**No. 24-6576**

**IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

JEFFREY POWERS, et al.,

Plaintiffs-Appellees,

v.

DOUGLAS A. COLLINS, et al.,

Defendants-Appellants

On Appeal from the United States District Court for the Central District of California

# REPLY BRIEF FOR APPELLANTS

YAAKOV M. ROTH
*Acting Assistant Attorney General*

JOSEPH T. MCNALLY
*Acting United States Attorney*

CHARLES W. SCARBOROUGH
DANIEL WINIK
AMANDA L. MUNDELL
*Attorneys, Appellate Staff*
*Civil Division, Room 7245*
*U.S. Department of Justice*
*950 Pennsylvania Avenue NW*
*Washington, DC 20530*
*(202) 305-8849*

# TABLE OF CONTENTS

**Page**

TABLE OF AUTHORITIES ..... iii

INTRODUCTION AND SUMMARY ..... 1

ARGUMENT ..... 2

I. The VJRA Bars Plaintiffs' Rehabilitation Act Claims Against VA ..... 2

II. The District Court Erred In Certifying A Class For Plaintiffs' Claims Seeking Housing From VA ..... 9

III. The District Court Erred On The Merits Of The Rehabilitation Act Claims ..... 12

A. The District Court Erred In Analyzing The Meaningful-Access Claim ..... 12

B. The District Court Erred In Analyzing The *Olmstead* Claim ..... 16

C. The District Court Erred In Analyzing The Claim Related To Developers' Income Eligibility Policies ..... 18

D. The District Court Erred In Granting Relief That Would Fundamentally Alter VA's Programs ..... 20

IV. The District Court Erred In Its Charitable-Trust Ruling ..... 22

A. Plaintiffs Lack Standing ..... 23

B. The 1888 Deed Did Not Establish A Trust ..... 24

C. Any Trust Established By The 1888 Deed Is Not Judicially Enforceable ..... 27

V. The District Court's Land-Use Injunctions Exceeded Its Authority ........ 30

CONCLUSION ........ 34

CERTIFICATE OF COMPLIANCE

# TABLE OF AUTHORITIES

**Cases:** **Page(s)**

*Armstrong v. Davis*,
275 F.3d 849 (9th Cir. 2001) .......... 11

*B.K. ex rel. Tinsley v. Snyder*,
922 F.3d 957 (9th Cir. 2019) .......... 11-12, 12

*Blue Water Navy Vietnam Veterans Association v. McDonald*,
830 F.3d 570 (D.C. Cir. 2016) .......... 2

*Broudy v. Mather*,
460 F.3d 106 (D.C. Cir. 2006) .......... 4

*Califano v. Yamasaki*,
442 U.S. 682 (1979) .......... 31

*Camacho v. Nicholson*,
21 Vet. App. 360 (2007) .......... 6

*City of Los Angeles v. Lyons*,
461 U.S. 95 (1983) .......... 32

*Dukes v. Wal-Mart Stores, Inc.*,
603 F.3d 571 (9th Cir. 2010) .......... 9

*Farquhar v. United States*,
1990 WL 121076 (9th Cir. Aug. 21, 1990) .......... 24, 25

*Fletcher v. City of San Diego*,
2002 WL 31480258 (Cal. Ct. App. Nov. 7, 2002) .......... 25

*Fornaro v. James*,
416 F.3d 63 (D.C. Cir. 2005) .......... 8

*Gill v. Whitford*,
585 U.S. 48 (2018) .......... 31

*Gonzalez v. ICE*,
975 F.3d 788 (9th Cir. 2020) ....................................................................11

*Gregory v. Fresno County*,
2019 WL 2420548 (E.D. Cal. June 10, 2019) ..............................................27

*Hearst v. Hearst*,
123 F. Supp. 756 (N.D. Cal. 1954 ...............................................................27

*He Depu v. Yahoo! Inc.*,
950 F.3d 897 (D.C. Cir. 2020).......................................................................23, 24

*Hooker v. Edes Home*,
579 A.2d 608 (D.C. 1990)...............................................................................23, 24

*INS v. St. Cyr*,
533 U.S. 289 (2001) ..........................................................................................5

*Kansas ex rel. Kobach v. U.S. Department of the Interior*,
72 F.4th 1107 (10th Cir. 2023) .....................................................................29

*Navajo Tribe of Indians v. United States*,
624 F.2d 981 (Ct. Cl. 1980) ...........................................................................28, 29

*Northwest Environmental Defense Center v. Bonneville Power Administration*,
477 F.3d 668 (9th Cir. 2007) .........................................................................32

*Olmstead v. L.C. ex rel. Zimring*,
527 U.S. 581 (1999)..........................................................................................16, 18

*O'Shea v. Littleton*,
414 U.S. 488 (1974)..........................................................................................32

*Parsons v. Ryan*,
754 F.3d 657 (9th Cir. 2014) .........................................................................11

*Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Department of Energy*,
232 F.3d 1300 (9th Cir. 2000) .......................................................................32

*Townsend v. Quasim*,
328 F.3d 511 (9th Cir. 2003) ....................16, 22

*Traynor v. Turnage*,
485 U.S. 535 (1988) ....................5

*United States v. Mitchell*,
463 U.S. 206 (1983) ....................28, 29

*United States v. Navajo Nation*,
556 U.S. 287 (2009) ....................28, 29

*United States ex rel. U.S. Coast Guard v. Cerio*,
831 F. Supp. 530 (E.D. Va. 1993) ....................26

*Valentini v. Shinseki*,
2012 WL 12882704 (C.D. Cal. June 19, 2012) ....................4

*Veterans for Common Sense v. Shinseki*,
678 F.3d 1013 (9th Cir. 2012) ....................1, 2, 3, 4, 5, 6, 8

*Wal-Mart Stores, Inc. v. Dukes*,
564 U.S. 338 (2011) ....................9, 11, 12

*Woody v. United States*,
368 F.2d 668 (9th Cir. 1966) ....................27

**Statutes:**

2 U.S.C. § 159 ....................28

38 U.S.C. § 5103A(a) ....................7

38 U.S.C. § 7104(a) ....................6

**Administrative Material:**

Bd. Vet. App. 1724432,
2017 WL 3410952 (June 28, 2017) ....................7

38 C.F.R. § 3.1(p) ..........7

38 C.F.R. § 20.3(f) ..........7

38 C.F.R. § 20.104(a) ..........7

**Legislative Material:**

H.R. Rep. No. 100-963 (1988) ..........5

**Other Authorities:**

Bogert et al., *Bogert's The Law of Trusts and Trustees* (Westlaw, updated July 2024):
§ 363 ..........23
§ 414 ..........23

*Restatement (Third) of Trusts* § 13 cmt. d (2003) ..........26

*Restatement (Third) of Trusts* § 95 (2012) ..........30

WDUN, *LISTEN: VA Secretary Doug Collins Speaks About Initiatives, Efficiency* (Mar. 10, 2025), https://perma.cc/B7JB-GASQ ..........1

## INTRODUCTION AND SUMMARY

As our opening brief explains (at 1, 9-11, 47-53), VA believes it is absolutely vital to house Veterans and has made significant efforts toward that goal, producing results in Los Angeles and elsewhere. Just days ago, VA Secretary Douglas A. Collins made clear his commitment to tackling this issue, explaining that VA has not yet made the "'progress that we need to make'" on the issue of homelessness.[1] The question here is not whether efforts to house homeless Veterans are important; they plainly are. It is whether VA can pursue those housing efforts on the West LA Campus in the manner contemplated by its carefully considered Master Plan—or whether, instead, the district court can reach beyond its authority to micromanage VA's operations.

Plaintiffs offer no meaningful defense of the district court's judgment. First, plaintiffs' argument against VJRA preclusion is foreclosed by *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc) (*VCS*). Second, plaintiffs fail to explain how their meaningful-access and *Olmstead* claims could be resolved without analyzing their individual circumstances.

[1] WDUN, *LISTEN: VA Secretary Doug Collins Speaks About Initiatives, Efficiency* (Mar. 10, 2025), https://perma.cc/B7JB-GASQ.

Third, plaintiffs err in characterizing our merits arguments as challenges to factual findings; the problem is that the district court's findings do not support its legal conclusions. Fourth, on the charitable-trust claim, plaintiffs articulate no basis for standing and conflate the existence of fiduciary duties with the judicial enforceability of those duties. Finally, in attempting to defend the district court's land-use injunctions, plaintiffs misunderstand the district court's authority under Article III, principles of equity, and the APA.

## ARGUMENT

### I. The VJRA Bars Plaintiffs' Rehabilitation Act Claims Against VA

1. Like the district court, plaintiffs characterize the VJRA as limited to precluding review of "'decisions that the Secretary has actually made' within the context of an individual veteran's VA benefits proceedings." Br. 20. But if that were true, it would have produced a different result in *VCS*. *See* Opening Br. 26. The Court there did not reason that VA had decided in individual cases how much delay to impose. It reasoned that determining the delays' reasonableness would require "review[ing] the circumstances surrounding the VA's provision of benefits to individual veterans." 678 F.3d at 1027. The same is true here.

Plaintiffs appear to cite *VCS* for the "'decisions that the Secretary has actually made'" language (Br. 20), but that language is not in *VCS*. It appears in *Blue Water Navy Vietnam Veterans Association v. McDonald*, 830 F.3d 570, 575 (D.C. Cir. 2016), which plaintiffs cite alongside *VCS*—but *Blue Water* holds that the VJRA is *not* limited to barring review of "individual benefits determinations," *id.*, which explains why plaintiffs otherwise do not invoke it. Plaintiffs may have meant to cite *VCS* for the proposition that the VJRA bars only the review of decisions made "within the context of an individual veteran's VA benefits proceedings" (Br. 20), but that too would be incorrect. At the cited page of the *VCS* opinion, the Court noted that it was "largely undisputed" that the VJRA bars "review of decisions made in the context of an individual veteran's VA benefits proceedings"; the Court did not hold that VJRA preclusion is *limited* to that undisputed sphere. 678 F.3d at 1023.

Plaintiffs attempt to distinguish *VCS* by arguing that, unlike in that case, they "have already received favorable benefits determinations" and do not "seek[] review of individual determinations." Br. 23. But, again, that misses the point of *VCS*. The delay-related claims there did not seek review of "individual determinations" denying benefits; they challenged systemic delays. And although the Court held in *VCS* that the VJRA did not preclude

separate claims challenging "VA's procedures for filing and handling benefits claims," it reasoned that adjudicating those claims would not require a court "to review 'decisions' affecting the provision of benefits to any individual claimants." 678 F.3d at 1034.[2] Plaintiffs' claims would require exactly that sort of review, as the district court recognized in *Valentini v. Shinseki*, 2012 WL 12882704, at *4 (C.D. Cal. June 19, 2012), *vacated upon settlement*, 2015 WL 14020677 (C.D. Cal. Feb. 17, 2015).

For the same reason, plaintiffs draw no support from *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006). Plaintiffs quote (Br. 23) a footnote from *VCS* discussing *Broudy*—but there, the Court was explaining why *Broudy* did "not support" jurisdiction because the claims in *Broudy*, unlike the delay-related claims in *VCS*, could have been resolved without "'revisit[ing] any decision made by the Secretary in the course of making benefits determinations.'" 678 F.3d at 1030 n.21 (emphasis omitted). The claims here are distinguishable from those in *Broudy* for the same reason, as well as others discussed in our opening brief (at 27).

---

[2] Plaintiffs suggest (Br. 24) that our opening brief "ignores" this holding of *VCS*, but see Opening Br. 24 (discussing the holding).

Plaintiffs fail to reckon with the fact that their argument would subvert the VJRA's "exclusive review mechanism," *VCS*, 678 F.3d at 1033, for the issues it covers. On plaintiffs' account, litigants wishing to proceed directly to federal court could simply bypass VA and thus avoid VJRA preclusion. That is obviously contrary to what plaintiffs recognize is the VJRA's "channel[ing]" function (Br. 19-20).

Finally, the "presumption in favor of judicial review of administrative action," *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), is inapposite. As *VCS* explains, the VJRA does not preclude judicial review; it simply provides for review to occur through the required framework. 678 F.3d at 1031-1032.

2. Plaintiffs also assert (Br. 20-21) that Rehabilitation Act claims are not of the type Congress meant to channel through the VJRA scheme. But as our opening brief explains (at 28-30), that argument ignores that one of the VJRA's principal aims was to overrule *Traynor v. Turnage*, 485 U.S. 535 (1988), which had allowed federal courts to review a claim that "VA's regulations conflicted with § 504 of the Rehabilitation Act." *VCS*, 678 F.3d at 1021. Plaintiffs thus err in arguing (Br. 20) that the VJRA's "purpose" is simply "to prevent the second-guessing of" individual "benefits adjudications." Indeed, the House Report plaintiffs quote for the proposition that

VJRA preclusion applies to "'technical VA decision-making'" (Br. 21) was specifically discussing the need to overrule *Traynor*. *See* H.R. Rep. No. 100-963, at 21 (1988) ("*Traynor* would inevitably lead to increased involvement of the judiciary in technical VA decision-making.").

Plaintiffs note (Br. 21) that the definition of VA benefits does not mention supportive housing. But as our opening brief explains (at 25), VA's determinations of what accommodations Veterans need to access benefits are determinations "'that relate to benefits decisions,'" *VCS*, 678 F.3d at 1025, whether or not they are themselves "benefits decisions." Plaintiffs offer no response.

3. Finally, plaintiffs suggest that their claims cannot be channeled through the VJRA framework because the Board of Veterans Appeals would be powerless to address them. But as our opening brief explains (at 30-31), the Board's statutory jurisdiction extends to "[a]ll questions in a matter which under [§ 511(a)] is subject to decision by the Secretary." 38 U.S.C. § 7104(a). As discussed above, such "matter[s]," *id.*, include whether VA's provision of benefits is consistent with the Rehabilitation Act.

Plaintiffs cite *Camacho v. Nicholson*, 21 Vet. App. 360 (2007), for the proposition that the Board cannot hear Rehabilitation Act claims (Br. 21).

But our opening brief explains (at 31) why *Camacho* is inapposite, and plaintiffs offer no response. In any event, the Board has addressed Rehabilitation Act issues. *See, e.g.*, Bd. Vet. App. 1724432, 2017 WL 3410952, at *3-4 (June 28, 2017) (determining that the Act obligated VA to provide a visually impaired Veteran with a notice in accessible form).

Contrary to plaintiffs' and their amici's arguments, a claim that a Veteran has been denied meaningful access to a benefit he is entitled to receive, as a result of his disability, would be a "claim" under VA regulations—*i.e.*, a statement "evidencing a belief in entitlement[] to a specific benefit." 38 C.F.R. §§ 3.1(p), 20.3(f). Like all such claims, it could be presented to a VA "'agency of original jurisdiction,'" adjudicated, and subsequently reviewed by the Board. Swords to Plowshares Br. 8. And contrary to amici's concern (Legal Scholars' Br. 21-22), the claimant could develop in that proceeding a factual record that would support later judicial review. Indeed, VA must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the … claim." 38 U.S.C. § 5103A(a). Like plaintiffs, the government is unaware of a prior instance in which the Board has been presented with a claim of this nature, which is presumably why such claims do not appear among the non-exhaustive "[e]xamples" in 38 C.F.R. § 20.104(a).

But there is no basis to conclude that VA could not or would not adjudicate such a claim, and VA informs us that it could and would.

Finally, plaintiffs contend (Br. 22) that "the Board has no authority to issue injunctive relief to alter systemic VA policies and practices held to be in violation of the Rehabilitation Act." But as our opening brief explains (at 31-32), if a Veteran raised through VA a claim that he needed an accommodation to access benefits, VA would either provide the accommodation or determine it was not authorized or required—and if VA made the latter determination erroneously, a reviewing court could remand for VA to grant the request. No injunctive relief would be required. And although the VJRA framework would not allow a "systemic" challenge of the sort brought here, that is irrelevant. Channeling statutes often require that covered claims be pursued through individual proceedings before an agency even where the claimants would rather pursue class-wide relief in federal court. And in *VCS*, this Court rejected an argument that requiring the plaintiffs to pursue their delay-related claims through the VJRA framework would deny them "adequate relief" because the claims were systemic. 678 F.3d at 1030-1032; *see also, e.g.*, *Fornaro v. James*, 416 F.3d 63, 67-69 (D.C. Cir. 2005) (Roberts, J.) (Civil Service Retirement Act).

## II. The District Court Erred In Certifying A Class For Plaintiffs' Claims Seeking Housing From VA

Plaintiffs offer no more persuasive defense of class certification for their claims seeking housing from VA. They argue that class treatment is proper because their claims "challenge a systemwide policy and practice." Br. 25; *see* Br. 24-28. That was the logic of this Court's decision in *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), which concluded that the plaintiffs had raised "the common question whether Wal–Mart's female employees nationwide were subjected to a single set of" discriminatory policies. *Id.* at 612 (emphases omitted). But the Supreme Court reversed, explaining that "'[w]hat matters to class certification … is not the raising of common "questions"—even in droves—but rather, 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).

Plaintiffs ignore this basic lesson of *Wal-Mart*—that the raising of common questions can establish commonality only where the answers can be determined on a class-wide basis. As our opening brief explains (at 33-36), the questions raised by plaintiffs' meaningful-access and *Olmstead* claims

cannot be answered on a class-wide basis. The answers turn on facts specific to individual Veterans.

Plaintiffs barely address this point. In a single sentence (Br. 27-28), they say the "variances" among their individual circumstances "only inform the *degree* to which class members lack meaningful access to healthcare services or are at risk of serious institutionalization." That is incorrect. Consider just the variation among the five named plaintiffs. One, Laurieann Wright, faces particular challenges in obtaining on-Campus healthcare because of where she lives (65 miles away) and the commuting challenges caused by her physical disabilities. *See* Opening Br. 34-35. But even if Ms. Wright lacked meaningful access to her benefits because of those challenges, that would say nothing about the other named plaintiffs, four of the other five of whom live on Campus and the fifth of whom lived (at least as of a year ago) within a mile. *Id.* Contrary to plaintiffs' assertion that "variances" among class members "only inform the *degree* to which" they lack healthcare access or face a consequent risk of institutionalization (Br. 27-28), there is no basis to suggest that a Campus resident or neighbor lacks meaningful access to on-Campus benefits—not to any "degree."

Plaintiffs largely rely on unexplained analogies to other cases. But in *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), which plaintiffs cite as "particularly instructive" (Br. 27), the single paragraph of analysis conflicts with the Supreme Court's subsequent decision in *Wal-Mart*. The Court in *Armstrong* reasoned "that commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members," 275 F.3d at 868, but as the Supreme Court explained, an allegation of a systemic practice cannot establish commonality unless the determination "of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke," *Wal-Mart*, 564 U.S. at 350.

And in plaintiffs' other cases, courts determined that claims could be resolved on a class-wide basis in the manner *Wal-Mart* requires. For example, in *Gonzalez v. ICE*, 975 F.3d 788 (9th Cir. 2020), this Court reasoned that "[a] determination concerning the reliability of [a] system of databases" would "resolve … on a classwide basis" a challenge to a policy of issuing immigration detainers based on the databases. *Id.* at 808. In *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014), the Court likewise reasoned that statewide prison practices were either "unlawful as to every inmate" or not. *Id.* at 678; *see id.* at 678-685. And in *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957 (9th Cir.

2019), the Court applied *Parsons* to reach the same conclusion as to statewide foster-care policies. *Id.* at 969. Those decisions, addressing distinct claims, do not establish that plaintiffs' claims here "depend upon a common contention … of such a nature that it is capable of classwide resolution," *Wal-Mart*, 564 U.S. at 350.

## III. The District Court Erred On The Merits Of The Rehabilitation Act Claims

Plaintiffs equally fail to defend the district court's merits analysis or the remedy it entered on the Rehabilitation Act claims.[3]

### A. The District Court Erred In Analyzing The Meaningful-Access Claim

Plaintiffs err in characterizing our challenge to the meaningful-access ruling as "factual, not legal." Br. 28-29. Our argument is not that the district court incorrectly determined the relevant historical facts but that those facts do not support its legal conclusions. *See, e.g.*, Opening Br. 44. Plaintiffs make the same mistake. The testimony they cite does not establish that the

[3] Plaintiffs concede (Br. 32 n.12) that the court erred in entering judgment against HUD on the meaningful-access and *Olmstead* claims and do not dispute that policy developments related to their financing claim have mooted any request for injunctive relief against HUD on that claim (*see* Opening Br. 46).

plaintiff class is deprived of meaningful access to healthcare benefits on the basis of disability.

Start where plaintiffs do, with VA official Steven Braverman's testimony that Campus facilities provide "the bulk of the specialty care" available to Veterans in Greater Los Angeles. 13-ER-2974. It is true that the Campus houses "specialty care," but Dr. Braverman also testified about the array of ambulatory-care centers and outpatient clinics that provide primary-care and mental-health services at locations throughout the LA area. *See* 13-ER-2973–2974; 13-ER-2981–2982; 13-ER-3132–3133. Plaintiffs identify no testimony, from Dr. Braverman or others, establishing what proportion of the plaintiff class requires specialty care of the sort available only on Campus, as opposed to the primary-care and mental-health services available at locations that may be more convenient for them to reach.

The other testimony on which plaintiffs rely (Br. 29-30) comes no closer to carrying their burden. Dr. Ben Henwood testified that "there's difficulty accessing healthcare when you don't have a stable place to live" (10-ER-2143), and Dr. Jonathan Sherin testified that Veterans should have "temporary communities in places … where healthy behaviors and where engagement with the healthcare system can occur more meaningfully" (15-ER-

3740). All of that is of course true, and it explains (in part) why VA is making such extensive efforts to ensure that all Veterans have a safe and stable place to live, on Campus or elsewhere. But none of it establishes plaintiffs' claim that members of the class categorically lack meaningful access to their VA healthcare benefits unless they have housing on the Campus in particular. Nor does the testimony that plaintiffs invoke (Br. 30) from Jeffrey Powers, Lavon Johnson, and Michael Dennis. *See* Opening Br. 41-42 (discussing the testimony of those witnesses).

Plaintiffs also cite a report that VA's Office of the Inspector General (OIG) issued in January 2025, long after the judgment in this case. But even aside from the fact that it is outside the record, and not judicially noticeable for the truth of its contents, the report does not say what plaintiffs claim. OIG did not "determine[] that many unhoused veterans lack 'primary care' services" (Br. 30); it determined that some of them "did not have an *assigned* primary care team" (2-SER-306 (emphasis added)). And OIG did not determine that "'permanent housing' would allow veterans to 'access the[ir] health care … [and] mental health treatment'" (Br. 30-31); it said that "HUD-VASH program services are designed to help unhoused veterans 'obtain

permanent housing *and* access the health care, mental health treatment, and other supports'" they need (2-SER-306 (emphasis added)).

Finally, plaintiffs cite Ms. Wright's testimony, which established that (1) her particular healthcare needs require services unavailable at the outpatient clinic near her home and (2) she has particular difficulty reaching the Campus. 18-ER-4631–4636. As our opening brief recognized (at 42-43), Ms. Wright could well be understood to lack meaningful access to on-Campus services. But far from carrying plaintiffs' burden for the class as a whole, the evidence as to Ms. Wright only underscores what the record is otherwise missing.

To prove a deprivation of meaningful access for the class as a whole, plaintiffs would at a minimum have needed to establish on a class-wide basis that their healthcare needs require treatment on the Campus and that they face disability-related obstacles to accessing that treatment. Plaintiffs offered no evidence of that sort, perhaps because doing so would have made clear why their claims are not susceptible to class-wide adjudication. Aside from limited testimony about healthcare access, of the sort discussed above, the trial focused heavily on other points, including the use of Campus land and the parameters of potential housing development.

In short, VA agrees as a policy matter that housing is important for Veterans, and it is making extensive efforts to achieve that goal. But this record is legally insufficient to justify the district court's conclusion that VA violated the Rehabilitation Act by depriving the plaintiff class of meaningful access to care—let alone its remedial order.

### B. The District Court Erred In Analyzing The *Olmstead* Claim

Plaintiffs fall equally short in defending the district court's analysis of their *Olmstead* claim. *Olmstead* does not demand that public entities "'provide a certain level of benefits to individuals with disabilities,'" *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 603 n.14 (1999), or "create new programs that provide heretofore unprovided services," *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003). It simply requires that, when public entities provide services, they do so in a manner that "avoid[s] unjustified isolation of individuals with disabilities" or a serious risk of such isolation. *Olmstead*, 527 U.S. at 597; *see Townsend*, 328 F.3d at 518. Here, then, the relevant question is whether VA's administration of its healthcare services created a serious risk of unjustified institutionalization of persons with disabilities. The district court made no such finding, and the record would not support one.

Plaintiffs respond by citing exactly the testimony that our opening brief explained was irrelevant, without addressing our explanation of why it is irrelevant. *See* Br. 32-33 (discussing testimony of Joseph Fields, Dr. Henwood, and Dr. Sherin); Opening Br. 38-39 (same). As our opening brief explains, the testimony shows that *homelessness* may place Veterans at risk of being hospitalized or jailed—not that *VA's administration of its healthcare services* does so. Even assuming the sorts of hospitalizations and jail stints described in the testimony would constitute institutionalizations within the meaning of *Olmstead*, nothing in the testimony attributes them to any difficulty that plaintiffs face in accessing VA services on the Campus. Plaintiffs do not argue otherwise.

Indeed, plaintiffs' brief virtually abandons the idea that VA's asserted "responsibility to house veterans" has anything to do with *Olmstead*. In the single paragraph (at 33-34) where they attempt to identify the source of that responsibility, plaintiffs point not to *Olmstead*, or even to VA's broader obligation not to discriminate based on disability, but to VA's statements—in the Master Plan for the Campus and in this litigation—that it *wants* to house Veterans. VA's expression of its desire to house Veterans, in the manner VA

determines to be an appropriate use of its resources, does not constitute a legal obligation to do so in the manner determined by the district court.

Finally, although plaintiffs describe (Br. 34) the virtues of Veterans' being "integrated into a community" "'with other veterans,'" the integration relevant for *Olmstead* purposes is integration of persons with disabilities into the broader community. *Olmstead*, 527 U.S. at 592. Plaintiffs fail to explain how a community consisting solely of Veterans with disabilities would be more, rather than less, integrated for *Olmstead* purposes.

### C. The District Court Erred In Analyzing The Claim Related To Developers' Income Eligibility Policies

Plaintiffs do no more to shore up the district court's analysis of their claim related to developers' income eligibility policies.

As an initial matter, VA informs us that, as a result of the policy changes discussed in our opening brief (at 45-46), all developers who currently maintain subsidized housing on the Campus have ceased counting service-connected disability benefits as income when determining eligibility for the housing. That development would appear to render this claim moot, and we call it to the Court's attention given the need for the Court to satisfy itself of jurisdiction.

If the Court reaches the merits, it should reverse. Plaintiffs contend (Br. 35) that, to the extent they count disability benefits as income, developers' income restrictions "do not treat all *disabled individuals* equally" because "Veterans with severe disabilities," who "receive higher income," are "less likely than individuals with more minor disabilities to" qualify. But as our opening brief explains (at 45), a policy that restricts housing eligibility on the basis of income—without regard for whether that income comes from wages or disability benefits—facially discriminates based on income, not disability.

In any event, even if developers' policies discriminated based on disability, that would not justify the order that VA build housing itself if it cannot find non-discriminatory developers. As our opening brief explains (at 46-47), if Congress had required VA to provide supportive housing, the Rehabilitation Act could require VA to satisfy that obligation on its own rather than outsourcing it to discriminatory contractors. But Congress has not imposed that requirement, so plaintiffs' claim could at most justify an order that VA refrain from leasing to discriminatory developers—not an order that VA undertake the function the developers would otherwise have performed.

Plaintiffs offer no meaningful response. They contend (Br. 37) that we "oversimplif[y]" the district court's order, but they do not dispute that the

order requires VA to build housing if it cannot find non-discriminatory developers willing to do so. And their argument (Br. 38) that "VA can successfully" build housing is irrelevant; the question is not whether VA could do that but whether it is legally required to.

### D. The District Court Erred In Granting Relief That Would Fundamentally Alter VA's Programs

Finally, plaintiffs repeat the district court's errors as to VA's fundamental-alteration defense.

Like the district court, plaintiffs virtually ignore VA's evidence that a mandate to construct extensive on-Campus housing (beyond what the Master Plan contemplates) would require VA to fundamentally alter its approach to housing Veterans in Los Angeles. *See* Opening Br. 48-50. By forcing VA to concentrate resources on one type of housing in one location for Veterans with particular disabilities, the order would undercut VA's broader efforts to provide diverse housing options to Veterans with diverse needs and preferences (including those with other disabilities). Plaintiffs' response (Br. 39) simply denies the existence of that tradeoff.

Plaintiffs' reasoning, like the district court's, may rest on the premise that VA's resources are not actually limited. But plaintiffs' assertion that the

expenditure of $100 million on temporary housing would consume only "an infinitesimal fraction" of VA's budget (Br. 39) is unmoored from reality. As of trial, the annual budget for "VA Greater Los Angeles" was "approximately $1.4 billion," of which "$125 million or so" was "allotted" to homelessness programs. 13-ER-3135. Spending $100 million on temporary housing would consume nearly the entire annual homelessness budget. Plaintiffs, like the district court, also ignore the extent to which VA's budget is more broadly strained. *See, e.g.*, 14-ER-3298–3299 (in a given year, VA can afford to replace only "one or maybe … two" of eight medical centers in "disrepair"). And $100 million for temporary housing is only the start. Plaintiffs fault VA for not "produc[ing] a cost estimate to build permanent supportive housing" (Br. 39), but as our opening brief explains (at 9-10, 46-47, 51), VA's program for permanent supportive housing places the costs on private developers as provided by the West Los Angeles Leasing Act. If VA had to bear those costs, they would unquestionably be massive.

Plaintiffs fault VA (Br. 39) for "fail[ing] to request" additional funding from Congress. But as our opening brief explains (at 48-50), courts evaluating fundamental-alteration defenses must consider how the cost of an accommodation would affect an agency's programs within its "financial and

other logistical limitations." *Townsend*, 328 F.3d at 519. They cannot simply assume the availability of additional funding.

Finally, plaintiffs' suggestion that the district court might reduce VA's housing obligations, if the "'actual need for housing' changed" (Br. 39), is both irrelevant and difficult to credit. In the next sentence of its opinion after the one where it suggested the housing obligation would be tailored to "actual need," the district court wrote that if "there were an overbuild, the additional units" could "be used to assist the VA's staff members who otherwise could not afford to find housing on or near the" Campus. 1-ER-88. The court made similar comments at trial (17-ER-4269) and stated after trial that it was "not afraid to overbuild" temporary housing to some extent (5-ER-1096; *see* 6-ER-1234 ("I'm not sure 750 has any reality, but see what I'm not afraid to do is overbuild. Now, how much, because I can always use that for staff if I need to. I just don't want to overly overbuild on temporary, because the long term goal is permanent supportive.")).

## IV. The District Court Erred In Its Charitable-Trust Ruling

The charitable-trust ruling is likewise legally flawed, and plaintiffs' defenses of it are no more convincing.

### A. Plaintiffs Lack Standing

As our opening brief explains (at 53-54), the general rule is that "no private citizen can sue to enforce a charitable trust merely on the ground that he believes he is within the class to be benefited by the trust," Bogert et al., *Bogert's The Law of Trusts and Trustees* (*Bogert's*) § 414 (Westlaw, updated July 2024), because the beneficiary of a charitable trust is the public at large, not "the particular human beings" who are the "conduits of [the trust's] social benefits to the public," *id.* § 363. Plaintiffs do not dispute that rule and do not dispute that, if they fall within the rule, the district court should have dismissed their claim for lack of jurisdiction.

Plaintiffs invoke an exception that some courts have applied where the set of "potential beneficiaries" of a charitable trust "is 'sharply defined' and 'limited in number.'" *He Depu v. Yahoo! Inc.*, 950 F.3d 897, 906 (D.C. Cir. 2020). But as our opening brief notes (at 54), any trust created by the 1888 deed would benefit a vast, ill-defined population—roughly speaking, all Veterans in the Western United States.

Plaintiffs, who bear the burden of establishing jurisdiction, cite just two cases—*He Depu* and *Hooker v. Edes Home*, 579 A.2d 608 (D.C. 1990)—for the proposition that the exception applies here. Br. 43-44. But the courts

there concluded that the asserted sets of potential beneficiaries were "sharply defined" because they were articulated by clear parameters—in *He Depu*, "(1) Chinese persons, (2) imprisoned in China, (3) for exercising their freedom of expression, (4) online," 950 F.3d at 906; and in *Hooker*, residents of the Georgetown neighborhood of Washington, D.C., who were "(1) female, (2) indigent, (3) aged, … (4) widowed," and (5) in good health, 579 A.2d at 615. The trust asserted here does not have nearly so well-defined a set of potential beneficiaries. The same is true of the requirement that potential beneficiaries be "'limited in number,'" *He Depu*, 950 F.3d at 906. In *He Depu*, the court found that requirement satisfied because the trust benefited "between 800 and 1,200 individuals," *id.* at 907, and in *Hooker*, the court explained that "'very few applications'" for assistance from the trust had been received notwithstanding active recruitment efforts, 579 A.2d at 615. Here, well over a million Veterans—some 1,000 times the figure in *He Depu*—reside in California alone.

### B. The 1888 Deed Did Not Establish A Trust

Plaintiffs fare no better in defending the district court's conclusion that the 1888 deed created a trust. As our opening brief explains (at 55-59), in *Farquhar v. United States*, 1990 WL 121076 (9th Cir. Aug. 21, 1990)

(unpublished), this Court interpreted this very deed "as creating a covenant or statement of purpose" for the land, not a perpetual "condition" on its use, *id.* at *3, and *Fletcher v. City of San Diego*, 2002 WL 31480258 (Cal. Ct. App. Nov. 7, 2002) (unpublished), interprets a similar deed in the same way.

Plaintiffs note that *Farquhar* did not involve a charitable-trust issue—but our opening brief recognized as much and explained (at 57) why the Court's "reasoning" nonetheless "makes clear that it did not regard the deed as binding the government to perpetual obligations." Plaintiffs have no response, and it is unclear what they mean by distinguishing between the deed's meaning "with respect to *donors* of the land" and its meaning "with respect to beneficiaries" (Br. 45-46). As for *Fletcher*, plaintiffs suggest the deed there was distinguishable because it did not refer to "'permanent[]'" maintenance of a naval facility. Br. 46 (emphasis omitted). But the deed conveyed land "'forever, for the exclusive use of the'" Navy. *Fletcher*, 2002 WL 31480258, at *1. Plaintiffs omit the word "forever," which—combined with the word "exclusive"—would seem to suggest a *purpose* of permanent usage to the same extent as the word "permanently" in the 1888 deed. As *Farquhar* and *Fletcher* reflect, statements of purpose that "merely … explain

the motivation for a bequest" do not create a charitable trust. *Restatement (Third) of Trusts* § 13 cmt. d (2003).

The one new case plaintiffs cite on this point, *United States ex rel. U.S. Coast Guard v. Cerio*, 831 F. Supp. 530 (E.D. Va. 1993), does not help them. The court there concluded that a gift to the Coast Guard Academy created a charitable trust because of a Virginia statute providing that "a valid 'charitable' trust is created by a devise or bequest for education or for charitable purposes." *Id.* at 536. That rule is inapplicable here. And plaintiffs further err in suggesting VA "admitted" the existence of a trust in the 2016 Draft Master Plan. Br. 45 (emphasis omitted). The quoted passage said that "housing on the … campus was and is *intended* to be used as a home for Veterans," 27-ER-6760 (emphasis added), not that VA is legally bound to use every inch of the Campus forever for that purpose.

Contrary to plaintiffs' suggestion (Br. 46), we do not contend "that it is impossible for donors to grant a gift to the federal government for a specific purpose in perpetuity." Our point is that doing so would require language clearer than that of the deeds at issue here and in *Farquhar* and *Fletcher*. Absent such language, a statement in a deed that the donor is conveying land for a particular purpose may obligate the government to use the land

initially for that purpose, but it cannot be construed to impose a perpetual trust obligation. None of plaintiffs' authorities is to the contrary. The statement that "'[a] donor has the right to give his property to another upon any conditions which he sees fit to impose,'" *Hearst v. Hearst*, 123 F. Supp. 756, 758 (N.D. Cal. 1954), does not address what language suffices to create a condition. The statement "that donations received for charitable purposes must be used for the purposes for which they are given," *Gregory v. Fresno County*, 2019 WL 2420548, at *32 (E.D. Cal. June 10, 2019), *adopted*, 2019 WL 7601832 (E.D. Cal. Aug. 8, 2019), is best understood to refer to the enforceability of properly created charitable trusts; if it referred to the circumstances in which a trust arises, it would be imprecise (*see* Opening Br. 55). And the reference to "the intent of the donor" in *Woody v. United States*, 368 F.2d 668, 673 (9th Cir. 1966), has nothing to do with trust law; it addressed whether a payment was charitable under tax law.

### C. Any Trust Established By The 1888 Deed Is Not Judicially Enforceable

In any event, any trust created by the 1888 deed would not be judicially enforceable. As our opening brief explains (at 59-62), there is a distinction between assuming trust duties and providing for judicial enforcement of

those duties. For example, Congress did the latter in 2 U.S.C. § 159, stating that a governmental entity "may be sued" in district court "for the purpose of enforcing the provisions of any trust accepted by it." There is no such language here; to the contrary, the Leasing Act contemplates administrative and political rather than judicial remedies.

Plaintiffs invoke *United States v. Navajo Nation*, 556 U.S. 287 (2009), *United States v. Mitchell*, 463 U.S. 206 (1983), and *Navajo Tribe of Indians v. United States*, 624 F.2d 981 (Ct. Cl. 1980), but those cases are largely inapposite. The language plaintiffs quote speaks principally to whether the government owed fiduciary duties to Tribes, not whether those duties were judicially enforceable. And as to the existence of fiduciary duties, the decisions were informed by "the undisputed existence of a general trust relationship between the United States and the Indian people," *Mitchell*, 463 U.S. at 225.

To the extent they are apposite, the decisions support our position, not plaintiffs'. None treated a fiduciary duty as judicially enforceable simply because it was a fiduciary duty; all three arose under statutes that expressly provided for judicial enforcement of certain governmental obligations. *Navajo Nation* and *Mitchell* involved the Tucker Act and Indian Tucker Act, which allow suits to recover damages for the government's breach of certain

obligations. *See* 556 U.S. at 289-290; 463 U.S. at 211-212. And *Navajo Tribe* involved the Indian Claims Commission Act, 624 F.2d at 983, which authorized "'a quasi-judicial body to hear and determine all tribal claims against the United States that accrued before August 13, 1946,'" *Kansas ex rel. Kobach v. U.S. Dep't of Interior*, 72 F.4th 1107, 1113 (10th Cir. 2023).

In *Navajo Nation* and *Mitchell*, moreover, the Supreme Court clearly distinguished between the existence of a fiduciary obligation and the judicial enforceability of that obligation. It explained that, to sue for damages, a Tribe not only "must identify a substantive source of law that establishes specific fiduciary or other duties" but also must show that "the relevant source of substantive law can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties." *Navajo Nation*, 556 U.S. at 290-291 (quotation marks omitted); *see Mitchell*, 463 U.S. at 216-217. The latter showing is necessary to make the fiduciary duty enforceable in a damages suit. Thus, far from helping plaintiffs, these cases underscore what is missing here: a statutory basis for judicial enforcement of the asserted trust duties.

Plaintiffs briefly reiterate (Br. 48) the district court's theory that the Leasing Act supplies the requisite basis for judicial enforcement, but like the

district court, they make no effort to identify why that would be. They simply analogize the "statutory obligations" imposed by the Act to "the types of fiduciary duties that trustees traditionally assume" and conclude from that analogy that the Leasing Act thus "impose[s] enforceable fiduciary duties against the Government under the 1888 Deed." That ipse dixit is no more convincing in plaintiffs' words than in the district court's.

Plaintiffs assert (Br. 49) that it does not matter whether the Leasing Act provides for "'judicial remedies'" because they are asserting "a common law claim for breach of fiduciary duty." They base that assertion on the premise that equitable trust duties are always "'enforceable against trustees in a court exercising equity powers.'" Br. 49 (quoting *Restatement (Third) of Trusts* § 95 (2012)). But that is the rule for enforcement against *private* trustees, not the government. Plaintiffs ignore that fiduciary duties are judicially enforceable against the government only when the government unambiguously assumes them and authorizes their enforcement. *See* Opening Br. 59-60.

## V. The District Court's Land-Use Injunctions Exceeded Its Authority

The district court also exceeded its Article III jurisdiction, its equitable powers, and its APA authority by enjoining the government from entering

into new agreements with the entities whose leases the court had voided and by then ordering the government to enter into such an agreement with Brentwood. Opening Br. 63-67.

Plaintiffs contend (Br. 50) that the orders were authorized because they were "necessary" given the supposed illegality of VA's past conduct. But district courts do not possess jurisdiction or equitable authority to issue whatever orders they deem necessary to prevent illegality in the world. Their jurisdiction and equitable powers extend only so far as necessary to "redress the … particular injury" established by the plaintiffs before them. *Gill v. Whitford*, 585 U.S. 48, 72-73 (2018); *see Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). To the extent plaintiffs suffered cognizable injuries from VA's past land-use agreements, those injuries were remedied by the invalidation of the agreements.

To put the same point differently, suppose the district court had invalidated the agreements (without entering further land-use injunctions) and plaintiffs then brought a suit seeking an injunction against new agreements with the same entities. The court would plainly lack jurisdiction over that suit, because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief"; a plaintiff must

establish a "real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974); *see City of Los Angeles v. Lyons*, 461 U.S. 95, 101-108 (1983). For the same reason, the court lacked jurisdiction (or equitable authority) to enter the land-use injunctions here.

Plaintiffs equally fail to explain how the injunctions are within the district court's APA powers. They cite (Br. 51) this Court's observation in *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668, 680-681 (9th Cir. 2007), that district courts possess "broad powers," as "court[s] of equity conducting judicial review under the APA," "to order 'mandatory affirmative relief'" to the extent "'necessary to accomplish complete justice.'" But as our opening brief explains (at 65), that language was simply describing the power to effectuate remedies prescribed by the APA—there, by ordering an agency that had unlawfully stopped doing something to continue doing it. Plaintiffs themselves quote (Br. 51) the Court's description of the available equitable relief as "'ancillary relief'"—*i.e.*, relief ancillary to the court's statutory powers. 477 F.3d at 680. Plaintiffs also cite *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Department of Energy*, 232 F.3d 1300 (9th Cir. 2000), but that case likewise involved permissible ancillary relief: "order[ing] rescission of" an unlawful sale, *id.* at 1305.

Here, as our opening brief explains (at 66), a parallel form of ancillary relief would have been an injunction against reentering agreements on the particular terms the district court had held were unlawful. But the court's power to grant equitable relief ancillary to statutory remedies cannot support the injunctions the court actually issued.

Finally, plaintiffs appear to suggest (Br. 52-53) that the order requiring VA to enter into a new lease with Brentwood was justified by the need to preserve "space for the construction of housing on" Campus. That argument rests on the faulty premise that the district court had authority to order the construction of housing on Campus. But even if the court had that authority, it could not justify an order requiring VA to enter a particular lease on particular terms with a particular entity. An order requiring VA to construct housing on Campus would properly leave VA free to determine where to place that housing, and what other uses of the Campus could be accommodated, without the district court's micromanagement. Plaintiffs' argument, like the entire course of these proceedings, reflects a fundamental misunderstanding of the district court's proper role.

## CONCLUSION

The district court's judgment should be reversed.

Respectfully submitted,

YAAKOV M. ROTH
*Acting Assistant Attorney General*

JOSEPH T. MCNALLY
*Acting United States Attorney*

CHARLES W. SCARBOROUGH

*/s/ Daniel Winik*
DANIEL WINIK
AMANDA L. MUNDELL
*Attorneys, Appellate Staff*
*Civil Division, Room 7245*
*U.S. Department of Justice*
*950 Pennsylvania Avenue NW*
*Washington, DC 20530*
*(202) 305-8849*
*daniel.l.winik@usdoj.gov*

## CERTIFICATE OF COMPLIANCE

**9th Cir. Case Number(s)** No. 24-6576

I am the attorney or self-represented party.

**This brief contains** 6,938 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ x ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated ____________.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

**Signature** */s/ Daniel Winik* **Date** March 11, 2025