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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Plaintiffs,

Case No.: 2:22-cv-08357-DOC-JEM

PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF OPPOSITION TO MOTIONS TO DISMISS

Judge: Hon. David O. Carter

vs.

DENIS RICHARD MCDONOUGH, in his official capacity, Secretary of Veterans Affairs;

MARCIA L. FUDGE, in her official capacity, Secretary of Housing and Urban Development;

DOUGLAS GUTHRIE, in his official capacity, President, Housing Authority of the City of Los Angeles;

ROBERT MERCHANT, in his official capacity, Acting Director, VA Greater Los Angeles Healthcare System;

KEITH HARRIS, in his official capacity, Senior Executive Homelessness Agent, VA Greater Los Angeles Healthcare System,

Defendants.

TABLE OF CONTENTS

Page

I. INTRODUCTION....1
II. THE COURT HAS JURISDICTION....1
A. This Court has jurisdiction over Plaintiffs' Rehabilitation Act claims against the VA....2
1. The VJRA does not divest this Court of jurisdiction....2
2. Plaintiffs have no forum other than this Court to seek reasonable accommodations and challenge denials thereof. 7
B. This Court Has Jurisdiction Over Plaintiffs' Claims Against HUD and HACLA 9
III. THE VA BREACHED ITS FIDUCIARY DUTIES 12
A. The 1888 Deed Created a Charitable Trust 12
B. The Government Accepted Enforceable Duties 13
IV. PLAINTIFFS' APA CLAIMS STATE A CLAIM....16
V. CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Andrews v. McDonough,
No. 2022-1979, 2023 WL 3220216 (Fed. Cir. May 3, 2023) (per curiam).....9

Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald,
830 F.3d 570 (D.C. Cir. 2016).....7, 8

Bluestein v. Levenson,
No. 12-cv-021-JL, 2012 WL 4472015 (D. N.H. Sept. 26, 2012).....6

Bluestein v. U.S. Dept. of Hous. and Urban Dev.,
2013 WL 6627965.....10

Broudy v. Mather,
460 F.3d 106 (D.C. Cir. 2006).....3, 5, 8

Brown v. Dep't of Veterans Affs.,
451 F. Supp. 2d 273 (D. Mass. 2006).....5

Burris v. Wilkie,
888 F.3d 1352 (Fed. Cir. 2018).....7, 9

Camacho v. Nicholson,
21 Vet. App. 360 (2007).....7

Coia v. Veterans Admin.,
570 F. Supp. 2d 12 (D.D.C. 2008).....5

Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.,
528 U.S. 167 (2000).....12

Hill v. Dep't of Veteran Affs.,
No. 3:22-cv-00246, 2023 WL 1998755 (M.D. Tenn. Feb. 9, 2023) (no federal jurisdiction over pro se claim of denial of eligibility for benefits on the basis of race and disability), *report and recommendation adopted*, 2023 WL 2301997 (M.D. Tenn. Mar. 1, 2023).....6

Krueger v. United States,
No. 17-CV-10574, 2017 WL 5467743 (E.D. Mich. Nov. 14, 2017).....6

Lee v. Modlin,
No. DLB-21-1609, 2022 WL 1227002 (D. Md. Apr. 25, 2022).....10

Marsh v. Dept. of Veterans Affs.,
921 F. Supp. 360 (N.D. W.Va. 1995), *aff'd*, 77 F.3d 469 (4th Cir. 1996).....6

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982).....7

Porto Rico Ry., Light & Power Co. v. Mor,
253 U.S. 345 (1920).....18

Raines v. Shinseki,
Vet. App. No. 09-3730.....7

Sheriff v. Grote,
No. 19-CV-0117-NDF, 2019 WL 13323092 (D. Wyo. July 5, 2019).....6

Thomas v. Principi,
394 F.3d 970 (D.C. Cir. 2005).....3

Valentini v. Shinseki,
860 F. Supp.2d 1079, 1105-06 (C.D. Ca. 2012).....13

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

Williams v. Tuscaloosa Veterans Affs. Med. Ctr.,
No. 7:16-cv-00263-RDP, 2016 WL 3087046 (N.D. Ala. June 2nd, 2016).....6

Zuspann v. Brown,
60 F.3d 1156 (5th Cir. 1995).....6

Statutes

29 U.S.C. § 701 et seq. .....*passim*

29 U.S.C. § 794(a).....8, 11

38 U.S.C. § 503 9

38 U.S.C. § 511 9

38 U.S.C. § 511(a).....5, 8, 9

38 U.S.C. § 8124 ..... 17, 18

59 U.S.C. § 9251 12

24 U.S.C. § 71, R.S. §4825 12

Veterans Judicial Review Act (Pub. L. No. 100-687) ..... *passim*

West Los Angeles Leasing Act of 2016, Pub. L. No. 114-226 ..... *passim*

West Los Angeles VA Campus Improvement Act of 2021, Pub. L. No. 117-18, 135 Stat. 288 ("2021 Amendment") 13

Other Authorities

38 C.F.R. § 3.1(p) 8

38 C.F.R. § 20.3 8

162 Cong. Rec. H5276 16

162 Cong. Rec. H5277 15

Fed. R. Civ. P. 19 10

Fed. R. Civ. P. 19(a)(1)(A) 10

H.R. 5936 15

Press Release, Off. Of Sen. Diane Feinstein, Senate Passes West LA VA Leasing Bill (Sept. 19, 2016), https://web.archive.org/web/20230929142408/https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=AAF79C0C-8361-4F0A-83F4-443D29D1D6A2 15

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PLAINTIFFS' SUPPLEMENTAL BRIEF

I. INTRODUCTION

The VA pays lip service to the objective of ending veteran homelessness so as to enable veterans suffering the most debilitating disabilities in our nation's history access to the services they must receive to hope to resume normal lives. But no more than that. As painfully clear from the hearing before this Court and in papers it has filed— and decades of history since the 1970's— the VA recognizes no fiduciary or legal duty under the Rehabilitation Act to afford veterans their due. The VA treats some 4000 disabled veterans in the Los Angeles area as outsiders to 388 lush acres deeded to be their home (not so to VA staff and affluent private school students and a college baseball team) and outsiders to federal anti-discrimination law.

Could Congress have ever intended such horrific results? Stating the proposition refutes that conclusion. And unsurprisingly, so does statutory text, history of the West LA grounds, and applicable case law. As we demonstrate below, the rules the VA calls for have no limiting principles whatsoever, would mandate opposite results in seminal Ninth and DC Circuit decisions, and render the 1888 deed a nullity for vets and a boondoggle for the VA.

It is time to put an end to veteran homelessness by law and reason.

II. THE COURT HAS JURISDICTION

The benefits at issue in this case are the mental and physical health care benefits offered by the Department of Veterans Affairs ("VA") at the West Los Angeles Grounds. Plaintiffs have already been determined to be eligible for those benefits and do not challenge that eligibility. Plaintiffs complain of the lack of housing provided by the VA on the West Los Angeles Grounds and the inadequacy of the HUD-VASH vouchers provided by the Department of Housing and Urban Development ("HUD") in the area surrounding the West Los Angeles Grounds. Housing is not provided by the VA, but by HUD and the Housing Authority of the City of Los Angeles ("HACLA") through vouchers and by third parties in a few

buildings on the West Los Angeles Grounds. Plaintiffs challenge the VA's failure to provide housing on the West Los Angeles Grounds and challenge HUD's and HACLA's failure to administer HUD-VASH vouchers in a way that supports housing in the area of the West Los Angeles Grounds. Plaintiffs argue that both failures discriminate against them because of their disabilities and prevent them from accessing the VA health care benefits for which they have already been determined to be eligible.

A. This Court has jurisdiction over Plaintiffs' Rehabilitation Act claims against the VA.

1. The VJRA does not divest this Court of jurisdiction.

The VA benefits at issue in this case are the health and mental health services offered on the West Los Angeles Grounds. Plaintiffs have already been found eligible for those benefits and do not challenge that determination. However, they are unable, as a practical matter, to access the benefits because of the failure of the VA to accommodate them by providing housing near where the services are provided by building units on the West Los Angeles Grounds.

Plaintiffs are legally eligible for such nearby housing, not because the VA offers a program with certain eligibility criteria, but because they have disabilities that make such housing necessary as an accommodation to access the services the VA does offer – health care. The VA does not offer such a housing benefit. At best, it allows third parties to offer some very limited housing on the West Los Angeles Grounds and allows HUD and HACLA to offer some HUD-VASH housing in distant areas. The Court, not the VA, therefore, is responsible for determining Plaintiffs' entitlement to the accommodation Plaintiffs seek.

The VA argues, in essence, that any accommodation that is in any way related to a VA benefit must be pursued exclusively through the VJRA system of review. Although Veterans Judicial Review Act ("VJRA") jurisprudence is not a model of clarity, this is not the standard. Plaintiffs posit that the distinction between claims

over which federal courts have jurisdiction and those over which jurisdiction is stripped by the VJRA depends on whether a Secretary decision is being made regarding individual eligibility for benefits. In the absence of a decision by the Secretary determining what VA benefits a veteran is eligible for, federal courts retain jurisdiction over claims against the VA.

The only Circuit Court case the VA cites for the proposition that all issues affecting benefits are subject to the VJRA is *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) ("*VCS*"). In that case, plaintiffs challenged the VA's delays in authorizing mental health benefits and adjudicating disability benefits claims. The delays challenged in *VCS* were the delays in authorizing VA benefits – obviously addressing those benefits covered by the VJRA.

The *VCS* decision does not support the VA's argument that all challenges that, in any way, relate to benefits are precluded from judicial review. Rather, in reviewing the Ninth Circuit's VJRA jurisprudence, the Court clearly recognized that some challenges would be covered by the VJRA, such as the challenge to "a regulation that affected the denial of a veteran's disability benefits," *id*. at 1023, while others would be subject to federal court oversight, such as a negligence action against VA doctors, which "would not 'possibly have any effect on the benefits he has already been awarded.'" *Id*. (citations omitted). The Court agreed with the Federal Circuit that the VJRA "'contemplates a formal 'decision' by the Secretary or his delegate' and does not apply to every decision that may indirectly affect benefits." *Id*. at 1024 (quoting *Bates v. Nicholson*, 398 F.3d 1355, 1365-66 (Fed. Cir. 2005)). *See also Thomas v. Principi*, 394 F.3d 970 (D.C. Cir. 2005) (retaining federal jurisdiction over claims of intentional infliction of emotional distress and malpractice for VA's failure to disclose diagnosis determined during provision of benefits); *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006) (retaining jurisdiction over demand for release of test results conducted during provision of benefits).

Importantly, the *VCS* Court went on to find that it had jurisdiction to address the plaintiffs' challenge to the constitutionality of certain regional office procedures because the absent procedures were not challenged in the context of benefits determinations, but as a facial due process challenge. As the Court put it:

> A consideration of the constitutionality of the procedures in place, which frame the system by which a veteran presents his claims to the VA, is different than a consideration of the decisions that emanate through the course of the presentation of those claims. In this respect, VCS does not ask us to review the decisions of the VA in the cases of individual veterans, but to consider, in the 'generality of cases,' the risk of erroneous deprivation inherent in the existing procedures compared to the probable value of the additional procedures requested by VCS.

VCS, 678 F.3d at 1034 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 344 (1976)).

In addition, the Court found the VJRA inapplicable because "the VJRA does not provide a mechanism by which the organizational plaintiffs here might challenge the absence of system-wide procedures. . ." *Id.* at 1035. Thus, because *VCS* did not "involve individual veterans seeking to challenge the lack of procedures in place at VA Regional Offices" but instead involved an organization "representing [its] members claiming a system-wide risk of erroneous deprivation" those claims could proceed. *Id.* Moreover, "because VCS cannot bring its suit in the Veterans Court, that court cannot claim exclusive jurisdiction over the suit." *Id*. at 1035.

In the current case challenging the absence of nearby housing, as in VCS' challenge to the absence of regional office procedures, an organizational plaintiff and a group of plaintiffs challenge not individual benefits decisions (the plaintiffs have already been found eligible for VA mental health and healthcare services), but the facial inadequacy of the housing accommodations available to accommodate their disabilities. The individual plaintiffs do not question their individual eligibility

or the adequacy of the mental health services they have been determined eligible for, but the general absence of nearby housing accommodations. And the organizational plaintiff, as in *VCS*, has no forum in the VJRA review system to challenge such systemic discrimination.

Consistent with the D.C. Circuit's holding in *Broudy* that section 511(a) preclusion applies only to questions arising in the course of benefits determinations, the Ninth Circuit recognizes that this Court retains jurisdiction over causes of action that are "sufficiently independent of any VA decision as to an individual veteran's claim for benefits." *Id.* at 1034. *VCS* makes clear that, rather than "apply[ing] to every decision that may indirectly affect benefits," section 511(a) preclusion is limited to VA "decisions that emanate through the course of the presentation of" claims for benefits. *Id*. at 1024, 1035.

Such decisions are not at issue here, where the VA has already determined that Plaintiffs are entitled to the benefits in question: the health and mental health services available on the VA's West L.A. campus. Instead, Plaintiffs ask the Court to consider whether the VA violated the Rehabilitation Act by failing to provide reasonable accommodations necessary to access benefits already awarded—an inquiry fundamentally distinct from the prohibited "consideration of the decisions that emanate" over the course of a benefits determination. *Id*. at 1034.

Nor do the district court cases the VA cites stand for the proposition that every issue in any way related to a VA benefit is exempted from judicial review. *See, e.g. Brown v. Dep't of Veterans Affs.*, 451 F. Supp. 2d 273, 278 (D. Mass. 2006) (retaining jurisdiction over facial constitutional challenge); *Coia v. Veterans Admin.*, 570 F. Supp. 2d 12, 13 (D.D.C. 2008) (pro se plaintiff "does not identify any specific law that was violated or any specific benefit to which plaintiff was entitled but was denied").

The VA relies on a group of unreported and *pro se* cases to make the point that some Rehabilitation Act cases are subject to the VJRA.[1] However, it is worth noting that the VA itself takes the position that at least some Rehabilitation Act claims are not within the jurisdiction of the Court of Appeals for Veterans Claims. As the VA has argued:

> To the extent that Appellant alleges that VA denied him 'reasonable accommodations under Section 504 of the Rehabilitation Act of 1973' . . . the Secretary responds that the Court's jurisdiction is limited to final Board decisions, which involve Title 38 of the United States Code, and that therefore this Court does not have jurisdiction over this allegation. *See* 38 U.S.C. § 7252(a) (Court has exclusive jurisdiction over Board decisions); 38 U.S.C. § 7104(a) (Board's jurisdiction is limited to certain matters arising under Title 38, U.S.C.

[1] *Hill v. Dep't of Veteran Affs.*, No. 3:22-cv-00246, 2023 WL 1998755 (M.D. Tenn. Feb. 9, 2023) (no federal jurisdiction over pro se claim of denial of eligibility for benefits on the basis of race and disability), *report and recommendation adopted*, 2023 WL 2301997 (M.D. Tenn. Mar. 1, 2023); *Sheriff v. Grote*, No. 19-CV-0117-NDF, 2019 WL 13323092, at *2 (D. Wyo. July 5, 2019) (no federal jurisdiction over pro se complaint of denial of eligibility for travel benefits, but federal court decides medical malpractice claim); *Krueger v. United States*, No. 17-CV-10574, 2017 WL 5467743 (E.D. Mich. Nov. 14, 2017) (no federal jurisdiction over claims the VA restricted plaintiffs' eligibility for benefits); *Williams v. Tuscaloosa Veterans Affs. Med. Ctr.*, No. 7:16-cv-00263-RDP, 2016 WL 3087046 (N.D. Ala. June 2nd, 2016) (no federal jurisdiction over *pro se* claim that VA canceled eligibility for treatment program); *Bluestein v. Levenson*, No. 12-cv-021-JL, 2012 WL 4472015 (D. N.H. Sept. 26, 2012) (no federal jurisdiction over pro se challenge to VA termination of benefits); *Marsh v. Dept. of Veterans Affs.*, 921 F. Supp. 360 (N.D. W.Va. 1995), *aff'd*, 77 F.3d 469 (4th Cir. 1996) (no federal jurisdiction over pro se claim of denial of eligibility for benefits). The only reported non-*pro se* case cited by the VA is *Zuspann v. Brown*, 60 F.3d 1156 (5th Cir. 1995), standing for the unremarkable concept that there is no federal jurisdiction over a claim of denial of individual medical benefits.

Exhibit A, Brief of Appellee Secretary of Veterans Affairs in *Raines v. Shinseki*, Vet. App. No. 09-3730, at 21. Indeed, assigning federal discrimination claims not tied to a specific benefits decision to an Article I tribunal such as the Court of Veterans Appeals would likely violate the Constitution. *Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-68 (1982) (Congress may only create non-Article III courts as territorial courts, courts-martial, and to adjudicate "public rights.")

2. Plaintiffs have no forum other than this Court to seek reasonable accommodations and challenge denials thereof.

The Government asserts that—rather than deny Plaintiffs the opportunity to seek reasonable accommodations (and appeal denials thereof) under the Rehabilitation Act—the VJRA "channels" those claims out of this Court and into the VA's benefits determinations process, subject to review by the Board of Veterans Appeals, the CAVC, and the Federal Circuit. Fed. Defs.' Consol. Reply Br. ISO Mot. to Dismiss, ECF No. 57 at 6 ("Consol. Reply"). Yet the Government fails to cite, and Plaintiffs have not found, a single case in which any of those tribunals adjudicated a Rehabilitation Act challenge to the VA's failure to provide reasonable accommodations necessary to access its services. To the contrary, the CAVC has expressly recognized that "neither the Board nor th[is] Court is authorized to hear actions brought under" the Rehabilitation Act, full stop.[2] *Camacho v. Nicholson*, 21 Vet. App. 360, 366 (2007).

The closest case the Government could find, *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016), does not involve a challenge to the denial of reasonable accommodations. It does not involve a Rehabilitation Act claim at all. Rather, the plaintiffs in *Blue Water* challenged a

[2] Indeed, the CAVC has no power to order the equitable relief contemplated by the Rehabilitation Act. *Burris v. Wilkie*, 888 F.3d 1352, 1359 (Fed. Cir. 2018).

presumption "lead[ing] directly to the denial of certain benefits for most, if not all, of the veterans it affects." *Id*. at 574. *Blue Water* therefore stands for the uncontroversial position that, where "a 'denial of benefits underlies' their allegations," plaintiffs may seek a remedy for that denial through the VA's administrative process. *Id*. at 574, 578. Moreover, it affirms the D.C. Circuit's holding in *Broudy v. Mather*, 460 F.3d at 112, that Section 511(a) "does not confer" on "the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits." *Bluewater*, 830 F.3d at 575 (emphasis in original). Far from granting the VA "exclusive jurisdiction" over "all issues that might somehow touch upon whether someone receives veterans benefits," *Broudy* recognizes that section 511(a) preclusion is limited to questions that arise in the course of a benefits determination. 460 F.3d at 112.

The plain language of the VA's regulations reflects this limitation. Under 38 C.F.R. § 20.3, the term "benefit" refers to a "payment, service, commodity, function, or status, entitlement to which is determined under laws administered by the [VA] pertaining to veterans . . . ." *Id.* § 20.3(e). The Rehabilitation Act is not a "law[] administered by the [VA] pertaining to veterans." *Id.* It is a federal antidiscrimination statute applicable to all programs and activities conducted not only by the VA, but "by any Executive agency." 29 U.S.C. § 794(a). Because the Rehabilitation Act is not a VA-administered benefits statute, entitlement to a reasonable accommodation thereunder is not a "benefit" within the meaning of 38 C.F.R. § 20.3. Similarly, because a "claim" subject to the VA's administrative process seeks a determination of the claimant's entitlement "to a specific benefit under the laws administered by [VA]," 38 C.F.R. § 3.1(p), a request for a reasonable accommodation under the Rehabilitation Act is not capable of adjudication through that process. The CAVC's inability to order the equitable relief contemplated by the Rehabilitation Act underscores this. Not one of the eight cases string-cited by the

Government holds otherwise. *See* Consol. Reply at 5 n.4 (no holding that request for reasonable accommodation falls within VA's exclusive jurisdiction).[3]

B. This Court Has Jurisdiction Over Plaintiffs' Claims Against HUD and HACLA

Both the Secretary of HUD and HACLA attempt to wrap themselves in the cloak of the VJRA as if they were the VA. They are not. The VJRA simply provides that "[t]he Secretary [of the VA] 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" and that "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).

The VJRA is, by its terms, applicable only to the Secretary of the VA, not all secretaries of all federal agencies and certainly not local housing authorities. Thus, regardless of this Court's determination regarding its jurisdiction over the VA's implementation of Permanent Supportive Housing as a reasonable accommodation

[3] Even if it did have the power to review Plaintiffs' claims, the VJRA system of review would be unable to grant the relief Plaintiffs seek. Article I courts like the Board and CAVC are "creatures of statute" and bound by the jurisdictional limits Congress creates. *Burris v. Wilkie*, 888 F.3d 1352, 1357 (Fed. Cir. 2018). The Board and CAVC lack the power to fashion a substantive equitable remedy outside of the bounds of its jurisdictional statute, such as an order that the Secretary must pay a veteran monetary benefits. *Id.* at 1358; *see also Andrews v. McDonough*, No. 2022-1979, 2023 WL 3220216, at *1 (Fed. Cir. May 3, 2023) (per curiam) ("the Board's jurisdiction is limited to matters arising under 38 U.S.C. § 511, which concerns VA benefits and not equitable relief."). This is because the power to provide equitable relief is expressly given to the Secretary, not the Board or the CAVC. *Burris*, 888 F.3d at 1357 (citing 38 U.S.C. § 503). Applied here, the CAVC would be unable to enjoin the Secretary to build more housing, because such equitable relief is outside the bounds of its jurisdictional statute and conferred only on the Secretary. *See Burris*, 888 F.3d at 1358 (noting that Section 511(a) must be read in the context of 38 U.S.C. § 503); *Andrews*, 2023 WL 3220216 at *1.

for veterans with disabilities, the Court retains jurisdiction over Plaintiffs' claims against HUD and HACLA for their administration of the voucher program.

The cases cited by HUD and HACLA offer no support for their position that the VJRA protects agencies other than the VA from judicial review. They all challenged benefits decisions *by the VA* and, therefore, were subject to the VJRA and within the jurisdiction of the Court of Veterans Claims. Neither HUD nor a public housing authority was even a party to two of the four cases they cite. In *Bluestein v. U.S. Dept. of Hous. and Urban Dev*., 2013 WL 6627965, an unreported case involving a pro se plaintiff, both the VA and HUD were nominally defendants, but it was clear that the actions of the VA were the basis of the challenge. *Bluestein v. U.S. Dept. of Hous. & Urb. Dev.*, No. No. 13–cv–247–PB, 2013 WL 6627965, at *3 (D. N.H, Dec. 16, 2013) ("While 'the HUD–VASH program is generally administered [by HUD] ... 'participation in the program is regulated by the VA national office.' . . .'As such, the denial of HUDVASH benefits is within the purview of the Secretary of Veterans Affairs'"). (citation omitted).

In contrast, plaintiffs here challenge aspects of the HUD-VASH program that are exclusively within the purview of HUD, namely rate setting. In *Lee v. Modlin*, the court refused to dismiss the pro se plaintiff's discrimination claim because the court could not determine whether the VA was involved in the challenged decision and, in the absence of VA involvement, the VJRA would not apply. The court was careful to delineate between claims (denial of a voucher) that involved VA action, and claims (discriminatory housing) that did not. *See Lee v. Modlin*, No. DLB-21-1609, 2022 WL 1227002 at *5–*7 (D. Md. Apr. 25, 2022).

In addition, HACLA and HUD are necessary parties under Federal Rule of Civil Procedure 19. Rule 19 states that a party must be joined as a party if "in that person's absence, the court cannot accord complete relief among existing parties[.]" Fed. R. Civ. P. 19(a)(1)(A). Plaintiffs have asked this Court for broad injunctive and declaratory relief to allow them to obtain PSH on and near the WLA Grounds. (*See*

generally First Am. Compl. ("FAC"), ECF No. 33, FAC ¶¶ 351(A), (D)–(F).) As counsel for the VA maintained during the parties' meet and confer, the failure to include HUD would lead to incomplete relief. Likewise, a remedy for HACLA's violation of Section 504 through its direct administration of the HUD-VASH program would be impossible to implement in the absence of changes to HUD's rate-setting policies. If this (or any) Court found that the VA violated Section 504 by failing to offer sufficient HUD-VASH vouchers and PSH in the vicinity of the WLA Grounds, HUD would not be bound by that finding to provide the requisite funding necessary to cure those violations; nor would HACLA be able to implement any changes. A new action would have to be brought to implement the relief imposed by the order that names these same parties who now seek to prematurely exit the case.

Finally, HACLA repeatedly asserts that it has no discretion and that it is simply following the regulations set forth by HUD. HUD, on the other hand, asserts that HACLA is the proper party as HACLA is the administrator of the program, not HUD. (*See* HUD Mot. to Dismiss at 2, ECF No. 49-1.) Nonetheless, HACLA's own Reply reinforces the position that HACLA plays a key role: it does not simply follow HUD's regulations. HACLA's Reply improperly requested judicial notice of various exhibits, including HACLA's request for exceptions and waivers of the rental amount limits. These exhibits purportedly assert that HACLA's request was, according to HACLA, approved, which allowed HACLA to fund HUD-VASH at a much higher rate. (Request for Judicial Notice, Ex. E, ECF No. 69-2.) While there is a factual dispute as to whether HACLA has actually started funding HUD-VASH at a higher rate[4], nevertheless, HUD's letter to HACLA at 6, indicated that this waiver "shall remain in effect until August 17, 2024" and that HACLA would be required to "resubmit a new waiver request prior to the expiration of these waivers."

[4] In HUD's Reply, HUD acknowledged that it and the local public housing authorities were "still in the process of implementing the recent waiver." (HUD Reply at 9, ECF No. 71-1.)

HACLA's application for a waiver is a tacit admission that it needs to do more, and that more is necessary. If HACLA is dismissed from this case, there is simply no way to guarantee that HACLA will continue applying for these waivers to actually provide the appropriate amount of support to our veterans; and any relief that HACLA may provide will be temporary.[5] Voluntary cessation of a violation of law is an inadequate basis for dismissal, especially when prospective relief is sought.

III. THE VA BREACHED ITS FIDUCIARY DUTIES

A. The 1888 Deed Created a Charitable Trust

The Court is correct: "Plaintiffs have plausibly alleged that the 1888 Deed created a charitable trust and that the government, through the WLALA, assumed enforceable trust duties." (Tentative Order at 19.) In 1866, Congress enacted 59 U.S.C. § 9251,[6] which granted authority to the Board of Managers of the National Home for Disabled Volunteer Soldiers to "have necessary buildings erected, having due regard to the health of location, facility of access, and capacity to accommodate the persons entitled to the benefits thereof." This language could have been written yesterday as a statement of what is needed at the WLA Campus. Nearly 160 years ago, before the subject deed was executed, Congress recognized (as it did more recently) that permanent supportive housing was required to fulfill the promise to our soldiers who return from service in need of our country's support.

The 1888 Deed provides, in relevant part, that the parties agreed to "locate, establish, construct and permanently maintain a branch of said National Home for Disabled Volunteer Soldiers on a site to be selected." (1888 Deed, ECF No. 37-3

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[5] HACLA's decision to apply for a waiver may be considered a voluntary cessation, a decision that is capable of repetition yet evading review. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 189 (2000) ("It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'"). (citing *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 283 (1982)).

[6] § 9251 was repealed in 1959 as part of the reorganization of the National Home for Disabled Volunteer Soldiers. 72 Stat. 1268, 1269, 1271, 1272

at 1.) For over 80 years, the government treated the property granted by the 1888 Deed in a manner that was consistent with the creation of a trust. For over 80 years, the Deed resulted in the gift being made and the home being maintained to support veterans and their families. As *Valentini I* found, and as this Court has tentatively agreed, the 1888 Deed clearly manifested an intent to grant the land to the government on the condition that the land be used to construct and permanently maintain housing for disabled veterans. (Tentative Order at 16–19); *Valentini v. Shinseki*, 860 F. Supp.2d 1079, 1105–06 (C.D. Ca. 2012) ("*Valentini I*) ("Through the 1888 Deed, the grantors gave the land to the Government for the benefit of disabled veterans. Pursuant to the 1866 Act, the Government had authorization to accept the gift and, indeed, did accept the gift. Because land was given to the Government for the purpose of benefitting a defined group of beneficiaries, a charitable trust was created, with the Government as trustee and disabled veterans as beneficiaries.").

B. The Government Accepted Enforceable Duties

At the hearing on the motion to dismiss, the VA declared it had no fiduciary duty (to veterans or otherwise) in using the WLA Campus. However, because the 1888 Deed created a charitable trust, the VA's denial of its fiduciary duty flies in the face of the government's prior acceptance and acknowledgement of enforceable duties as a trustee.

Since *Valentini I* and as the Court noted in its tentative Order, Congress has twice, recently, passed acts signaling the government's assumption of enforceable duties: (1) the West Los Angeles Leasing Act of 2016, Pub. L. No. 114-226 (the "WLALA") (https://www.govinfo.gov/content/pkg/COMPS-12228/pdf/COMPS-12228.pdf) (last accessed Oct. 6, 2023), and (2) the West Los Angeles VA Campus Improvement Act of 2021, Pub. L. No. 117-18, 135 Stat. 288 ("2021 Amendment") (https://www.govinfo.gov/content/pkg/PLAW-117publ18/pdf/PLAW-117publ18.pdf) (last accessed Oct. 6, 2023).

Section 2(a) of the WLALA provides that the "Secretary of Veterans Affairs may carry out leases described in subsection (b)." Subsection 2(b) describes the types of leases that are allowed on the WLA Campus as those 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 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 benefits.
>
> (F) Volunteerism.
>
> (G) Family support services, including child care.
>
> (H) Transportation.
>
> (I) Services in support of one or more of the purposes

WLALA § 2(b)(2)(A)–(D). Further, section (2)(c) prohibits "any land-sharing agreement . . . unless such agreement (1) provides additional health-care resources to the Campus; and (2) benefits veterans and their families . . . ." (*See also* FAC ¶¶ 327(B)–(C), (E) (with citations to WLALA).) The 2021 Amendment had the same effect and required land use revenues to be credited for certain purposes including providing "temporary or permanent supportive housing for homeless or at-risk veterans and their families." 2021 Amendment § 2(d)(1)(A).

The legislative history of the WLALA and the VA's own recognition of the land's purpose, supports this interpretation that Congress intended for the government to accept enforceable duties as trustee of the charitable trust:

1. Senator Dianne Feinstein: "Today is an important milestone in our 10-year effort to transform the West LA VA into a nationwide

leader for veterans' services . . . . When I first started working on this issue in April 2007, **the West LA VA was not living up to its obligation to serve veterans**.[7]

2. Congressman Mark Takano: Mr. Speaker, there is a long history here with the West L.A. Campus. Without going into too much detail, this provision would ensure that the VA West L.A. Campus is used for the betterment of veterans, **the original intent of the legacy when the land was donated decades ago**.[8]
3. Congressman Ted Lieu: "I am pleased the House of Representatives passed the West Los Angeles Leasing Act of 2016, which authorizes the VA to implement the Master Plan for the West L.A. VA campus. Today represents a giant leap forward in **restoring the property to the Old Soldiers' Home it was always intended to be."**[9]
4. Congressman Jeff Miller: "This historic site has suffered from **many years of neglect, misuse**, and mismanagement; but, with passage of H.R. 5936, as amended, today, I am confident that it will finally be on the path to preservation, revitalization, [[Page H5277]] and the **fulfillment of its mission to serve and to provide for veterans in need throughout the Greater Los**

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[7] *See* Press Release, Off. Of Sen. Diane Feinstein, Senate Passes West LA VA Leasing Bill, (Sept. 19, 2016), https://web.archive.org/web/20230929142408/https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=AAF79C0C-8361-4F0A-83F4-443D29D1D6A2.

[8] 162 Cong. Rec. H5277, available at https://www.govinfo.gov/content/pkg/CREC-2016-09-12/html/CREC-2016-09-12-pt1-PgH5274.htm..

[9] Press Release, Off. Of Rep. Ted Lieu, House Passes Bill by Rep. Lieu to Restore West L.A. VA as Beacon of Service to Veterans (Sept. 12, 2016), https://lieu.house.gov/media-center/press-releases/house-passes-bill-rep-lieu-restore-west-la-va-beacon-service-veterans.

Angeles area.[10]

5. Secretary of the VA, Robert A. McDonald: "This land was deeded for the benefit of Veterans in 1888 to serve as a home for our nation's heroes. **This plan brings us one step closer to getting the land back to its intended purpose as an inviting, welcoming, community for Veterans and their families**."[11]

(emphasis added).

Time and time again, both Congress and the VA have recognized that the purpose of the WLALA was to restore the land back to the original intent: to principally benefit veterans and their families. The VA should be required to live up to its obligations. It is not enough for Congress and the VA to make public statements about the purpose and intent of the WLALA without any accountability, yet for the VA to assert at the Motion to Dismiss hearing that, despite these representations, the VA has no fiduciary duty to veterans. It is time for the VA to be held accountable for its failures at the WLA Campus.

IV. PLAINTIFFS' APA CLAIMS STATE A CLAIM

The VA has granted several easements on the West LA Grounds, including: (1) an easement to the City of Los Angeles to construct temporary supportive housing; (2) (1) an easement to CalTrans "for the maintenance and operation of the I-405 freeway on and off ramps"; and (3) an easement to the South Coast Air Quality Management District. The challenged easements violate the APA because they exceed the authority granted to the VA under the WLALA, which provides at (e)(1), in relevant part:

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[10] 162 Cong. Rec. H5276, , accessible at https://www.govinfo.gov/content/pkg/CREC-2016-09-12/html/CREC-2016-09-12-pt1-PgH5274.htm.

[11] U.S. Dep't of Veterans Affs., Greater Los Angeles Campus Draft Master Plan (2016), at 3, accessible at https://draft-master-plan-assets.s3.amazonaws.com/media/uploads/2018/08/02/Executive-Summary.pdf.

> Notwithstanding any other provision of law . . . pursuant to section 8124 of title 38, United States Code, the Secretary may grant easements or rights-of-way on, above, or under lands at the Campus to
>
> (A) Any local or regional public transportation authority to access, construct, use, operate, maintain, repair, or reconstruct public mass transit facilities . . .; and
>
> (B) The State of California, County of Los Angeles, City of Los Angeles, or any agency or political subdivision thereof, or any public utility company. . . for the purpose of providing such public utilities

Pub. L. 114-226, 130 Stat. 926. The VA argues that the WLALA should be read to add nothing to the terms of 38 U.S.C. § 8124, which authorizes the Secretary to provide easements of any VA land to State agencies and public service companies without limitation as to purpose. The VA's Office of Inspector General ("OIG") considered the VA's interpretation of the WLALA as granting the VA broad authority to enter into any easement authorized by § 8124, and the OIG rejected that position. (Decl. of Zachary Avallone ("Avallone Decl.) Ex. 7 at 62 ("VA OIG 2021 Report"), ECF No. 37-9 ("Neither canons of statutory construction nor the history of land use in West LA that prompted the WLA Act support VA's position.").)

As the VA OIG found, the easements that the VA is allowed to enter into under the WLALA are limited and only "for the purpose of providing such public utilities." (VA OIG Report at 65 ("The VA OIG interprets this phrase to apply to easements to both and VA interprets the phrase to apply only to public utility companies.").) In rejecting the VA's position, the VA OIG noted three reasons:

1. If Congress intended to set forth three types of easements as OGC states, it is unclear why they would have organized Section 2(e) into two paragraphs rather than three.
2. Second, statutes should be read in such a way that does not render provisions

> unnecessary or superfluous . . . . Therefore, since the State of California, County of Los Angeles, City of Los Angeles already enjoyed these authorities under the general provisions of 38 U.S.C. § 8124, it would not have been necessary for Congress to specifically add subparagraph 2(e)(1)(B) to the WLA Act.
>
> 3. Another canon of statutory interpretation is that statutes should be read harmoniously . . . That Congress would want to limit the Secretary's broad authority to grant easements as that authority pertains to the West LA campus is reasonable given the history of misuse of VA land at the West LA campus. Moreover, VA OIG's interpretation allows a harmonious reading of both statutes because even though the general authority of § 8124 was limited in terms of the types of easements allowed in subsection 2(e)(1)(B), the portions of § 8124 not otherwise set out in subsections 2(e) would still apply.

(*Id.* at 66–67.) In addition, the canon that "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all," *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920), applies here.

In addition to those easements, the VA has granted a license for drilling oil, a lease for a parking lot, and a lease to the Brentwood school. As it relates to the drilling license, also known as the Breitburn Lease, the VA OIG found that the license at issue had nothing to do with the Bureau of Land Management ("BLM"), but rather the agreement between the VA and Breitburn that was revived in March 2017 to allow Breitburn to slant drill on the WLA Campus. (VA OIG Report at 33 ("On March 7, 2017, License No. 691-97-01-1L was revived in a 10-year agreement between VA and Breitburn. This 'revived' revocable license No. 691-97-01-1L is the one at issue in OIG's report, and it has no connection to BLM.").) As such, the VA's argument that the WLALA does not apply to leases by the BLM is, at best, a factual dispute not subject to resolution at the motion to dismiss stage.

In the interest of brevity and as Plaintiffs have previously briefed the issues related to the lease for the parking lot and Brentwood lease, Plaintiffs incorporate that discussion by reference and note that these leases simply violate the WLALA as they in no way "principally benefit" veterans and their families. (*See* Plaintiffs' Opp'n to VA MTD at 19, ECF No. 45.)

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court amend its draft order and deny Federal Defendants' Motions to Dismiss in their entirety.

Respectfully submitted,

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