No. 24-6576

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JEFFREY POWERS, *et al.*,

Plaintiffs–Appellees,

v.

DENIS RICHARD MCDONOUGH,
in his official capacity as Secretary of Veterans Affairs, *et al.*,

Defendants–Appellants.

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

LEGAL SCHOLARS' MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' MOTION TO STAY

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Amici legal scholars—Erwin Chemerinsky, Pamela Karlan, Judith Resnik, Laurence Tribe, Michael Wishnie, and Adam Zimmerman—respectfully seek leave to file the attached brief as *amici curiae* in opposition to Appellants' motion for a stay. All parties before this Court consent to the filing of this brief. As set forth more fully in the attached brief, *amici* have significant expertise regarding the issues before the Court and a strong interest in the outcome of this motion.

Date: November 19, 2024

Respectfully submitted,

/s/ Evelyn Danforth-Scott

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CERTIFICATE OF SERVICE

I hereby certify that on November 19, 2024, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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STATEMENT OF INTEREST[1]

Amici Erwin Chemerinsky, Pamela Karlan, Judith Resnik, Laurence Tribe, Michael Wishnie, and Adam Zimmerman are law professors from leading academic institutions. The scope of the jurisdiction-stripping provision of the Veterans' Judicial Review Act falls comfortably within amici's domains of scholarly expertise, and the statute's proper interpretation is of significant interest to them.

INTRODUCTION

The Veterans' Judicial Review Act ("VJRA") does not withdraw jurisdiction over Plaintiffs' claims. The jurisdiction-stripping language in Section 511 prohibits federal district courts from second-guessing the Secretary of Veterans Affairs' previous judgments in individualized benefit determinations. *See, e.g.*, *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc) ("*VCS*"). But, consistent with that statute's plain text and this circuit's longstanding principle that jurisdiction-stripping language must be narrowly construed, Section 511 is limited to "barr[ing] review in the district court of

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), Amici submit this brief without an accompanying motion for leave to file because all parties before this Court have consented to its filing. Amici state that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party, nor their counsel, contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than Amici, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

decisions that the Secretary has actually made." *Blue Water Navy Viet. Veterans Ass'n, Inc. v. McDonald*, 830 F.3d 570, 575 (D.C. Cir. 2016). Section 511 does not vest the VJRA review process with exclusive purview over all statutes that implicate veterans' care, particularly not those outside the agency's areas of expertise. *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006); *see also Axon Enter., Inc. v. FTC*, 598 U.S. 175, 186 (2023). It applies only to determinations about benefits actually offered by the agency, not "all action or inaction by the VA." *Tunac v. United States*, 897 F.3d 1197, 1203 (9th Cir. 2018).

Here, Plaintiffs did not collaterally attack the Secretary's prior benefit decisions. Instead, they sought reasonable accommodations to access benefits the Secretary already granted them—accommodations guaranteed outside of statutes the VA administers, and which do not qualify as benefits within the agency's own definition of the term. The district court therefore did not impermissibly "review" benefits decisions; it simply acknowledged them as fact, something Article III courts routinely do for expert agency determinations.

The Government's position would also deprive Plaintiffs of a meaningful forum to air their claims. Neither the VJRA, its implementing regulations, nor the VA's own practices contemplate adjudicating Rehabilitation Act claims of this sort through the VJRA's dispute resolution process. Even if they did, the VA lacks the power to issue the full remedies Plaintiffs sought below. This Court should avoid

reading the one statute as foreclosing relief under the other—a result Congress "rarely" expects when it crafts agency review schemes. *Axon*, 598 U.S. at 186.

ARGUMENT

I. The District Court properly exercised jurisdiction.

A. Jurisdiction stripping language must be construed narrowly.

Congress drafts legislation against a "strong presumption in favor of judicial review of administrative action." *I.N.S v. St. Cyr*, 533 U.S. 289, 298 (2001). Moreover, "[e]ven where the ultimate result" is to "limit judicial review," the "narrower construction of a jurisdiction-stripping provision is favored over the broader one." *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004). The "express instructions of the Supreme Court, [circuit] precedent, and common sense" all warn against wooden, maximalist readings of jurisdiction-stripping language. *Acre v. United States*, 899 F.3d 796, 800 (9th Cir. 2018).

Where a jurisdiction-stripping provision funnels claims through a special agency review scheme, it must also be read against the presumption that "the point" of such schemes is generally "to give the agency a heightened role in the matters it customarily handles, and can apply distinctive knowledge to." *Axon*, 598 U.S. at 186. For claims that fall outside the agency's bailiwick, "courts are at no disadvantage" to evaluate them, diminishing the purpose of exclusive agency review. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 (2010); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994).

B. The text of Section 511 extends only to "review" of previous benefit determinations—something Plaintiffs did not seek.

On its face, Section 511 of the VJRA withdraws Article III jurisdiction only over a specific subset of claims: those that would second-guess the VA's pre-existing, individualized benefit determinations. The statute prohibits federal district courts from (1) "review[ing]" any "decision of the Secretary" as to (2) "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a). Read together, those clauses bar "review in the district court of decisions that the Secretary has actually made," *McDonald*, 830 F.3d at 575, in "the context of an individual veteran's VA benefits proceedings." *VCS*, 678 F.3d at 1023.

That targeted displacement of jurisdiction incorporates several meaningful limitations. Critically, Section 511 does not grant the agency "*exclusive* jurisdiction to construe laws affecting the provision of veterans benefits" or to "consider all issues that might somehow touch upon whether someone receives veterans benefits." *Broudy*, 460 F.3d at 112. Otherwise, it would "require the Secretary, and only the Secretary, to make all decisions related to laws affecting the provision of benefits," sweeping well beyond the narrow review scheme Congress designed. *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000). Nor does it capture "all action or inaction by the VA." *Tunac*, 897 F.3d at 1203 (cleaned up). It encompasses only those benefits Congress has provided for

veterans through the agency, not any possible action the VA takes outside of the benefit schemes Congress empowered it to administer.

Section 511 also does not bar claims that "would not possibly have any effect on the benefits" a veteran has "already been awarded," *VCS*, 678 F.3d at 1023 (cleaned up), even where those claims turn on fact-bound, individualized evaluations of the agency's provision of care. For example, medical malpractice claims alleging VA providers' negligence generally remain subject to district court review. *Tunac*, 897 F.3d at 1204-05; *see also VCS*, 678 F.3d at 1023.

Here, Plaintiffs' claims plainly fall beyond the reach of Section 511. They did not ask the district court to "review[]" any benefit decision. Rather, they took the Secretary's prior determinations of law and fact about their eligibility for benefits as a given, and contested their ability to *access* those benefits. And accommodations to access benefits are analytically distinct from underlying benefit awards themselves. To draw this out, consider a disabled veteran who sues the VA under the Rehabilitation Act seeking wheelchair ramps at the entryway to an agency-run medical facility. That veteran's eligibility to receive care at the facility would surely be due to a prior determination by the Secretary. But it would stretch the text of Section 511 past its breaking point to suggest he seeks judicial "review" of that determination. The point is to meaningfully access benefits already awarded, not to collaterally attack the award itself. So, too, for these Plaintiffs.

True, rights conferred by the Rehabilitation Act "affect" veterans' benefits in the most literal possible sense. But common-sense limitations on agency authority preclude reading that lone word in Section 511 so expansively as to vest the VJRA's review process with exclusive jurisdiction over all Rehabilitation Act claims, including those pressed below. To start, the Rehabilitation Act does not implicate the VA's "distinctive knowledge," *Axon*, 598 U.S. at 186. Plaintiffs seek accommodations under a generally applicable civil rights statute that Congress passed to hold the government accountable through private suit, not a statute that vests any one expert agency with exclusive decision-making authority based on its specialized expertise. *Cf. Sierra v. City of Hallandale Beach*, 904 F.3d 1343, 1351–52 (11th Cir. 2018) (affirming jurisdiction because the agency had "no expertise" on "what constitutes a violation under the Rehabilitation Act"). In any event, open-ended clauses that delineate an agency's authority should generally be given "a non-hyperliteral reading," lest the statute "assum[e] near-infinite breadth." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016) (narrowly defining agency power to regulate practices "affecting" electricity rates).

The prospect that this Court will first need to "determine whether individual Plaintiffs are entitled to VA benefits" and then verify "the scope of those benefits," Reply in Supp. of Mot. to Dismiss, 8–9, *Powers et al. v. McDonough et al.*, No. 22-cv-8357, ECF No. 57 (C.D. Cal. August 7, 2023), is also not to the

contrary. Plaintiffs asked the district court to recognize their entitlement to benefits because those entitlements served as the factual predicate to their denial-of-access claims. But identifying facts from an agency's undisputed record is not remotely the same as asking this Court to "review" that agency's determinations. Indeed, a contrary holding would have perverse consequences. It could prevent the agency's determinations from having preclusive effect in subsequent Article III proceedings, despite the "longstanding" principle that "courts may take" those determinations "as given." *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (cleaned up). That would frustrate the statute's very purpose: preserving the agency's primacy in technical decision-making.

C. The Government's position would deprive veterans of any meaningful opportunity to enforce their rights.

The Government's reading of Section 511 would also leave Plaintiffs in a jurisdictional no man's land—unable to pursue relief in federal district court *and* the VJRA adjudication process. But, as the Supreme Court recently explained, Congress "rarely allows claims about agency action to escape effective judicial review." *Axon*, 598 U.S. at 186. For that reason, even otherwise-exclusive statutory review schemes typically do not displace district court jurisdiction if doing so would "foreclose all meaningful judicial review." *Id.* (cleaned up).

As the Court of Appeals for Veterans Claims has already recognized, *Camacho v. Nicholson*, 21 Vet. App. 360, 366 (Vet. App. 2007), neither the VJRA

nor its implementing regulations authorize adjudicating Rehabilitation Act claims of this sort through the special agency review scheme. The VJRA prescribes that veterans first file individual claims for benefits through the VA itself; they may then challenge those determinations through the special statutory review scheme. VA regulations, however, permit the agency's regional offices—the first step in the benefits determination process—to consider veterans' claims only for benefits "under the laws administered" by the VA. 38 C.F.R. § 3.1(p). And the Rehabilitation Act, recall, is not a law administered by the VA; it is a generally applicable federal nondiscrimination statute. Indeed, because Plaintiffs have no "entitlement to" permanent supportive housing "under laws administered by the" VA, the relief they seek does not even qualify as a "benefit" within the agency's own definition of the term, 38 C.F.R. § 20.3(e). Removing any doubt, the agency's standard forms literally do not allow veterans to present Rehabilitation Act claims, as would be required by 38 C.F.R. Section 3.1(p).

Even if Plaintiffs could pursue their claims through the VJRA adjudication scheme (and they cannot), that process would not grant them the remedy awarded below. Rehabilitation Act claimants may recover the full range of remedies authorized by Title VI of the Civil Rights Act, 29 U.S.C. § 794a, including system-wide injunctive relief. But neither Title 38 nor the VA's own regulations permit the agency to award the spectrum of remedies authorized by the Rehabilitation Act,

including the injunction they sought here. *See generally* 38 U.S.C. § 101 et seq; 38 C.F.R. § 1.9 et seq.

II. This plain text reading of Section 511 is fully consistent with *VCS*.

In its most recent extended treatment of Section 511, *Veterans for Common Sense v. Shinseki*, the en banc 9th Circuit concluded a district court had lacked jurisdiction over class-wide claims challenging the VA's lengthy processing times for mental health treatment. 678 F.3d at 1026. The claims here, however, are distinguishable. Plaintiffs did not ask the district court to reconsider the VA's benefits determinations by dressing up indisputably barred individual claims as system-level problems. They did not attack the VA's adherence to statutes it administers, nor its provision of benefits within the agency's definition of the term. Instead, Plaintiffs sought to vindicate a separate statutory right, created under a law of general applicability, to access those pre-determined and unchallenged benefits.

VCS's characterization of Congress's goals in passing the VJRA also does not counsel against jurisdiction. *VCS* cited one House Report as indicative of Congress's purpose in enacting Section 511. *See* 678 F.3d at 1021. Legislative history is an increasingly disfavored means of divining statutory meaning, particularly where—as here—text alone sheds sufficient light on the question at hand. Nevertheless, to the extent that source is relevant, it is fully consistent with the district court's exercise of jurisdiction below.

The House Report discusses Section 511 against the backdrop of the Supreme Court's decision in *Traynor v. Turnage*, 485 U.S. 535 (1988). There, the Court allowed district court jurisdiction over a claim alleging the VA's denial of benefits based on alcoholism violated a veteran's Rehabilitation Act rights. H.R. Rep. No. 100-963, at 21 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5803. According to the report, Congress passed Section 511 to reassert the primacy of "technical VA decision-making" in benefit determinations. *Id.*

In responding to *Traynor*, however, Congress surely did not mean to insulate the VA from judicial oversight over the full universe of statutory claims implicating veterans' benefits, including any possible challenges under the Rehabilitation Act. It merely meant to protect the VA from judicial second-guessing over the same kind of individual benefit determinations at the heart of *Traynor* itself: those involving "an individual's application for benefits," and the agency's denial of "such benefits under laws providing benefits to veterans." *Id.* That is a far cry from excluding all Rehabilitation Act claims, particularly those that take prior VA determinations for granted and do not even seek benefits offered by the agency.

CONCLUSION

The district court properly exercised jurisdiction, and *amici* respectfully request that the Court deny the government's motion for a stay.

Date: November 19, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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