FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs - Appellees,

and

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

Plaintiffs,

BRIDGELAND RESOURCES, LLC,

Intervenor-Plaintiff - Appellee,

v.

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

No. 24-6576

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

ORDER

Defendants - Appellants,

and

DOUGLAS GUTHRIE,

Defendant - Appellee,

BRENTWOOD SCHOOL,

Intervenor.

Filed September 11, 2026

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

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

SUMMARY*

Veterans Affairs

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

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

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

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

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

ORDER

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

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

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

The panel's decision in this case confirms that sympathetic facts make bad law. By all accounts, the Department of Veterans Affairs ("VA") has not done a good job of providing for veterans in Los Angeles, particularly homeless veterans. Its failures have drawn the scrutiny of Congress, which has twice passed (in 2016 and 2021) legislation specifically concerning homeless veterans in Los Angeles, as well as the attention of the President, who last year issued an Executive Order that likewise focuses on the VA's west Los Angeles campus. But the answer to this complex problem does not lie in the remarkable decree upheld by the panel here.

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

I

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

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

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

> No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

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

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

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

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29 U.S.C. § 794(a).

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

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

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

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

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

II

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

A

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

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

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

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

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

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

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

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

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

On the assumption that § 504 reached some disparate impacts, the Court proceeded to consider "which disparate impacts § 504 might make actionable." *Choate*, 469 U.S. at 299. The "proper starting point," the Court stated, was its prior decision in *Davis*, where the plaintiff's Rehabilitation Act claim was properly rejected "because the further modifications [the plaintiff] sought would have compromised the essential nature of the [nursing] program" to which she sought admittance. *Id.* at 300. This analysis in *Davis*, the *Choate* Court explained, established the following governing rule: "[W]hile a [defendant] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Id.* Put another way, "an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the [defendant] offers," and "to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made." *Id.* at 301. But the Court reiterated that the "reasonable accommodations" needed to provide "meaningful access" do *not* require fundamental modifications to the program. *Id*. at 300–01.

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

Consistent with *Choate*, this court has recognized that a "meaningful access" claim is simply one form of a "reasonable accommodation" claim and that "[r]easonable accommodation does not require an organization to make fundamental or substantial alterations to its programs." *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010). "[E]ntities are required only to make reasonable changes in *existing* policies in order to accommodate individuals' disabilities" and "are not required to create new programs that provide heretofore unprovided services to assist disabled persons." *Townsend v. Quasim*, 328 F.3d 511, 518 (9th Cir. 2003) (emphasis altered). "In no event is the entity required to undertake measures that would impose an undue financial or administrative burden or effect a fundamental alteration in the nature of the service." *Where Do We Go Berkeley v. California Dep't of Transportation*, 32 F.4th 852, 862 (9th Cir. 2022) (simplified) (quoting *Tennessee v. Lane*, 541 U.S. 509, 532 (2004)).

B

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

1

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

"Under the test outlined in *Choate*," the court must "first consider the nature of the *benefit* [the plaintiffs] were allegedly denied." *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1210 (9th Cir. 2020) (emphasis added), *cert. dismissed*, 142 S. Ct. 480 (2021). The benefit that Plaintiffs were allegedly discriminatorily denied here is the "medical care and treatment" provided to them by the VA. 38 U.S.C. § 7301(b); *see also* 38 C.F.R. § 17.38(a). As the panel correctly noted, *see Powers*, 163 F.4th at 1183, Plaintiffs expressly concede that the "permanent supportive housing" they seek is *not* among the "benefits" to which they are entitled under the medical program at issue. As set forth in the applicable regulations, the "medical benefits package" at issue includes "[o]utpatient medical, surgical, and mental healthcare," "[i]npatient hospital, medical, surgical, and mental healthcare," "[p]rescription drugs," and "[e]mergency care in VA facilities," and it does not include permanent supportive housing. 38 C.F.R. § 17.38(a). [5] Rather, as the panel explained, Plaintiffs' argument is that "housing is a *reasonable accommodation* that is necessary for them to access the benefits" to which they are entitled under the VA's medical program. *Powers*, 163 F.4th at 1183 (emphasis added).

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

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

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

2

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

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

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

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

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

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

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

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

* * *

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

III

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

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

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

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

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

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

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

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

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

IV

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

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

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

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

V

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

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

The district court certified a Rule 23(b)(2) class defined as "[a]ll homeless veterans with Serious Mental Illness [SMI] or Traumatic Brain Injuries [TBI], who reside in Los Angeles County." In upholding the district court's conclusion that this class satisfied the commonality requirement, the panel relied on the assertedly common question of whether, as a result of the "VA's failure to provide supportive housing on or near the Campus," "members of Plaintiffs' putative class are denied meaningful access to necessary healthcare services and placed at serious risk of institutionalization." *Powers*, 163 F.4th at 1185. But whether any individual class member needs permanent supportive housing as a *reasonable accommodation* in connection with the VA's provision of medical services plainly entails an individualized inquiry into the particular circumstances of each class member. *See, e.g.*, *Zukle v. Regents of Univ. of Cal.*, 166 F.3d 1041, 1048 (9th Cir. 1999) ("Whether a particular accommodation is reasonable depends on the circumstances of the individual case." (citation omitted)).

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

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

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

* * *

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

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

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

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

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

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

To begin, the Rehabilitation Act includes no private right of action to compel federal agencies to provide disabled persons "meaningful access" to federal programs and activities, whether express or implied. The Rehabilitation Act prohibits discrimination on the basis of disability "under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency." 29 U.S.C. § 794(a). In turn, the Act establishes that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance." *Id.* § 794a(a)(2). So the plain text of the Rehabilitation Act limits remedies in two important ways. First, while the Act broadly establishes liability for actions "by any Executive agency," *id.* § 794(a), it narrows remedies against the federal government only to instances when it acts as a "Federal provider of [funding] assistance," *id.* § 794a(a)(2). Second, the Act restricts remedies to those found in Title VI of the Civil Rights Act of 1964. *Id.* But Title VI only *creates* remedies that extend to federal agencies' decisions "to terminat[e] or refus[e] to grant or to continue financial assistance." 42 U.S.C. § 2000d-2. Thus, "[a]lthough the Rehabilitation Act prohibits discrimination by executive agencies acting as both grant providers and regulators, it authorizes an express private right of action to enforce only the grant-making provision." *Moya v. U.S. Dep't of Homeland Sec.*, 975 F.3d 120, 128 (2d Cir. 2020) (citing 29 U.S.C. § 794a). On top of this, Congress provided other methods to enforce the Rehabilitation Act's anti-discrimination aims—(1) by directing agency heads to "promulgate such regulations as may be necessary to carry out the" prohibition, 29 U.S.C. § 794(a), and (2) by allowing suits against executive agencies to proceed under the Administrative Procedure Act ("APA"). *See Moya*, 975 F.3d at 128. That Congress failed to provide a cause of action for alleged discrimination in federal agencies' operation of federal programs, but *did* expressly do so for agencies' funding decisions, makes clear that courts shouldn't imply such a remedy from the statute. *See FS Credit Opportunities Corp. v. Saba Cap. Master Fund, Ltd*, 146 S. Ct. 1546, 1553 (2026).

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

Second, expanding on a single sentence of an outdated and little-reasoned circuit precedent, the panel short-circuited any meaningful analysis of the class-action commonality requirement. *See Powers*, 163 F.4th at 1185 (relying on *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *abrogated in part on other grounds by Johnson v. California*, 543 U.S. 499 (2005)). *Armstrong* dealt with a class of disabled prisoners and parolees suing a state parole authority for disability accommodations during their parole proceedings. 275 F.3d at 855–57. In a fly-by-night analysis, the *Armstrong* panel decided that Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement was satisfied because the plaintiff class had made a civil-rights challenge to a "system-wide practice or policy that affect[ed] all of the putative class members." *Id.* at 868 (simplified). By doing so, the *Armstrong* panel made quick work of any "individual factual differences among the individual litigants" that might have existed. *Id.*

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

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

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

I.

Private Right of Action

The Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. § 701 *et seq.*), is a landmark piece of civil rights legislation. One of the Rehabilitation Act's many laudable purposes is to "empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. § 701(b)(1). The Rehabilitation Act promises that Americans will not be denied access to programs on the basis of disability:

> No otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

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

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

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d *et seq*.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e–5), applied to claims of discrimination in compensation) shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

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

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

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

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

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

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

We know that § 794a(a)(2)'s private right of action is limited to the federal government's funding decisions—not its general programs and activities—for two reasons. First, in contrast to § 794(a), which broadly prohibits discrimination in "any program or activity conducted by any Executive agency," § 794a(a)(2)'s remedies apply narrowly to only the federal government's role as "Federal provider of such assistance." This difference in language means something. As the Supreme Court has said in the context of the waiver of sovereign immunity,

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

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

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

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

And the text of the Rehabilitation Act gives another indication that there's no such private right of action. Recall that when Congress creates a detailed remedial scheme, that strongly suggests courts should not recognize remedies that were not expressly provided for, even where there is substantive rights-creating language. *Alexander*, 532 U.S. at 290. That makes sense—while the Supreme Court has instructed us to assess whether "a statute use[s] 'rights-creating language' aimed at protecting 'a particular class of persons,'" *FS Credit Opportunities Corp.*, 146 S. Ct. at 1553 (simplified), such language is "necessary" but not "sufficient" to infer congressional intent to create a private judicial remedy, *In re Wild*, 994 F.3d 1244, 1255 n.11 (11th Cir. 2021) (en banc) (Newsom, J.) (simplified); *accord Allco Renewable Energy Ltd. v. Mass. Elec. Co.*, 875 F.3d 64, 71 (1st Cir. 2017).

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

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

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

Many circuits have come to a similar conclusion. More than 35 years ago, then-Judge Stephen Breyer held for the First Circuit—sitting en banc for good measure—that the Rehabilitation Act's text precluded a private cause of action against the Department of Transportation's "refusal to amend, modify, or waive its regulation preventing [the deaf plaintiff] from driving a truck." *Cousins,* 880 F.2d at 605. Then-Judge Breyer observed that the Rehabilitation Act "is silent about whether and how a person injured by the government *as regulator* is to enforce the Act against the government." *Id.* In concluding that the Rehabilitation Act contains no implied private right of action for such circumstances, he reasoned that since judicial review is already generally available against federal agencies under the APA, there was no need to "strain" to find an implied cause of action in the Rehabilitation Act. *Id.* at 610.

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

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

We are on the wrong side of this lopsided circuit split. In 1991, we held that a physician had a cause of action under the Rehabilitation Act against the Justice Department and the FBI when they refused to send agents to him for examinations after it was discovered he had AIDS. *Doe*, 941 F.2d at 782, 794–95. We recognized that no statutory text expressly established a cause of action. *See id.* at 787. And elsewhere in *Doe*, we even acknowledged that sovereign immunity erects a higher bar for implying a private right of action. *Id.* at 789. But we did not know when to give up—we charged forward, wielding floor statements by individual legislators to assert that "Congress knew" some courts had interpreted the Act to provide an implied private cause of action. *Id.* at 786–87. We also relied on a single question asked by one Senator to similarly decide that Congress had intended for the Act to offer a broad remedy for all instances of disability discrimination. *Id.* at 787 ("In the congressional debates on section [794a], Senator Bayh asked and Senator Cranston confirmed that 'section [794a] merely extends to the handicapped the same remedies, procedures and rights already extended' through Titles VI and VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972." (simplified)). We then rode this swell of assumptions and legislative history to conclude that "the most reasonable interpretation" of the Rehabilitation Act was to make the federal government just as liable as private individuals. *Id.* at 791; *see also id.* at 791–93 (extensively examining House and Senate floor debates among individual legislators). But "at the very best," this legislative history was "ambiguous." *Dorsey*, 41 F.3d at 1555 (criticizing the Ninth Circuit's analysis). We even admitted that "the debates do not state outright that [§ 794(a)] subjects federal agencies to private actions for money damages," *Doe*, 941 F.2d at 792, despite reasoning that the debates "unequivocally express Congress's intent to do precisely that," *id.* at 793.

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

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

Finally, Plaintiff-Appellees argue that the federal government waived this argument by not pressing it before the panel. But the federal government sufficiently preserved this issue for review. While it primarily focused on whether the Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4113 (codified as amended at 38 U.S.C. § 7251 *et seq.*), stripped us of subject-matter jurisdiction, the federal government made clear in its opening brief an intent to challenge in "an appropriate case" this court's precedent holding that the Rehabilitation Act provides an implied private right of action against federal programs. *See* Opening Br. 30 n.2 (citing *Doe*, 941 F.2d at 787). And in its petition for rehearing en banc, the federal government confirmed that this is now "an appropriate case." That's because we could not have reconsidered *Doe* at the panel stage, so the government's request to do so would have been "futile." *United States v. Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir. 2014) (en banc). In any event, "we have the authority and discretion to decide questions first raised in a petition for rehearing en banc" and "we have done so at the government's request." *Id.* at 1159–60 (simplified). Both parties addressed this pure question of law in their en banc petition briefing, so nothing bars us from considering the question as an en banc court. *See Lee v. Fisher*, 70 F.4th 1129, 1154 (9th Cir. 2023) (en banc). Indeed, when the issue is of great "importance" (as this one no doubt is), we should feel obliged to do so. *Id.*

II.

Class-Action Commonality

Class actions are "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Wal-Mart*, 564 U.S. at 348 (simplified). Though class actions can create efficiencies for courts and parties, they also raise distinct dangers. *See, e.g.*, *Kincannon v. United Airlines, Inc.*, 168 F.4th 713, 735 (5th Cir. 2026) (Willett, J., concurring in part and concurring in the judgment). Opportunistic litigants hungry for damages may assert themselves as leaders of classes that didn't ask to be led, creating undue pressures on defendants to settle for fear of a ruinous judgment. *See, e.g.*, *id.*; *see also Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 685 (9th Cir. 2022) (en banc) (Lee, J., dissenting) ("If a court certifies a class, the potential liability at trial becomes enormous, maybe even catastrophic, forcing companies to settle even if they have meritorious defenses."). The prospect of injunctive relief against the government on behalf of large classes can convert courts into quasi-legislators, effectively allowing judges to make policy choices on behalf of thousands—or even millions—of people. *See Trump v. CASA, Inc.*, 606 U.S. 831, 867–68 (2025) (Alito, J., concurring). To that end, we must treat class certification with care.

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

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

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

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

A.

Article III Standing

The greatest flaw with the panel's expansive view of class actions is that it created commonality between injured and uninjured class members. Two of the most important checks on our powers as federal judges are that we can only decide "concrete disputes between an injured plaintiff and a defendant according to the law," *Washington v. Trump*, 145 F.4th 1013, 1041 (9th Cir. 2025) (Bumatay, J., concurring in part and dissenting in part), and "that we may only grant party-specific relief," *id.* at 1040. These checks "prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013) (simplified). At the end of the day, "[t]he Founders left non-particularized challenges to disfavored policy to the ballot box—not the courts." *Washington v. Trump*, 145 F.4th at 1041 (Bumatay, J., concurring in part and dissenting in part). So "we must resist the temptation to expand our authority by . . . allowing . . . jurisdictional end-runs." *Id.*

"The federal court system is reserved only for those that have suffered an injury" cognizable under Article III. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 791 n.7 (9th Cir. 2021), *vacated on reh'g en banc*, 31 F.4th 651 (9th Cir. 2022); *see FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 380 (2024). A class action is no different. *See Olean Wholesale Grocery Coop.*, 993 F.3d at 791 n.7; *see also Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 446 (2016) (Roberts, C.J., concurring) ("Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not."); *Speerly v. Gen. Motors, LLC*, 143 F.4th 306, 352 (6th Cir. 2025) (en banc) (Nalbandian, J., concurring) (determining, after surveying historical practice, that a district judge who "certifies a class containing individuals who lack Article III standing" risks committing an ultra vires act). That's why "[t]he presence of uninjured parties in a certified class . . . raises serious standing implications under Article III." *Olean Wholesale Grocery Coop.*, 993 F.3d at 791 n.7. After all, "if there are members of a class that aren't even injured, they can't share the same injury with the other class members." *Lab'y Corp. of Am. Holdings v. Davis*, 605 U.S. 327, 332 (2025) (Kavanaugh, J., dissenting) (simplified). In sum, Article III places limits on commonality under Rule 23 and prohibits us from approving an expansive class like the one here.

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

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

Or take plaintiff Laurieann Wright, who illustrates another standing problem. She suffers from PTSD and lives in VA-affiliated housing in Lancaster—almost 65 miles away from the West L.A. Campus. Ms. Wright apparently could travel to the Campus, but she indicated that sitting in traffic or on a train for hours is painful because of her physical disabilities. Thus, it's not clear that the VA's failure to provide housing has solely injured Ms. Wright—rather, her physical disabilities play a role. So even if she is injured by the VA's actions, her claims require a different analysis than those of a veteran without physical disabilities or a long commute.

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

B.

Impact of *Wal-Mart*

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

In assessing commonality, *Wal-Mart* instructs that a putative class must establish that class members "have suffered the same injury." 564 U.S. at 350 (simplified). Once again, this requires a showing that the class action will "generate [a] common answer[]" to "an issue that is central to the validity of each one of the [class members'] claims in one stroke." *Id.* (simplified). That goes well beyond a showing "merely that [class members] have all suffered a violation of the same provision of law." *Id.* And the showing is necessarily fact-intensive, *see id.* at 353, given that "[d]issimilarities within the proposed class . . . have the potential to impede the generation of common answers," *id.* at 350 (simplified). Confirming commonality is a rigorous undertaking. *See id.* at 350–51.

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

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

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

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

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

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

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

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

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

C.

Armstrong's Factual Context

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

In *Armstrong*, disabled state prisoners and parolees sued the California Board of Prison Terms and state officials, alleging that the state parole authority failed to make certain accommodations for them at parole proceedings in violation of federal law. *Armstrong*, 275 F.3d at 854. They alleged that the Board's parole notification, hearing, and appeals process required written forms that they could not understand without accommodations, which in turn caused those prisoners and parolees to forfeit their rights or be unable to adequately represent themselves at their parole hearings. *Id.* at 856–58. The class consisted of prisoners and parolees with six categories of disability: mobility impairments, hearing disabilities, visual disabilities, learning disabilities, mental retardation, and renal impairments. *Id.* at 854. Though the Board sought to split the state prisoners into different classes, the *Armstrong* panel disagreed despite some “individual factual differences” among the groups. *Id.* at 868. The panel reasoned that “the differences that exist here do not justify requiring groups of persons with different disabilities, all of whom suffer similar harm from the Board’s failure to accommodate their disabilities, to prosecute separate actions.” *Id.*

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

In contrast, the panel here didn’t explain how the VA has “system-wide” control over the class of homeless veterans or how its limited housing policy on the West L.A. Campus has constituted a “system-wide” policy or practice. The VA certainly doesn’t control Los Angeles’s county-wide housing or population of disabled homeless veterans. Far from it. Indeed, it’s likely that significant numbers of class members were outside the reach of the VA’s housing policy—it doesn’t and can’t house the thousands of homeless veterans in the county. In fact, the panel didn't even say how many of the class members actually sought VA care at the West L.A. Campus or how many of those would have directly benefitted from permanent housing on the West L.A. Campus. Indeed, it's anyone's guess as to how the VA's "systematic" housing policy has "affected" the putative class—if at all. The panel never told us beyond superficialities. *See Powers*, 163 F.4th at 1185. Under the panel's approach, any challenged action could be labeled "systematic" and satisfy *Armstrong*'s low bar.

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

III.

Conclusion

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

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

I respectfully dissent.