put [him] in a place where they can find [him]." With this testimony, it's hard to see how he's an injured member of the putative class.

Or take plaintiff Laurieann Wright, who illustrates another standing problem. She suffers from PTSD and lives in VA-affiliated housing in Lancaster—almost 65 miles away from the West L.A. Campus. Ms. Wright apparently could travel to the Campus, but she indicated that sitting in traffic or on a train for hours is painful because of her physical disabilities. Thus, it's not clear that the VA's failure to provide housing has solely injured Ms. Wright—rather, her physical disabilities play a role. So even if she is injured by the VA's actions, her claims require a different

analysis than those of a veteran without physical disabilities or a long commute.

Contrary to the panel's assertion, these individual circumstances aren't mere differences in "*degree*" of injury. *Powers*, 163 F.4th at 1185 n.10. Some putative class members suffered no injury at all. Others may have suffered injuries but can't trace them to the VA's alleged discriminatory practices. Still others may have injuries not redressed by the district court's injunction. The panel ignored this jurisdictional problem by taking a sweeping view of what "affects" class members. *Id.* at 1185. This conflated *effects* with *injuries*. Even if a challenged policy "affects" an individual, it doesn't necessarily "injure" that individual for Article III purposes.

B.

Impact of *Wal-Mart*

Even more, the panel's reliance on *Armstrong* conflicted with the Supreme Court's teachings in *Wal-Mart*. The government contested the commonality of Plaintiff-Appellees' two sets of class claims—the "meaningful access claims" and the so-called "*Olmstead* claims," named for *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999). The panel botched the commonality inquiry for both.

In assessing commonality, *Wal-Mart* instructs that a putative class must establish that class members "have suffered the same injury." 564 U.S. at 350 (simplified). Once again, this requires a showing that the class action will "generate [a] common answer[]" to "an issue that is central to the validity of each one of the [class members'] claims in one stroke." *Id.* (simplified). That goes well beyond a showing "merely that [class members] have all suffered a

violation of the same provision of law." *Id.* And the showing is necessarily fact-intensive, *see id.* at 353, given that "[d]issimilarities within the proposed class . . . have the potential to impede the generation of common answers," *id.* at 350 (simplified). Confirming commonality is a rigorous undertaking. *See id.* at 350–51.

While the panel paid lip service to *Wal-Mart*, its analysis was sorely lacking. That analysis hinged on Plaintiff-Appellees' allegation that "the VA's failure to provide supportive housing on or near [the West L.A. Campus] results in systemic discrimination against them. As a result, [class members] are denied meaningful access to necessary healthcare services and placed at serious risk of institutionalization." *Powers*, 163 F.4th at 1185. The panel further stated that "Plaintiffs' claim that the VA's 'past and current practice' of not providing permanent housing to the class of veterans represents discrimination based on disability" satisfies the commonality requirement. *Id.* at 1185.

Wal-Mart was invoked, but it was not followed. After all, *Wal-Mart* was clear: "Rule 23 does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate . . . that there are *in fact* . . . common questions of law or fact." 564 U.S. at 350. That certainly wasn't done here. Indeed, it's not even clear whether this conclusory analysis would survive a basic run-in with *Twombly* or *Iqbal*. That both the meaningful access and *Olmstead* claims required fact-intensive showings only magnifies the panel's errors.

Start with meaningful access claims. The Supreme Court has established that "an otherwise qualified handicapped individual must be provided with meaningful

access" to a benefit, and that this may require a reasonable accommodation. *Alexander v. Choate*, 469 U.S. 287, 301 (1985). In turn, the benefit itself "cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." *Id.* The panel accepted Plaintiff-Appellees' position "that housing is a reasonable accommodation that is necessary for them to access the benefits the VA has already conferred to them." *Id.* at 1183. But the very core of this assertion depends on the fact-specific, individualized question of whether this housing is indeed a reasonable accommodation. *See Mark H. v. Hamamoto*, 620 F.3d 1090, 1097–98 (9th Cir. 2010). This is nowhere in the opinion.

The same goes for the "*Olmstead* claims." *Olmstead* provided that:

> States are required to provide community-based treatment for persons with mental disabilities when the State's treatment professionals determine that such placement is appropriate, the affected persons do not oppose such treatment, and the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with mental disabilities.

527 U.S. at 607. Transposing that holding over to the present case, it's clear that these claims were similarly littered with factual landmines. That's the case even if Plaintiff-Appellees "need only show that the challenged [agency] action creates a serious risk of institutionalization." *Powers*, 163 F.4th at 1187 (quoting *M.R. v. Dreyfus*, 697 F.3d 706,

734 (9th Cir. 2012)); *cf. M.R.*, 697 F.3d at 726 (reversing a district court that "did not sufficiently consider individualized evidence" when assessing whether plaintiffs bringing claims under the Rehabilitation Act would suffer irreparable injury). But the panel rebuffed the need for convincing evidence showing commonality. *Powers*, 163 F.4th at 1185.

Instead, the panel applied *Armstrong*, which suggests that commonality is per se established for civil rights actions when "a system-wide practice or policy . . . affects all of the putative class members." 275 F.3d at 868. At least on its face, that's more expansive than *Wal-Mart*'s rule, which would dictate that any such alleged harm will satisfy commonality only where its truth or falsity will "resolve an issue that is central to the validity of each one of the claims in one stroke." 564 U.S. at 350. And compare the panel's evidence-free analysis with the fact-intensive deep dive that *Wal-Mart* conducted in assessing commonality. *See id.* at 351–58.

In sum, we were told that the lack of permanent housing on the West L.A. Campus "affects all of the putative class members." *Powers*, 163 F.4th at 1185. But how? What was the "glue" whereby all class members were affected in a way that is relevant to the Rehabilitation Act claims? *Cf. Wal-Mart Stores*, 564 U.S. at 352. We got none of those answers. Simply, the VA's decision not to build permanent housing on its West L.A. Campus doesn't injure *each* homeless veteran in Los Angeles County in a common way—nor does it "affect" *each* homeless veteran in a similar way to answer whether the VA has discriminated on the basis of disability. It is not enough for class members to be "affected" by a policy in the broadest, most expansive sense of that term. Rather, to comport with *Wal-Mart*, the challenged "practice

or policy" must directly act on all of the class members and cause *common injuries*. The panel got it wrong.

C.

***Armstrong*'s Factual Context**

The tensions between *Wal-Mart* and *Armstrong* are obvious. But even if we were to accept *Armstrong*, the panel ignored all its context in deeming the VA's decision not to build permanent housing on its Campus a "system-wide practice." *Powers*, 163 F.4th at 1185. As we have long said, the "language of the court must be read in the light of the facts before it." *Julian Petrol. Corp. v. Courtney Petrol. Co.*, 22 F.2d 360, 362 (9th Cir. 1927); *accord Marshall v. Andrew F. Mahony Co.*, 56 F.2d 74, 78 (9th Cir. 1932). By plucking *Armstrong*'s "system-wide practice or policy" language from its context, the panel created an end run around the commonality requirement.

In *Armstrong*, disabled state prisoners and parolees sued the California Board of Prison Terms and state officials, alleging that the state parole authority failed to make certain accommodations for them at parole proceedings in violation of federal law. *Armstrong*, 275 F.3d at 854. They alleged that the Board's parole notification, hearing, and appeals process required written forms that they could not understand without accommodations, which in turn caused those prisoners and parolees to forfeit their rights or be unable to adequately represent themselves at their parole hearings. *Id.* at 856–58. The class consisted of prisoners and parolees with six categories of disability: mobility impairments, hearing disabilities, visual disabilities, learning disabilities, mental retardation, and renal impairments. *Id.* at 854. Though the Board sought to split the state prisoners into different classes, the *Armstrong* panel

disagreed despite some "individual factual differences" among the groups. *Id.* at 868. The panel reasoned that "the differences that exist here do not justify requiring groups of persons with different disabilities, all of whom suffer similar harm from the Board's failure to accommodate their disabilities, to prosecute separate actions." *Id.*

The "system-wide practice or policy" in *Armstrong* was very different than what we have in this case. There, the prisoners sued the *Board* for the *Board's* failure to accommodate their ability to protect themselves in proceedings run by the *Board*. Thus, the Board had complete and direct control over the prisoners and the parole "system." And the "system" injured the prisoners in the same relevant way—the lack of accommodations precluded adequate representation in parole hearings, even if the precise accommodation would differ among the different categories of disability. *See Armstrong*, 275 F.3d at 868–69. So the defendants directly controlled the "system" by which the *Armstrong* plaintiffs defined their class, and the challenged policy or practice acted directly on each class members in the same way. In other words, because the prisoners all suffered from the same harm, the same remedy—making parole notices more accessible—would redress their injuries.

In contrast, the panel here didn't explain how the VA has "system-wide" control over the class of homeless veterans or how its limited housing policy on the West L.A. Campus has constituted a "system-wide" policy or practice. The VA certainly doesn't control Los Angeles's county-wide housing or population of disabled homeless veterans. Far from it. Indeed, it's likely that significant numbers of class members were outside the reach of the VA's housing policy—it doesn't and can't house the thousands of

homeless veterans in the county. In fact, the panel didn't even say how many of the class members actually sought VA care at the West L.A. Campus or how many of those would have directly benefitted from permanent housing on the West L.A. Campus. Indeed, it's anyone's guess as to how the VA's "systematic" housing policy has "affected" the putative class—if at all. The panel never told us beyond superficialities. *See Powers*, 163 F.4th at 1185. Under the panel's approach, any challenged action could be labeled "systematic" and satisfy *Armstrong*'s low bar.

Even if *Armstrong* survives *Wal-Mart* (which I doubt), it doesn't apply here. Plaintiff-Appellees defined their class as all homeless veterans with serious mental illness or traumatic brain injuries across all of Los Angeles County, (rightfully) decried the unique harms that all such homeless veterans face, and sought permanent supportive housing "on or near" the VA campus to rectify those harms. The problem is that the VA does not control every aspect of veteran homelessness across the County, and its decisions thus won't "affect[]" all class members in a similar way. *See Armstrong*, 275 F.3d at 868. So any remedies ordered won't redress the entire class as they did in *Armstrong*. Rather, the order to build permanent housing only helps those homeless veterans who would actually live on its grounds or otherwise directly benefit from the housing. Simply, the class was too broadly defined for *Armstrong* to automatically confer commonality.

III.

Conclusion

Many may disagree with the lack of housing for veterans on the VA's West L.A. Campus; just as many may also disagree with the decisions that have led to this situation.

But judges cannot solve every problem. We have no business ordering the VA to build thousands of housing units on a whim. This is not the Ninth Circuit Court of Appropriations. And we cannot judicially create a cause of action when Congress refuses to do so. Nor can we conjure a class when no commonality exists. Precedent saying otherwise should be overruled.

I respectfully dissent.

FILED

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFREY POWERS; et al.,

Plaintiffs - Appellees,

and

SAMUEL CASTELLANOS; et al.,

Plaintiffs,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellee,

v.

DENIS RICHARD MCDONOUGH; et al.,

Defendants - Appellants,

and

DOUGLAS GUTHRIE,

Defendant - Appellee,

BRENTWOOD SCHOOL,

Intervenor.

No. 24-6576

D.C. No.
2:22-cv-08357-DOC-KS
Central District of California,
Los Angeles

ORDER

Before: CALLAHAN, DESAI, and DE ALBA, Circuit Judges.

Appellants' motion to stay the mandate (Dkt. No. 141) is GRANTED. *See* Fed. R. App. P. 41(d)(1). The mandate is stayed until December 10, 2026, to allow the Solicitor General to decide whether to file a petition for writ of certiorari. If, within that period, Appellants advise the Clerk of this Court that a petition for certiorari has been filed, or an extension of time to do so has been granted, then the mandate shall be further stayed until the time to file the petition has expired, or if a petition has been filed, until final disposition of the matter by the Supreme Court. Appellants must promptly notify the Clerk of this Court in the event the Solicitor General determines not to seek certiorari before December 10, 2026, in which case the stay will be lifted immediately.