

Case No. 24-6888

In the United States Court of Appeals
for the Ninth Circuit

JEFFREY POWERS, et. al.,

Plaintiffs-Appellees,

v.

BRENTWOOD SCHOOL,

Intervenor-Appellant.

On Appeal from the United States District Court
for the Central District of California
Case No. 2:22-cv-08357-DOC-KS
The Honorable David O. Carter

BRENTWOOD SCHOOL'S REPLY BRIEF

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INTRODUCTION

The Answering Brief correctly points out that Brentwood School's Opening Brief does not acknowledge its settlement agreement with the Plaintiffs. It only received preliminary, but not final, court approval. Nevertheless, Brentwood School should have acknowledged the settlement agreement.

In any event, Brentwood School is in full support of the settlement agreement and believes that the District Court was within its authority to require the VA to enter into a lease as set forth therein. Brentwood School is confident in the district court's supervision of the settlement agreement and the related lease. Brentwood School wants to continue to provide services to Veterans and needs a lease to do so.

Brentwood School would honor that settlement agreement and enter into the lease with the VA contemplated therein. The settlement agreement between Brentwood School and the plaintiff class was supervised by the district court and special master. It was carefully crafted and established a balance of interests between the VA, the Veterans and Brentwood School. It increased the benefits to VA and Veterans as follows:

- \$5M in additional cash consideration
- The return of portions of the formerly leased premises on an agreed upon schedule for the construction of housing
- Increased hours and services for Veterans
- Setting the conditions for the return of other portions of land pursuant to a new lease upon showing of need for housing sites; and
- a one-year term to allow regular monitoring of circumstances and the need for lease term adjustments, if any.
- The Court will retain jurisdiction.

Importantly, the settlement agreement recognizes that there is tremendous value between public and private partnerships and that Brentwood School is in the best position to be a private partner that provides significant benefits to Veterans. That same concept is recognized in the Leasing Act,¹ and Brentwood School was specifically endorsed by Congress to be one of those partners in the statute's legislative history. The problem, however, is that there is presently no

¹ Capitalized terms in this Reply Brief have the same definitions as those in the Opening Brief.

lease in effect, nor has the agreement received final approval by the district court.

Brentwood School wants to continue providing services to Veterans, but needs a lease to make that happen. As the district court observed, the athletic facilities on the 22 acre property, consisting of a track, football and baseball fields, an aquatic center with a competition pool, basketball courts, and a cardio and weight facility, all of which have been built and maintained at Brentwood School's expense, provide significant benefits to Veterans and are critical to the school and its 1,200 students. Without these facilities, Brentwood School would be existentially threatened and irreparably harmed. Without a lease, Brentwood School cannot continue to provide important services for Veterans such as educational and vocational offerings, special events, transportation services, and basic needs support which are critical to a thriving Veteran community on the WLA Campus.

After the district court voided Brentwood School's prior 2016 lease with the VA in the Final Judgment, the school engaged in extensive negotiations with Plaintiffs, which were overseen by the district court and special master, for a settlement agreement that included a new lease

that would allow Brentwood School to continue providing a robust range of services to Veterans, to share use of the Veteran's property with them, and to model for its student body the importance of respecting and supporting those who have served our country. Importantly, the settlement agreement also allowed Brentwood School to intervene in the case to appeal the Final Judgment in the event the settlement agreement did not receive final court approval.

The settlement agreement was signed and preliminarily approved by the district court over VA's objection, but did not receive final court approval before the district court proceedings were stayed pending appeal. **To be clear, Brentwood School stands by—and is ready, willing and able to perform pursuant to—the settlement agreement, provided that it gets final approval from the district court and the new lease contemplated therein is finalized and in effect.** Given the lack of final approval, the uncertainty resulting from VA's objection, and the stay preventing the settlement approval process from proceeding, Brentwood School intervened and filed this appeal in order to preserve its legal position. Because this appeal is entirely

consistent with the terms of the settlement agreement and the motion to intervene, judicial and contractual estoppel do not apply.

Brentwood School wants to continue working with, and providing services to, the Plaintiffs and other Veterans at the WLA Campus. Brentwood School cares deeply for the Veterans and wants its longstanding, mutually beneficial relationship to continue on uninterrupted. But that can only occur with a legally compliant lease in effect – the new lease contemplated in the settlement, or the prior 2016 lease depending on this Court’s ruling on this appeal, or another lease.

PROCEDURAL HISTORY

Based on the following procedural history, judicial and contractual estoppel do not apply to Brentwood School’s appeal.

1. Brentwood School entered into its lease with VA in 2016. 2-ER-270. Brentwood School believed the 2016 lease complied with the Leasing Act because it required the school to provide services to Veterans and their families for the purposes enumerated in the statute. 2-ER-270

2. The Final Judgment was entered on October 11, 2024, which voided Brentwood School’s 2016 lease. 1-ER-68-69, 72, 79. Without a valid lease, Brentwood School suddenly found itself subject to potential

trespass in the middle of the school year.

3. In response to the Judgment—and Brentwood School’s desire to maximize Veteran services—Brentwood School entered into the settlement agreement with Plaintiffs for a new lease that included additional Veteran services and increased rent payments for the benefit of Veterans. 1-SER-33-49.

4. Brentwood School has always been fully committed to this settlement agreement, but the settlement agreement required **final** court approval and a new lease before it would become effective. 1-SER-43, at Sec. 10.1(b).

5. Because it was possible the settlement agreement would not receive final court approval, thereby leaving Brentwood School without a lease, the parties expressly agreed in the settlement agreement that Brentwood School would be allowed to intervene to protect its interests through an appeal of the Judgment:

11. Stipulation For Brentwood School to Intervene to File a Notice of Appeal. The Parties agree that it is the expectation of this Settlement Agreement that all claims involving Brentwood School will be resolved. However, the time period contemplated by this Settlement Agreement is likely to exceed the statutory amount of time for Brentwood School to file an appeal. To that end, the Parties agree to stipulate for Brentwood School to intervene in the Class Action in order to file a timely notice of appeal. The appeal would be a protective appeal. In the event of an appeal filed by VA, the Plaintiffs agree that Brentwood School may file a notice of renewal of the lease that the Court has deemed void.

1-SER-44, at Sec. 11.

6. Brentwood School contends that the district court had the authority to grant final approval of the settlement agreement and to order the VA to enter into a lease consistent with the terms of the settlement agreement.

7. Brentwood School's unopposed motion to intervene was entirely consistent with the settlement agreement. In that motion, Brentwood School confirmed that it was fully committed to the settlement agreement, but noted that because the settlement agreement required final court approval and a new lease, it was intervening to appeal the Judgment to protect its interests, including the voiding of its 2016 lease. 1-SER-22-31.

8. Brentwood School did not intervene solely for the purpose of "defending the settlement agreement" on appeal.² Rather, while Brentwood School fully intended to move forward with the settlement agreement if allowed, the purpose of the appeal was always to protect Brentwood School's interests in the event the settlement agreement did not receive final court approval and, for instance, the 2016 lease was

² It should be noted that no final appealable orders have been entered related to the post-Judgment settlement agreement.

resurrected. *Id.*

9. On October 18, 2024, the settlement agreement was preliminarily approved by the district court and was set for a final fairness hearing on November 13, 2024. 1-FER-16-28.

10. On November 8, 2024, prior to final approval of the settlement agreement, this Court granted the government's emergency motion for an administrative stay of, among other things, the settlement approval process in the district court.

11. On November 13, 2024, the district court granted Brentwood School's motion to intervene and specifically noted that "[t]he Court has not given final approval of the settlement and does not do so at this time." 1-SER-6.

12. On November 25, 2024, this Court granted the government's motion for a stay pending appeal, which continued the stay of the settlement approval process in the district court, and stayed all aspects of the Judgment *except* the voiding of the third-party leases, including Brentwood School's lease.

13. Following this Court's stay order, Brentwood School found itself without a lease, as the 2016 lease remained void and the lease

under the settlement agreement could not be considered for final approval.

14. As a result, consistent with the terms of the settlement agreement and the motion to intervene, Brentwood School had no choice but to pursue its appeal of the Judgment.

15. Nevertheless, given its enduring commitment to Veterans, Brentwood School is still providing the enhanced Veteran-services contemplated in the settlement agreement.

ARGUMENT

I. Judicial estoppel does not apply because Brentwood School has not taken an inconsistent position.

Federal law governs the application of judicial estoppel in federal courts. *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983, 992 (9th Cir. 2012). Under federal law, judicial estoppel only applies when a party takes a position that is “clearly inconsistent with its earlier position” resulting in an “unfair advantage.” *New Hampshire v. Maine*, 532 U.S. 742, 751 (2001) (quotations omitted).

Brentwood School has not taken an inconsistent position. As discussed above, the settlement agreement expressly acknowledged that Brentwood School would be intervening to appeal the Judgment in the

event the settlement agreement did not receive final court approval. 1-SER-44, at Sec. 11. The motion to intervene said the same. 1-SER-22-31.

Because the settlement agreement did not receive final court approval, Brentwood School is simply exercising its right to appeal the Judgment consistent with its prior position. As such, judicial estoppel does not apply.

II. Contractual estoppel does not apply because the settlement agreement did not receive final approval.

Brentwood School is not contractually estopped from appealing the Judgment. While Brentwood School has always been committed to the settlement agreement, the settlement agreement states that it only becomes effective upon final court approval. 1-SER-44, at Sec. 10(b). Because the settlement agreement has not received final court approval, it does not prohibit Brentwood School from protecting its interests on appeal.

III. Even if Brentwood School did not intervene, it would still have standing to bring this appeal.

Even if Brentwood School did not intervene—which it did—it would still have standing to appeal because (1) it participated in the district court proceedings; and (2) the equities of the case favor hearing the appeal since the Judgment voided Brentwood School's lease. *See Hilao*

v. Estate of Marcos, 393 F.3d 987, 992 (9th Cir. 2004) (holding that nonparties may appeal “when (1) the appellant, though not a party, participated in the district court proceedings, and (2) the equities of the case weigh in favor of hearing the appeal”) (internal quotations omitted); *see also* 1-ER-3 (“Brentwood School has participated in the hearing on injunctive relief and other conferences with Plaintiffs’/Class counsel, the Monitor, and the Court”); 2-ER-162-220 (Brentwood School’s representative testifying at trial); 1-ER-72 (declaring that the “lease between the VA and the Brentwood School ... is void.”).

IV. This Court reviews issues of statutory construction de novo.

“A decision of the district court regarding statutory construction is a ruling of law, and as such is reviewed de novo by this court.” *Haynes v. United States*, 891 F.2d 235, 238 (9th Cir. 1989). “Under the de novo standard of review, [this Court] [does] not defer to the lower court’s ruling but freely consider the matter anew, as if no decision had been rendered below.” *United States v. Silverman*, 861 F.2d 571, 576 (9th Cir. 1988).

The issue raised in Brentwood School’s appeal is one of statutory construction—i.e., the proper interpretation of the Leasing Act. As a

result, this Court applies a de novo review with no deference to the district court's factual findings.³

V. Applying the plain language of the Leasing Act does not lead to an absurd result.

Based on the Leasing Act's definition of "principally benefit veterans and their families"—which discusses the *services* that must be provided—the phrase unambiguously modifies the word "services" and not the word "lease" in the statute. Pub. L. No. 114-226, at § (k)(1).

Applying the plain language of the Leasing Act does not lead to an absurd result. As the name implies, the purpose of the Leasing Act is to increase Veteran services by allowing VA to enter into leases with third parties that provide services to Veterans and their families for the enumerated purposes. This is to increase Veteran services by encouraging third parties to enter into such leases.

The only statutory requirement imposed by Congress is that the lease must require the lessee "to provide services" that are offered

³ While the issue before this Court is reviewed de novo, Brentwood School feels compelled to respond a few factual assertions in the Answering Brief. First, the fair market rent in the 2016 lease was based on three separate appraisals of the relevant property. 1-FER-13-15. Second, in the third year of its lease, Brentwood School completed an audit of lease compliance that was provided to VA. 1-FER-11-12.

“exclusively to veterans and their families” or are “designed for the particular needs of veterans and their families as opposed to the general public” for one or more of the enumerated purposes. Pub. L. No. 114-226, at §§ (b)(2), (k)(1). If the lease meets that statutory requirement, Congress entrusted VA with the discretion to avoid the types of leases imagined in the Answering Brief’s slippery slope hypothetical. And if Congress has an issue with a particular lease that VA accepts, it can take action in response to the required reporting that it receives from VA and the OIG under the statute. Pub. L. No. 114-226 at §§ (h)(1), (j)(1)-(3). Thus, no absurd result exists that should prevent this Court from applying the plain language of the Leasing Act as written.

VI. The Leasing Act’s legislative history supports the proper interpretation of the statute.

If this Court determines that the Leasing Act is ambiguous, the legislative history confirms that the district court’s interpretation was erroneous. In response, the Answering Brief makes two arguments that are addressed below.

First, the Congressional Committee Report (Committee Report) did *not* state that Brentwood School’s 2016 lease was “a ‘misuse’ of the land” or that Brentwood School “provide[s] services to the general public’ and

‘any use of or benefit of the leased space by Veterans or their families was ancillary.’” That language in the Committee Report was generally referring to leases that existed before *Valentini I*, including, among others, Brentwood School’s *prior* ESA. H.R. Rep. 114-570 at 6. Indeed, the Committee Report enthusiastically endorsed the *new* lease with Brentwood School that was referenced in the Master Plan. *Id.* at 6.

Second, because Congress was fully aware that VA was not invalidating Brentwood School’s lease based on the OIG’s interpretation of the Leasing Act, Congress’s *inaction* on the issue when amending the statute in 2021 cannot be viewed as an adoption of the OIG’s interpretation. Indeed, if Congress agreed with the OIG’s interpretation, it would have needed to take some affirmative action to force VA—the agency that was standing by its lease—to change its position. By keeping the relevant portions of the Leasing Act the same, it is presumed that Congress found it unnecessary to require VA to change its position. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.”).

CONCLUSION

The Leasing Act recognizes that there is tremendous value between public and private partnerships and authorizes the type of lease at issue in this appeal. Brentwood School needs a lease in order to be a private partner that provides important services for Veterans such as educational and vocational offerings, special events, transportation services, and support for basic needs that are critical to a thriving Veteran community on the WLA Campus. Brentwood School asks that the Courts uphold its right to a lease for the subject property.

DATED this 11th day of March, 2025.

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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2676 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the type face requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style.

DATED this 11th day of March, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2025, I served a true and correct copy of the foregoing **BRENTWOOD SCHOOL'S REPLY BRIEF** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Wendy Cosby
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