

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

MOTION TO STAY THE MANDATE

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The government respectfully moves to stay the mandate under Federal Rule of Appellate Procedure 41(d). Plaintiffs oppose this motion.

INTRODUCTION

There is no dispute that Veterans in Los Angeles need more housing. The President has directed VA to provide Campus housing well beyond what the district court ordered. Exec. Order No. 14,296, 90 Fed. Reg. 20,369 (May 14, 2025). VA is in the process of implementing that vision and working more generally to rectify past mistakes in the use of the Campus. But this Court erred in affirming the district court's extraordinary injunction, requiring VA to undertake its Campus-development efforts under judicial superintendence.

Rather than allowing the injunction to take immediate effect, the Court should stay its mandate—and thus maintain the existing stay of the injunction pending this appeal—until the Solicitor General has determined whether to file a petition for a writ of certiorari and the Supreme Court has had the opportunity to adjudicate any such petition. This Court stays its mandate regularly in cases presenting substantial grounds for Supreme Court review. As the multiple dissents from the denial of rehearing explain, this is exactly such a case. Should the Solicitor General elect to seek certiorari

here – a determination he will make as expeditiously as possible given the need for a full deliberative process – the petition plainly would not be “frivolous or filed merely for delay,” Circuit Rule 41-1. It would raise serious issues that warrant resolution before VA’s efforts to develop its Campus are subjected to judicial control.

STATEMENT

As the Court is aware, this case presents claims that the Department of Veterans Affairs (VA) has violated Section 504 of the Rehabilitation Act by not providing sufficient housing on its West Los Angeles Campus for Veterans with disabilities. After a bench trial, the district court ruled in plaintiffs’ favor and ordered VA to construct “1,800 additional permanent supportive housing units” beyond those contemplated by VA’s prior Campus development plan, “as well as 750 temporary” units. 1-ER-88. And based on its ruling that income restrictions on housing are discriminatory if Veterans’ benefits are counted as income, the court ordered VA to ensure that “a sufficient number of housing units at the [Campus] are free from” such restrictions, including by building them itself, rather than through developers, if necessary. 1-ER-89-90. During and after trial, the district court made clear its intent to superintend VA’s management of the Campus in minute detail.

A unanimous motions panel of this Court stayed the injunction pending appeal. But the merits panel affirmed the district court's Rehabilitation Act rulings and the injunction it issued, while vacating or reversing other portions of the district court's judgment.

The government petitioned for rehearing en banc, and five judges dissented from the denial of rehearing. Judge Collins, joined by Judges Bress, Bumatay, and Tung, wrote that "the panel's decision contravenes the limitations the Supreme Court has established concerning claims under" Section 504, Op. 9; ignores the plain-text requirements of Section 504, *see* Op. 23-25; misunderstands the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), *see* Op. 20-23; and disregards limits on class certification, *see* Op. 25-27. Judge Bumatay, joined by Judges VanDyke and Tung, wrote that this Court is "on the wrong side of" a "lopsided circuit split" regarding whether Section 504 implies a private right of action against federal programs, Op. 42, and identified additional errors in the panel's class-certification analysis, *see* Op. 45-56.

ARGUMENT

Under Federal Rule of Appellate Procedure 41(d)(1), a stay of the mandate pending the filing and disposition of a petition for a writ of certiorari is

appropriate when “the petition would present a substantial question and ... there is good cause for a stay.” This Circuit’s Rule 41-1 elaborates that such a motion “will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay.”

A stay of the mandate is manifestly warranted here. The Solicitor General is still actively in the process of determining whether to file a petition for a writ of certiorari – a process that requires extensive consultation within the government – but any such petition would present not just one but multiple substantial grounds for Supreme Court review. And there is good cause for a stay, as evidenced by the unanimous motions-panel decision to stay the injunction pending this appeal.

The mandate should accordingly be stayed for 90 days from the date when rehearing was denied – until December 10 – to allow the Solicitor General to determine whether to seek certiorari. If the Solicitor General decides to seek certiorari, then under Rule 41(d)(2)(B), the stay would extend until the “final disposition” of proceedings in the Supreme Court. We will promptly notify the Court in the event that the Solicitor General determines not to seek certiorari before the expiration of the 90-day period, in which case the stay could be lifted immediately.

I. A Petition For A Writ of Certiorari Would Present Multiple Substantial Questions

There is no serious doubt that a petition for a writ of certiorari in this case, should the Solicitor General elect to file one, would present multiple substantial questions for Supreme Court review.

First, and most obviously, such a petition could present the question whether Section 504 of the Rehabilitation Act implies a private right of action against federal programs. As Judge Bumatay’s dissent from the denial of rehearing explains (Op. 40-42), there is a clear circuit split on that question—every other circuit to have addressed it has departed from this Court’s view—and although the split is lopsided, pitting only this Court against three of its sister circuits, it has been entrenched by the Court’s choice not to reconsider its aberrational precedent. This is exactly the sort of question the Supreme Court routinely grants certiorari to review. *See* S. Ct. R. 10(a).

Second, a petition for a writ of certiorari could present the question whether Section 504 authorizes the extraordinary theory of liability that the Court accepted or the extraordinary relief it affirmed. As Judge Collins’s dissent from the denial of rehearing explains (Op. 15), the Court’s ruling “squarely contravenes” Supreme Court precedent, including the limitations

on Section 504 established by the Supreme Court's decisions in *Alexander v. Choate*, 469 U.S. 287 (1985), and *Olmstead*. It also ignores the plain text of Section 504's requirement to show discrimination caused "solely" by reason of disability, 29 U.S.C. § 794(a) — a requirement that plaintiffs cannot satisfy. These are likewise the sorts of issues that the Supreme Court regularly reviews. *See* S. Ct. R. 10(c).

Finally, a petition for a writ of certiorari could present the question whether the certification of the plaintiff class contravened the Supreme Court's ruling in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). As Judge Collins's dissent from the denial of rehearing explains, "a cursory survey of even the *named* Plaintiffs reveals sharp dissimilarities among class members, as well as direct admissions that Plaintiffs have not 'suffered the same injury.'" Op. 26. Judge Bumatay's dissent expands on this obvious lack of commonality (Op. 47-50) and on its inconsistency with *Wal-Mart* (Op. 50-54). And even if plaintiffs could show a deprivation of access to their healthcare benefits on a classwide basis, they cannot possibly establish a classwide entitlement to the relief this Court affirmed: "It is evident that not every individual class member will require ... permanent housing" on the Campus "to the same extent, or in the same fashion," as a "reasonable accommodation"

to ensure access. Collins Op. 27. This sort of clear conflict between circuit and Supreme Court precedent is another common basis for certiorari. See S. Ct. R. 10(c).

The substantiality of these issues is bolstered by the context in which they arise: a “remarkable decree” (Collins Op. 5) under which the district court would impose “continuing micromanagement” of “everything from where to place portable toilets to where to install a new pickleball court” (Bumatay Op. 28). This sort of commandeering of federal property, and of a federal agency’s budget, presents a clear “depart[ure] from the accepted and usual course of judicial proceedings,” “call[ing] for the exercise of [the Supreme] Court’s supervisory power,” S. Ct. R. 10(a).

II. There Is Good Cause To Stay The Mandate

It is equally clear that good cause supports a stay of the mandate.

As noted at the outset, there is no dispute that Veterans in Los Angeles need more housing. The President has directed VA to provide Campus housing well beyond what the district court ordered. 90 Fed. Reg. 20,369. And VA is in the process of fulfilling that vision. In May, for example, VA “issued a request for proposals to build approximately 220 temporary units” on Campus and announced that it expected the number of on-Campus

housing units to rise to 2,048 by next year, up from 955 in January 2025. VA, Press Release (May 28, 2026), <https://perma.cc/PGD7-T7ZY>. VA has also been working to rectify past errors in the use of the Campus. In February, for example, VA announced the termination of its leases with the Brentwood School and Safety Park Corporation and its revocable license with Bridgeland Resources. VA, Press Release (Feb. 9, 2026), <https://perma.cc/L28J-Y825>.

These efforts will continue regardless of this litigation. But as a unanimous motions panel recognized when it granted the government’s motion for a stay pending this appeal — and as the dissents from the denial of rehearing en banc have now reiterated — VA’s efforts should not be subject to “the district court’s continuing micromanagement,” *Bumatay* Op. 28; *see Collins* Op. 5, and certainly not before the government has had the opportunity to seek Supreme Court review should the Solicitor General elect that course.

As the Court is aware from its review of this case, it is difficult to overstate the degree of that micromanagement during the period before this Court stayed the injunction. To identify just one example, the court abruptly issued an “emergency order” directing VA to identify “vendors of modular housing” that could be installed within three to four months — even though

the post-trial opinion specified a 12-month timeline — and purported to “suspend[]” “[a]ny procurement rules applicable to VA” for the purchase of that housing. 1-ER-42–43. The court then inserted itself in the procurement process. In one hearing, for example, the court questioned an employee of a housing developer about “[s]pecifications for ... modular units that would help inform the VA procurement process” (3-ER-519; *see* 3-ER-520), while opining that “[t]he preferred vendor” of housing “was to be contacted to determine its capacity to deliver 50 to 100 modular units” (3-ER-521). And the court did not stop at procurement. It went on to opine on how the units could be installed:

First of all we can truck in showers, we can truck in toilets, we can get sewage over land, you don’t have to trench, you can trench later on, this is an emergency, you’ve already got lighting at the stadium for god sakes, go out and look at it again. This is not hard.

Okay, so what do we need to do for our decking? And I’m not going to require trenching, that’s something that we can come back and do.

3-ER-528; *see also, e.g.*, 3-ER-533 (“We can get generators put there if you wanted to quite frankly, and you don’t even need to go overhead. You don’t know this, but another job I used to have was climbing power [poles], okay? Yeah. So I know this can be done.”). In short, Judge Bumatay’s observation

that “[j]udges cannot replace their black robes with yellow hard hats” (Op. 28) was not hyperbolic – indeed, it was barely even figurative – in its characterization of the district court’s efforts here.

This is not an injunction that should be allowed to take effect until the government has had the opportunity to seek Supreme Court review, should the Solicitor General elect to do so. It is for VA, not for the district court, to determine the most effective way of using public funds and public property to serve Veterans.

CONCLUSION

The mandate should be stayed for 90 days from the denial of rehearing to allow the Solicitor General to determine whether to seek certiorari – and,

if the Solicitor General elects to seek certiorari, the stay should extend through the Supreme Court's final disposition of the case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in 14-point Book Antiqua, a proportionally spaced font, and that it complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 2048 words, according to Microsoft Word.

/s/ Daniel Winik

Daniel Winik