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15 **UNITED STATES DISTRICT COURT**  
16 **CENTRAL DISTRICT OF CALIFORNIA**

17 JEFFREY POWERS, <i>et al.</i> ,	Case No.: 2:22-cv-08357 DOC (JEMx)
18 <i>Plaintiffs,</i>	<i>Hon. David O. Carter</i>
19 v.	<b>[PROPOSED] BRIEF OF LEGAL</b>
20	<b>SCHOLARS AS AMICI CURIAE IN</b>
21 DENIS RICHARD MCDONOUGH, in	<b>SUPPORT OF PLAINTIFFS</b>
22 his official capacity as Secretary of	Date: Nov. 10, 2023
23 Veterans Affairs, <i>et al.</i> ,	Compl. filed: Nov. 15, 2022
24 <i>Defendants.</i>	<i>Trial Date: No trial date set</i>

TABLE OF CONTENTS

1

2 TABLE OF AUTHORITIES..... ii

3 IDENTITY AND INTEREST OF *AMICI CURIAE* .....v

4 INTRODUCTION .....1

5 ARGUMENT .....2

6

7 I. This Court retains jurisdiction over Plaintiffs’ Rehabilitation Act

8 claims.....2

9 A. Basic principles of statutory interpretation require

10 construing jurisdiction stripping language narrowly.....2

11 B. The text of Section 511 extends only to judicial “review” of

12 previous benefit determinations—something Plaintiffs do

13 not seek.....3

14 C. The Government’s position would deprive veterans of any

15 meaningful opportunity to enforce their rights under the

16 Rehabilitation Act.....7

17 II. This plain text reading of Section 511 is fully consistent with the

18 Ninth Circuit’s reasoning in *VCS*. .....9

19

20 CONCLUSION.....12

21

22

23

24

25

26

27

TABLE OF AUTHORITIES

Page(s)

CASES

*Acre v. United States*,  
899 F.3d 796 (9th Cir. 2018).....2

*ANA International, Inc. v. Way*,  
393 F.3d 886 (9th Cir. 2004).....2

*Axon Enterprise, Inc. v. Federal Trade Commission*,  
598 U.S. 175 (2023)..... 1, 2, 3, 7

*B&B Hardware, Inc. v. Hargis Industries, Inc.*,  
575 U.S. 138 (2015).....7

*Bax v. Doctors Medical Center of Modesto, Inc.*,  
No. 1:17-cv-01348, 2021 WL 3733113 (E.D. Cal. Aug. 24, 2021) .....9

*Blue Water Navy Vietnam Veterans Association, Inc. v. McDonald*,  
830 F.3d 570 (D.C. Cir. 2016) .....1, 4

*Broudy v. Mather*,  
460 F.3d 106 (D.C. Cir. 2006) ..... 1, 4, 10

*Camacho v. Nicholson*,  
21 Vet. App. 360 (Vet. App. 2007).....8, 9

*Dismuke v. United States*,  
297 U.S. 167 (1936).....2

*Federal Energy Regulatory Commission v. Electric Power  
Supply Association*,  
577 U.S. 260 (2016).....6

*Floyd-Mayers v. American Cable Co.*,  
732 F. Supp. 243 (D.D.C. 1990) .....6

*Free Enterprise Fund v. Public Co. Accounting Oversight Board*,  
561 U.S. 477 (2010).....3

1 *Hanlin v. United States*,  
214 F.3d 1319 (Fed. Cir. 2000).....4

2

3 *INS v. St. Cyr*,  
533 U.S. 289 (2001).....2

4

5 *Jennings v. Rodriguez*,  
138 S. Ct. 830 (2018).....3, 7

6

7 *Sierra v. City of Hallandale Beach*,  
904 F.3d 1343 (11th Cir. 2018).....5

8

9 *Thomas v. Principi*,  
394 F.3d 970 (D.C. Cir. 2005) .....4

10

11 *Thunder Basin Coal Co. v. Reich*,  
510 U.S. 200 (1994).....3, 7

12

13 *Torres v. United States Department of Homeland Security*,  
411 F. Supp. 3d 1036 (C.D. Cal. 2019).....7

14

15 *Traynor v. Turnage*,  
485 U.S. 535 (1988).....11

16

17 *Tunac v. United States*,  
897 F.3d 1197 (9th Cir. 2018) .....1, 4

18

19 *Veterans for Common Sense v. Shinseki*,  
678 F.3d 1013 (9th Cir. 2012)..... 1, 4, 9, 10

20

21 *Wilkie v. Robbins*,  
551 U.S. 537 (2007).....2

22

23 *Wong v. United States*,  
373 F.3d 952 (9th Cir. 2004).....2

24 **STATUTES**

25 29 U.S.C. § 794a .....9

26 38 U.S.C. § 5100 .....9

1 38 U.S.C. § 511 ..... *passim*

2 38 U.S.C. § 7104.....7

3 38 U.S.C. § 7251 .....7

4 38 U.S.C. § 7261 .....7

5 38 U.S.C. § 7292.....7

6 8 U.S.C. § 1252(g) .....3

7

8 **REGULATIONS**

9 38 C.F.R. § 20.3(e).....8

10 38 C.F.R. § 3.1(p).....8

11

12 **LEGISLATIVE MATERIALS**

13 H.R. Rep. No. 100-963 (1988),

14 *reprinted in 1988 U.S.C.C.A.N. 5782* .....6, 11

15

16

17

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## INTRODUCTION

The Veterans' Judicial Review Act ("VJRA") does not withdraw this Court's jurisdiction over Plaintiffs' Rehabilitation Act 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 the Ninth Circuit's longstanding principle that even indisputable jurisdiction-stripping language must be narrowly construed, Section 511 is limited to "barr[ing] review in the district court of 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's special review process with exclusive purview over all statutes that implicate veterans' care, particularly not those outside the agency's core 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). And Section 511 is limited to determinations about benefits actually offered by the agency; it does not cover "all action or inaction by the VA." *Tunac v. United States*, 897 F.3d 1197, 1203 (9th Cir. 2018).

Here, Plaintiffs do not seek review of the Secretary's prior benefit decisions. Instead, in keeping with the Rehabilitation Act's promises, they seek reasonable accommodations to access whatever benefits the Secretary has already accorded them—accommodations that exist outside of statutes the VA administers and which do not qualify as benefits within the agency's own definition of the term. To the extent Plaintiffs' claims require this Court to consider past benefit determinations, it is merely to *acknowledge* the Secretary's prior findings of fact and conclusions of law, something Article III courts routinely do for expert agency determinations. This Court thus retains jurisdiction.

1 Strengthening that conclusion, the Government’s position would deprive  
2 Plaintiffs of a meaningful forum to air their claims. Neither the VJRA, nor its  
3 implementing regulations, nor the VA’s own internal practices contemplate  
4 adjudicating Rehabilitation Act claims of this sort through the VJRA’s specified  
5 dispute resolution process. Even if they did, the VA lacks the power to issue the full  
6 remedies Congress authorized for violations of the Rehabilitation Act, including the  
7 injunctive relief Plaintiffs seek here. This Court should avoid reading the one statute  
8 as foreclosing relief under the other—a result Congress “rarely” expects even when  
9 it crafts otherwise-exclusive agency review schemes, *Axon*, 598 U.S. at 186.

## 10 ARGUMENT

### 11 I. This Court retains jurisdiction over Plaintiffs’ Rehabilitation Act claims.

12 *A. Basic principles of statutory interpretation require construing*  
13 *jurisdiction stripping language narrowly.*

14 Congress drafts legislation against a “strong presumption in favor of judicial  
15 review of administrative action.” *INS v. St. Cyr*, 533 U.S. 289, 298 (2001). To rebut  
16 that presumption, a statute must contain “compelling” language to the contrary.  
17 *Dismuke v. United States*, 297 U.S. 167, 172 (1936). This presumption in favor of  
18 Article III jurisdiction applies with equal force for statutes that inarguably limit some  
19 aspects of federal courts’ reach. “Even where the ultimate result” is to “limit judicial  
20 review,” the “narrower construction of a jurisdiction-stripping provision is favored  
21 over the broader one.” *ANA Int’l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004);  
22 *see also Wong v. United States*, 373 F.3d 952, 963 (9th Cir. 2004) (jurisdiction-  
23 stripping language should not be read “broadly” where it can be “subject to a ‘much  
24 narrower’ interpretation”), *overruled on other grounds by Wilkie v. Robbins*, 551  
25 U.S. 537 (2007).

26 Consider, for example, *Acre v. United States*, 899 F.3d 796 (9th Cir. 2018).  
27 There, the Ninth Circuit held that a non-citizen could proceed with FTCA claims



1 brought in the district court based on injuries he suffered when the Attorney General  
2 wrongfully executed a removal order against him. Although 8 U.S.C. Section  
3 1252(g) strips Article III courts of jurisdiction over “any cause or claim . . . arising  
4 from the decision or action by the Attorney General” to “execute removal orders,”  
5 the Ninth Circuit declined to read such language to literally “extend to *any* action  
6 taken in connection with a removal order.” *Id.* at 799 (emphasis in original). Rather,  
7 relying on “the express instructions of the Supreme Court, our precedent, and  
8 common sense,” it construed the scope of the relevant jurisdiction-stripping  
9 provision “narrowly” and permitted suit. *Id.* at 800; *see also Jennings v. Rodriguez*,  
10 138 S. Ct. 830, 840–41 (2018) (plurality).

11 In the context of statutory review schemes like the one supplied by the VJRA,  
12 otherwise-indeterminate jurisdictional grants must also be read against the  
13 presumption that “the point of special review provisions” is generally “to give the  
14 agency a heightened role in the matters it customarily handles, and can apply  
15 distinctive knowledge to.” *Axon*, 598 U.S. at 186. Where a claim falls outside the  
16 agency’s bailiwick, “courts are at no disadvantage” to evaluate it, diminishing  
17 Congress’s underlying rationale for exclusive agency review. *Free Enter. Fund v.*  
18 *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010); *see also Thunder Basin*  
19 *Coal Co. v. Reich*, 510 U.S. 200, 212 (1994).

20 *B. The text of Section 511 extends only to judicial “review” of previous*  
21 *benefit determinations—something Plaintiffs do not seek.*

22 Here, Section 511’s jurisdiction-stripping language withdraws Article III  
23 jurisdiction over a specific subset of claims. The statute contains two requirements:  
24 It prohibits federal district courts from (1) “review[ing]” any “decision of the  
25 Secretary” as to (2) “questions of law and fact necessary to a decision by the  
26 Secretary under a law that affects the provision of benefits by the Secretary to  
27 veterans.” 38 U.S.C. § 511(a). Together, those clauses prohibit “review in the

1 district court of decisions that the Secretary has actually made,” *Blue Water Navy*  
2 *Viet. Veterans Ass’n*, 830 F.3d at 575, in “the context of an individual veteran’s VA  
3 benefits proceedings,” *VCS*, 678 F.3d at 1023.

4 That targeted displacement of jurisdiction incorporates several meaningful  
5 limitations. Critically, Section 511 does not “require the Secretary, and only the  
6 Secretary, to make all decisions related to laws affecting the provision of benefits.”  
7 *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000). Instead of granting  
8 the agency “*exclusive* jurisdiction to construe laws affecting the provision of  
9 veterans benefits” or to “consider all issues that might somehow touch upon whether  
10 someone receives veterans benefits,” Section 511 “simply gives the VA authority to  
11 consider” questions about how specifically to provide for veterans—including for  
12 factors such as ease of access—when it makes “a decision about benefits.” *Broudy*,  
13 460 F.3d at 112 (emphasis in original). Claims that otherwise touch on the agency’s  
14 provision of benefits remain justiciable through standard Article III review so long  
15 as they do not seek to second-guess the VA’s pre-existing, individualized  
16 determinations. *Id.*

17 Relatedly, Section 511 does not capture “all action or inaction by the VA.”  
18 *Tunac*, 897 F.3d at 1203 (quoting *Thomas v. Principi*, 394 F.3d 970, 974–75  
19 (D.C. Cir. 2005)). It encompasses only those benefits Congress has already provided  
20 for veterans through the agency, not any possible action the VA may take outside of  
21 the precisely-delineated benefit schemes Congress gave it the power to administer.

22 Finally, Section 511 does not reach claims that “would not possibly have any  
23 effect on the benefits” a veteran has “already been awarded,” even where those  
24 claims turn intimately on fact-bound, individualized evaluations of the agency’s past  
25 provision of benefits. *VCS*, 678 F.3d at 1023 (citation and quotations omitted). For  
26 example, medical malpractice claims against the VA generally remain subject to  
27 district court review. *Id.*

1 Here, Plaintiffs’ Rehabilitation Act claims fall beyond the reach of Section  
2 511 several times over. First, they do not ask the court to “review[.]” any prior benefit  
3 decision. Far from seeking to dislodge, undermine, or otherwise revise them,  
4 Plaintiffs take the Secretary’s prior determinations of law and fact about their  
5 eligibility for benefits as a given. Plaintiffs instead contest their ability to *reach*  
6 previously awarded benefits on account of their significant disabilities. And  
7 accommodations to access benefits are analytically distinct from the underlying  
8 benefit awards themselves; for example, it would stretch the text of Section 511 well  
9 past its breaking point to suggest a disabled veteran who sues the VA under the  
10 Rehabilitation Act seeking wheelchair-friendly ramps at the entryway to an agency  
11 medical facility had sought judicial “review” of a past benefit determination.

12 Indeed, Plaintiffs do not even seek “benefits” within the agency’s own  
13 understanding of the term. The statutes the VA administers do not provide permanent  
14 supportive housing for unhoused veterans, and comparable existing programs fall  
15 chiefly under the purview of the Department of Housing and Urban Development,  
16 not the VA. *See* Br. of *Amicus Curiae* Swords to Plowshares at 12 n.2, ECF No. 92.

17 Moreover, although rights conferred by the Rehabilitation Act surely  
18 “affect[.]” the provision of veterans’ benefits in the most literal possible sense, § 511,  
19 neither a common-sense reading of the statutory text nor traditional limitations on  
20 agency review schemes dictate that the VJRA’s review process commands exclusive  
21 jurisdiction over all Rehabilitation Act Claims. These Plaintiffs seek reasonable  
22 accommodations under a statute of general applicability—one that Congress passed  
23 to hold the federal government accountable by creating private rights enforceable  
24 through suit, not a statute that vests any one expert agency (let alone the VA  
25 specifically) with an exclusive grant of administrative and decision-making  
26 authority based on the agency’s specialized expertise. *Cf. Sierra v. City of*  
27 *Hallandale Beach*, 904 F.3d 1343, 1351–52 (11th Cir. 2018) (jurisdiction-stripping

1 statute did not give the FCC exclusive jurisdiction over Rehabilitation Act claims  
2 because “the FCC has no expertise” on “what constitutes a violation under the  
3 Rehabilitation Act”); *Floyd-Mayers v. Am. Cab Co.*, 732 F. Supp. 243, 247  
4 (D.D.C. 1990) (despite administrative commission’s “greater expertise in its  
5 specialized field,” Article III courts are “better-equipped to resolve disputes arising  
6 out of allegations of discrimination in violation of federal . . . civil rights statutes”).  
7 And open-ended clauses that delineate an administrative agency’s authority in this  
8 manner should generally be given “a non-hyperliteral reading,” to “prevent the  
9 statute from assuming near-infinite breadth.” *FERC v. Elec. Power Supply Ass’n*,  
10 577 U.S. 260, 278 (2016) (narrowly constructing agency’s power to regulate  
11 practices “affecting” electricity rates).

12 The prospect that this Court will first need to “determine whether individual  
13 Plaintiffs are entitled to VA benefits” and then verify “the scope of those benefits,”  
14 VA’s Reply in Supp. of Mot. to Dismiss at 8–9, ECF No. 57, is not to the contrary.  
15 Plaintiffs have asked the district court to recognize their existing entitlement to  
16 benefits solely because those entitlements serve as the factual predicate to their  
17 denial-of-access Rehabilitation Act claims. But identifying objectively verifiable  
18 background information about Plaintiffs by drawing on an administrative agency’s  
19 pre-determined (and here undisputed) record is not remotely the same as asking this  
20 Court to “review” that agency’s underlying determinations. To the best of amici’s  
21 knowledge, no jurisdiction-stripping provision has ever been interpreted to preclude  
22 an Article III court from merely acknowledging the fact of an agency’s previous  
23 factual findings in ancillary litigation. Indeed, reading the VJRA to prohibit judicial  
24 recognition of the Secretary’s underlying benefits determinations would undermine  
25 the statute’s very purpose, which was to preserve the agency’s primacy in “technical  
26 VA decision-making.” H.R. Rep. No. 100-963, at 20–21, 27–28 (1988), *reprinted in*  
27 1988 U.S.C.C.A.N. 5782, 5802–03, 5809–10. Equally to the point, reading the

1 VJRA to prohibit judicial recognition of the Secretary’s underlying benefits  
2 determinations would have perverse consequences more generally: it could prevent  
3 the agency’s underlying determinations from having preclusive effect in subsequent  
4 Article III proceedings even when the standard requirements for issue preclusion are  
5 otherwise met, despite the “longstanding” principle the “courts may take” those  
6 determinations “as given.” *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138,  
7 148 (2015) (quotations omitted). This Court should resist such a counter-productive  
8 reading of Section 511.

9 *C. The Government’s position would deprive veterans of any meaningful*  
10 *opportunity to enforce their rights under the Rehabilitation Act.*

11 As if these building blocks of statutory interpretation were not enough to  
12 exercise jurisdiction over Plaintiffs’ Rehabilitation Act claims, practical  
13 considerations likewise counsel in favor of district court review. Because Congress  
14 “rarely allows claims about agency action to escape effective judicial review,” even  
15 an otherwise-exclusive statutory review scheme may not displace Article III  
16 jurisdiction where doing so would “foreclose all meaningful judicial review’ of the  
17 claim.” *Axon*, 598 U.S. at 186 (quoting *Thunder Basin*, 510 U.S. at 212–13); *see*  
18 *also Jennings*, 138 S. Ct. at 840 (plurality) (refusing to interpret jurisdiction stripping  
19 provision so broadly as to make certain claims “effectively unreviewable”). That is  
20 particularly true where forcing a claimant to proceed through a special statutory  
21 review scheme would make the form of relief he seeks unavailable. *See Torres v.*  
22 *U.S. Dep’t of Homeland Sec.*, 411 F. Supp. 3d 1036, 1049 (C.D. Cal. 2019).

23 Neither the VJRA nor its implementing regulations authorize VA to review  
24 Plaintiffs’ Rehabilitation Act claims. Those authorities establish only a limited  
25 framework for adjudicating veterans benefit claims. *See generally* 38 U.S.C.  
26 §§ 7104, 7251, 7261, 7292(a), (c), (d)(1). Under the statute, veterans must first file  
27 individual “claims” for “benefits” through the VA itself; they then may challenge

1 those determinations through the VJRA’s special statutory review scheme. The  
2 agency’s regulations, in turn, define a “claim” as a request for the “determination of  
3 entitlement or evidencing a belief in entitlement, to a specific benefit under the laws  
4 administered by the [VA] submitted on an application form prescribed by the  
5 Secretary.” 38 C.F.R. § 3.1(p). Benefits encompass the “payment, service,  
6 commodity, function, or status, entitlement to which is determined under laws  
7 administered by the [VA] pertaining to veterans and their dependents and survivors.”  
8 38 C.F.R. § 20.3(e).

9 Those definitions contain two relevant limitations. First, VA regulations  
10 permit the agency’s frontline processing offices to consider veterans’ claims for  
11 benefits only “under the laws administered” by the VA. 38 C.F.R. § 3.1(p). But the  
12 Rehabilitation Act is not a law administered by the VA; it is a federal anti-  
13 discrimination statute that cuts across agencies. Driving this point home, VA forms  
14 do not even allow veterans to present Rehabilitation Act “claims” or seek relief under  
15 the statute, as required by 38 C.F.R. § 3.1(p). Second, accommodations sought under  
16 the Rehabilitation Act do not fall within the definition of “benefits” authorized by  
17 VA regulations. 38 C.F.R. § 20.3(e). Plaintiffs have no “entitlement to” permanent  
18 supportive housing “under laws administered by the” VA, *id.*, and the VJRA thus  
19 provides them with no mechanism by which to make these claims. These two  
20 restrictions mean Plaintiffs’ Rehabilitation Act claims are neither “benefits” within  
21 the meaning of the VJRA review scheme, nor “claims” susceptible to its  
22 adjudication. The Court of Appeals for Veterans Claims has even expressly  
23 recognized as much, explaining “neither the [Board of Veterans Appeals] nor th[is]  
24 Court is authorized to hear actions brought under” the Rehabilitation Act. *Camacho*  
25 *v. Nicholson*, 21 Vet. App. 360, 366 (Vet. App. 2007).

26 Even if Plaintiffs could pursue their Rehabilitation claims through the VJRA  
27 adjudication scheme—and they cannot—that process cannot grant them the

1 injunctive relief they seek. Rehabilitation Act claimants may recover the full range  
2 of “remedies, procedures, and rights set forth in Title VI of the Civil Rights Act  
3 of 1964.” 29 U.S.C. § 794a. This means “compensatory damages, injunctive relief,  
4 and other forms of relief traditionally available in suits for breach of contract.” *Bax*  
5 *v. Drs. Med. Ctr. of Modesto, Inc.*, No. 1:17-cv-01348, 2021 WL 3733113, at \*31 (E.D.  
6 Cal. Aug. 24, 2021). The VJRA’s review system, by contrast, is trained at resolving  
7 individual veterans’ “claims” for benefits under the VA’s laws. *See generally*  
8 38 U.S.C. § 5100 *et seq.* Refereeing the claims administration process is a far cry  
9 from awarding the full suite of remedies available under the Rehabilitation Act.  
10 *Camacho*, 21 Vet. App. at 366.

11 In short, dismissing Plaintiffs’ Rehabilitation Act claims on the basis of  
12 Section 511 would leave veterans in a jurisdictional no man’s land—preventing  
13 veterans from pursuing such claims in federal district court *and* the VJRA  
14 adjudication process. Surely Congress did not intend that unusual result.

15 **II. This plain text reading of Section 511 is fully consistent with the Ninth**  
16 **Circuit’s reasoning in *VCS*.**

17 Holding that Section 511 does not reach Plaintiffs’ Rehabilitation Act claims  
18 fits comfortably with the Ninth Circuit’s prior caselaw interpreting the VJRA. In its  
19 most recent extended treatment of Section 511, *Veterans for Common Sense v.*  
20 *Shinseki*, an en banc 9th Circuit concluded that district courts lacked jurisdiction  
21 over class-wide claims challenging the VA’s lengthy processing times for mental  
22 health treatment. The court began by reasoning it would “undoubtedly” lack  
23 jurisdiction to consider an individual veteran’s claim of “unreasonabl[e] delay[s]” in  
24 the provision of mental health care. *VCS*, 678 F.3d at 1026. It then rejected the  
25 plaintiffs’ efforts to “circumvent” that jurisdictional bar “by disavowing relief on  
26 behalf of any individual veteran” and repackaging their claims as an attack on  
27 systemic failures. *Id.* Ultimately, adjudicating the plaintiffs’ claims would still

1 require “evaluating the circumstances of individual veterans and their requests for  
2 treatment” *and* “determining whether the VA handled those requests properly.” *Id.*  
3 at 1028. Section 511 therefore barred district court review.

4 These Rehabilitation Act claims, however, are sharply distinguishable from  
5 the separate constitutional and statutory claims in *VCS*. Plaintiffs have not asked  
6 this Court to reconsider the VA’s benefit determinations by dressing up indisputably  
7 barred individual claims as system-level problems. Their claims do not attack the  
8 VA’s adherence to statutes it has been authorized to administer, nor its provision of  
9 benefits within the agency’s own definition of the term. They take the VA’s prior  
10 actions administering its own programs for granted, at both an individual and a  
11 systemic level. Instead, they seek to vindicate a separate statutory right, created  
12 under a law of general applicability, that would enable them to access those pre-  
13 determined and undisputed benefits.

14 Nor does the general analytical approach in *VCS* counsel against exercising  
15 jurisdiction here. *VCS* does not dislodge the Ninth Circuit’s general maxim that  
16 jurisdiction-stripping provisions must be read narrowly, nor the longstanding  
17 principles that limit the exclusive reach of special statutory review schemes. And  
18 *VCS* itself expressly invokes the D.C. Circuit’s more detailed approach to applying  
19 Section 511, which that Circuit has developed the course of its extensive  
20 consideration of jurisdiction-stripping under the VJRA—an approach which  
21 emphasizes that Section 511 does not give the Secretary “*exclusive* jurisdiction” over  
22 “all issues that might somehow touch upon whether someone receives veterans  
23 benefits,” *Broudy*, 460 F.3d at 112 (emphasis in original); *see VCS*, 678 F.3d  
24 at 1030 n.21 (applying *Broudy*’s test but distinguishing its facts).

25 Finally, *VCS*’s characterization of Congress’s goals in passing the VJRA also  
26 does not counsel against exercising jurisdiction. *VCS* cited one House Report as  
27 indicative of Congress’s purpose in enacting Section 511. *See VCS*, 678 F.3d



1 at 1021. Legislative history is an increasingly disfavored means of divining  
2 statutory meaning, particularly where—as here—text alone sheds sufficient light on  
3 the question at hand. Nevertheless, to the extent that source is relevant to resolving  
4 this motion, it is fully consistent with adjudicating Plaintiffs’ claims.

5 The House Report in question discusses Section 511 against the backdrop of  
6 the Supreme Court’s then-recent decision in *Traynor v. Turnage*, 485 U.S. 535  
7 (1988). There, the Court had allowed district court jurisdiction over a claim alleging  
8 that the VA’s denial of certain benefits based on a veteran’s alcoholism violated his  
9 Rehabilitation Act rights. H.R. Rep. No. 100-963, at 21. Congress passed  
10 Section 511 to reassert the primacy of “technical VA decision-making” in such  
11 individual benefit determinations. *Id.*

12 But *Traynor*, the same report observes, “involve[d] an individual’s application  
13 for benefits, and the Administrator’s refusal to grant such benefits under laws  
14 providing benefits to veterans.” *Id.* It follows that in responding to *Traynor*,  
15 Congress did not mean to insulate the VA from independent judicial oversight with  
16 respect to the full universe of possible statutory challenges affecting veterans’  
17 benefits, including any possible challenge brought under the Rehabilitation Act. It  
18 merely meant to insulate the VA from judicial second-guessing over the same kind  
19 of individual benefit determinations at the heart of *Traynor* itself: those already  
20 pressed before the agency and consummated by the Secretary. That is a far cry from  
21 excluding any possible Rehabilitation Act claim, particularly those that take prior  
22 benefit determinations for granted and do not even seek benefits offered under  
23 statutes administered by the VA.

1 **CONCLUSION**

2 This Court retains jurisdiction over Plaintiffs’ Rehabilitation Act claims. By  
3 its terms, Section 511 withdraws Article III jurisdiction only over claims that would  
4 require collateral judicial review of prior VA benefit awards. Plaintiffs here,  
5 however, take those past determinations as a given. Instead, in order to access  
6 benefits the VA has already awarded them, Plaintiffs seek disability accommodations  
7 that fall outside the scope of agency-awarded benefits and which arise under a statute  
8 the agency does not administer. This Court should not read Section 511 so  
9 expansively as to cover claims that fall well outside its plain text, particularly since  
10 doing so would deprive Plaintiffs of any meaningful alternative forum.

11 Dated: November 10, 2023

Respectfully submitted,

12  
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