

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
(WESTERN DIVISION - LOS ANGELES)

JEFFREY POWERS, ET AL,	)	CASE NO: 2:22-cv-08357-DOC-JEMx
	)	
Plaintiffs,	)	CIVIL
	)	
vs.	)	Los Angeles, California
	)	
DENIS RICHARD MCDONOUGH,	)	Tuesday, July 9, 2024
ET AL,	)	
	)	(10:41 a.m. to 3:15 p.m.)
Defendants.	)	

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HEARING RE:

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [DKT.NO.192];

MOTION FOR SUMMARY JUDGMENT  
AS TO PLAINTIFFS' FIRST AMENDED COMPLAINT AND IN OPPOSITION  
TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT [DKT.NO.193]

BEFORE THE HONORABLE DAVID O. CARTER,  
UNITED STATES DISTRICT JUDGE

APPEARANCES:                              SEE PAGE 2

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APPEARANCES:

For Plaintiffs:

ROMAN M. SILBERFELD, ESQ.  
TOMMY H. DU, ESQ.  
Robins Kaplan  
2121 Avenue of the Stars  
Suite 2800  
Los Angeles, CA 90067  
310-552-0130

MARK D. ROSENBAUM, ESQ.  
AMANDA R.M. SAVAGE, ESQ.  
Public Counsel  
610 S. Ardmore Ave.  
Los Angeles, CA 90005  
213-385-2977

For Intervenor  
Plaintiff:

ERNEST J. GUADIANA, ESQ.  
Elkins Kalt Weintraub, et al.  
10345 W. Olympic Boulevard  
Los Angeles, CA 90064  
310-746-4400

For Defendants:

CODY T. KNAPP, ESQ.  
JODY D. LOWENSTEIN, ESQ.  
BRAD P. ROSENBERG, ESQ.  
U.S. Department of Justice  
1100 L Street NW  
Washington, DC 2005  
202-514-3374

1 Los Angeles, California; Tuesday, July 9, 2024; 10:41 a.m.

2 (Call to Court)

3 **THE COURT:** On the record then in Jeffrey Powers  
4 versus Richard Denis McDonough, et al. And, counsel, just  
5 remain seated and make your appearances, please.

6 **MR. SILBERFELD:** Good morning, Your Honor, Roman  
7 Silberfeld, Robins Kaplan for the plaintiff.

8 **THE COURT:** Good morning.

9 **MR. HU:** Good morning, Your Honor, Tommy D. Hu on  
10 behalf of plaintiffs.

11 **THE COURT:** Pleasure.

12 **MR. ROSENBAUM:** Good morning, Your Honor, Mark  
13 Rosenbaum from Public Counsel on behalf of plaintiffs.

14 **THE COURT:** Pleasure.

15 **MS. SAVAGE:** Good morning, Your Honor, Amanda Savage  
16 from Public Counsel.

17 **THE COURT:** Okay. And pull that microphone closer  
18 when you speak, you've got a quiet voice, okay? Thank you.  
19 Counsel.

20 **MR. KNAPP:** Good morning, Your Honor, Cody Knapp for  
21 the federal defendants.

22 **THE COURT:** Pleasure.

23 **MR. LOWENSTEIN:** Jody Lowenstein for the federal  
24 defendants.

25 **THE COURT:** Pleasure.

1           **MR. ROSENBERG:** Brad Rosenberg from the Department of  
2 Justice for the federal defendants.

3           **THE COURT:** Good seeing you.

4           **MR. GUADIANA:** And Ernest Guadiana on behalf of  
5 intervenor Bridgeland Resources.

6           **THE COURT:** Okay. I want to start with something not  
7 related to your motion today and that is, earlier in the case I  
8 disclosed to you that first of all I was a veteran. Second, I  
9 disclosed to you that I'd had numerous contact with Steven  
10 Braverman and other individuals and I got the witness list for  
11 the first time last evening, about 4:30 I think you filed it.  
12 We saw it last night, later in the evening.

13                   And one of the motions now involves Dr. Sharon  
14 Braverman apparently as a witness and a whole host of people,  
15 so I'm going to tell you a shaggy dog story for just a moment  
16 and it's going to take some time because there may be some VA  
17 officials who come into my court whose name I haven't put with  
18 a face. And I may have met them in Washington, D.C., so I  
19 haven't disclosed this before.

20                   It's going to take a while. What year did we start,  
21 when was this, yeah, I have to go back to 2018 with Carol Sobel  
22 appearing in court with Brooke Weitzman and the County of  
23 Orange involving the Santa Ana riverbed and what was estimated  
24 to be a minimum of 500 and as many as 14 homeless persons  
25 living in the riverbed.

1           No citation had been issued for five and a half years  
2 by the Orange County Sheriff's Office or Orange Police  
3 Department or the Anaheim Police Department. For want of a  
4 better word, it had become a depository, let's say with help  
5 from different agencies, dropping homeless off throughout  
6 Orange County.

7           That ranged from a number of cities, they had their  
8 own police force and their own mayor, coastal cities and would  
9 transport homeless from their cities to the Santa Ana riverbed  
10 and literally drop them off. And the police weren't going to  
11 be witnesses, frankly, but the fire department was willing to  
12 be.

13           And so if you talk to the Anaheim Fire Department,  
14 and they sat up in a tower, they would see a certain city with  
15 a patrol car dump a homeless, and sometimes veteran who was an  
16 amputee off in the river, from another city.

17           This is going to take a while because it's going to  
18 tie into a disclosure about VA witnesses for a moment and  
19 you're going to have to help me with who's testifying.

20           The first issue was trash. And after listening to  
21 three days of the parties trying to define what trash was, and  
22 frankly in frustration, I got off the bench and decided to take  
23 a walk on the Santa Ana riverbed, because the advocates  
24 believed that almost everything that the county was taking was  
25 personal property or licenses.

1           And for the County's perspective, this had turned  
2 into an absolute horrific health issue. In fact, 400 pounds of  
3 feces were removed in just a number of days, and so you've got  
4 a waterway. You can imagine what has occurred over five and a  
5 half years.

6           It was hard to define. You couldn't define trash,  
7 but walking down that riverbed it became obvious what was trash  
8 and what wasn't. And frankly a good portion of the homeless  
9 community decided, because the judge was coming, and it was  
10 kind of unorthodox and new, that they were going to clean up  
11 the riverbed themselves, and so you saw people out there  
12 voluntarily asking for, can we get trash bags because they  
13 couldn't get trash bags to clean up the riverbed.

14           After that eight mile or so walk and one of the  
15 advocates, unfortunately, passed out from heat stroke, but we  
16 revived her, they settled. Trust me, the walk wasn't designed  
17 to make them settle, but they settled.

18           And we were able to get trash bags out there, get  
19 garbage trucks coming out for the first time and open up a  
20 restroom, the only one along the river, because Orange County  
21 had taken a position at that time that we can rid of the  
22 homeless if we don't provide any restrooms.

23           That riverbed had become a focal point, not analogous  
24 but similar to your skid row here in Los Angeles. In Orange  
25 County it had a lot of focus, let's say, by the citizens in

1 Orange County and by the most active reporting service at the  
2 time, and that was the voice of Orange County.

3 Now, the LA Times hadn't picked this up yet. And the  
4 sheriff then was going to clear the riverbed and this Court  
5 enjoined the sheriff from doing so until they had a plan and  
6 there was no plan at the time. You have to remember '19 or  
7 2018 there was no plan.

8 But a very progressive sheriff, under sheriff at this  
9 time Don Barnes came forward and said, Judge, look, we really  
10 need to clear this up, we've got a plan and this is eventually  
11 going to lead to Ben Carson and meeting in Washington, D.C.  
12 which is eventually going to tie into the VA. So you've got to  
13 bear with me on this story for a moment.

14 The Court was actively involved with Barnes and with  
15 Carol Sobel and Brooke Weitzman and the attorneys for the  
16 county and we all worked together collectively. And one of the  
17 things that was first decided was, how can we have four or five  
18 federal judges in Orange County making decisions involving  
19 homeless cases, because the city and the county had no  
20 barometer. You had no right to operate in terms of making  
21 decisions. And so any decision your elected officials made,  
22 they had to be in fear of the federal court coming back in two  
23 years and say, you did it all wrong.

24 So it was kind of a collective unorthodox way of  
25 saying, this potentially is going to be okay with the Court,

1 but the Court has to be involved in trying to set some  
2 parameter that the Court can live with in terms of humane  
3 treatment. And so the first decision was, let's centralize  
4 this in one court and that's how all the cases in Orange County  
5 came to my court. Okay?

6 Now, I'll fast forward to Los Angeles, when we got  
7 here, you had such different judges. You had Judge Fischer,  
8 Judge O'Farrell, you had Judge Klausner, you had Judge Snyder,  
9 I'm running out of judges. You had six different judges making  
10 different decisions or the same decision but there was no  
11 barometer to operate with. My colleagues here have been very  
12 very gracious and putting those cases into one court. It could  
13 have been Judge Carter, it could have been anybody, but it  
14 helped operating with some kind of line that all of you could  
15 depend upon because otherwise you could never make an  
16 investment as the city or the county because any investment you  
17 made without some kind of feeling that the Court would  
18 acquiesce to it, money ill spent.

19 Now, you're not the county and you're not the city,  
20 okay. Bear with me. All right. The first thing we decided  
21 was if we're going to clear the riverbed what are we going to  
22 do with people. And remember, we had no plan.

23 So Supervisor Edward Bill (phonetic) at that time  
24 came up with the idea, Judge, we'll give you 30 motel rooms  
25 for -- I'm sorry, 400 motel rooms for 30 days. Now, think of



1 how primitive that was compared to the sophistication and the  
2 money spent now, but this is in 2018. And this is Orange  
3 County.

4           The second thing that we decided was we had very few  
5 mental health workers. In other words, if we're going to deal  
6 with a population that has a high degree of mental illness, is  
7 this going to be the traditional law enforcement sweeps that  
8 have taken place in Orange County before in 1998 I believe and  
9 1999, which was basically a round up where homeless were put at  
10 the Santa Ana stadium and actually were given ink markings.

11           So we had to literally hire young people out of  
12 college and we called them blue coats and those people became  
13 the first, I'm going to say mental health workers on a volume  
14 basis, because there were so few professionals that you could  
15 put on the river.

16           The second decision made was we wanted to include the  
17 press. It occurred to me if the press walked with us, we would  
18 have less violence because normally what happens is the press,  
19 you'll see often times is put across the river or in a holding  
20 pen to report. And therefore, they've got to be suspicious  
21 when there are numerous claims made for 1983 violations, what  
22 are the police doing out there, are they hammering people or  
23 what.

24           So the press could walk down and report just as they  
25 went and then Brooke Weitzman and Carol Sobel stepped forward

1 with I think a miracle and they said, Judge, let us go down and  
2 talk to our people first. Let us go into the tents and talk to  
3 our people first before law enforcement comes in and have the  
4 mental health workers.

5 So talking to Don Barnes the plan became let's get  
6 Carol Sobel out with Brooke Weitzman walking down that river  
7 with the Court, so that they have authority, let's get the  
8 mental health workers right behind us and the medical people  
9 and then let's get the police.

10 20 yards back, so that they're there for safety  
11 purposes, but not the first tip of the spear if you would,  
12 because that's always going to cause violence and get the press  
13 right in the middle of us, because manipulatively it had a way  
14 of quelling it and it had a way of bringing down law  
15 enforcement because they're trained to be paramilitary. We're  
16 asking them to do so much.

17 The next thing that occurred to me was that the  
18 federal court, by the time we heard a problem in our  
19 traditional way of sitting on the bench, if you're out in the  
20 riverbed as litigants and something occurs, we've got 18 dump  
21 trucks, we've got 40 blue coats, we've got 25 to 30 sheriffs,  
22 if you see a problem, you now have to come to court, you have  
23 to get your coat and tie if you start it at 9 o'clock, by the  
24 time you drive to court and get dressed up so you look like  
25 you're supposed to be in court, 10 o'clock, by the time you try

1 to explain it to the judge who's trying to absorb it, 11 or  
2 11:30, by the time I try to write an opinion 2 o'clock or 2:30,  
3 by the time we take that back out there, we've held up 18  
4 trucks, we've literally stopped that effort, so an unorthodox  
5 position admittedly, we simply took the federal court to the  
6 riverbed.

7           And the reason was, setting up a card table, if we  
8 saw something, we could immediately resolve it on the spot.  
9 Now, thank God we did that because the first day -- oh, I'm  
10 sorry, the second day, the first day was wonderful; the second  
11 day the union said to the county workers, you can't start work  
12 until 8:30. Well everybody was ready to go at 8 o'clock so the  
13 sheriffs were about to step off first, which would've caused a  
14 melee on the river and by simply saying, I'm going to threaten  
15 you with an injunction, stop that process, by 9 o'clock we had  
16 it sorted out.

17           The unions came on board, extended the hours, et  
18 cetera, my compliments to them, no violence. I represent to  
19 you that in five days with what turned out not to be 500  
20 people, it turned out to be almost 1,400 people we didn't have  
21 one act of violence. Let me repeat that.

22           Now, it's going to lead to Ben Carson in a moment so  
23 hang with me, stay with me for a moment. The biggest problem  
24 at that time turned out to be the VA which is not connected to  
25 your case. And what occurred was that the VA, we called and

1 said to the VA, hey, look, we've got veterans out there, one  
2 guy in fact is an amputee who's been dropped off by a certain  
3 city, according to Anaheim in the middle of the night, he's  
4 trying to go the bathroom in a plastic bottle, can you help us.  
5 Well, Judge, you don't have jurisdiction.

6 Well, it's a navigable waterway, have you looked at  
7 the -- now that should cause a laugh. If you looked at the  
8 Santa Ana River, I don't know if it's a navigable waterway, but  
9 it's kind of a tough place when you're in federal court and  
10 you've got, you know, an audience like this with a hundred  
11 people in your court literally and you literally ask one of the  
12 attorneys to call the VA in court, that's got to be  
13 embarrassing.

14 The VA came out. And by the way, they did a  
15 wonderful job. They literally responded to that phone call,  
16 but that frankly took some grandstanding and some pressure to  
17 get them out there. But when they got there, they were  
18 phenomenal. We got our veterans sorted out, we got  
19 identification, we got the DD-214s, we got licenses, we start  
20 them in the process.

21 So that's my first disclosure about my initial  
22 meeting with the VA. Pressured to get them there, the press  
23 was helpful in that. Benefit, once they got there, phenomenal  
24 job.

25 All right. Now, there's a Voice of Orange County and

1 they're writing articles at this time and Spencer Custodio, I'm  
2 mispronouncing his name, but it wasn't making an impact other  
3 than Orange County and then the Los Angeles Times picked it up.  
4 Bednarowski at the time and who's the other person, yeah,  
5 Christopher Goffard. And they wrote about this clearance going  
6 on on the Santa Ana riverbed. And when the LA Times picked  
7 that up, I then got a call from Ben Carson who was part of the  
8 Trump administration and I believe he's HUD, help me, yeah.

9           And he asked -- he was going to come out and talk  
10 about what he saw as this phenomenal effort in Orange County  
11 and my response is, if you come here, every member of the press  
12 will pick that up. I'll just fly to Washington, D.C. It's  
13 easier for a federal judge, nobody knows who I am, nobody cares  
14 in Washington, D.C., but, Ben Carson, if you're coming here,  
15 that's going to attract a lot of notoriety and if we're going  
16 to have a conversation, let's have it in D.C.

17           Now, what was happening out in the riverbed, remember  
18 I said -- no, we had 1,400 people out there. When we signed  
19 the injunction, we gave them two weeks. And the last portion  
20 of that two weeks, we estimate about 400 people simply left  
21 because this clearance was starting let's say hypothetically on  
22 a Monday, I forget the day of the week, 400 people just  
23 disappeared.

24           We don't know if they went into a residential area,  
25 we don't know if they went back home, we don't know if they

1 were couch surfing, we have no idea where they went. We had  
2 about, I think Carolyn Brooks and I would estimate about a  
3 thousand people on that river. And when we started down that  
4 river the first day you have to imagine all these dump trucks  
5 lined up, this huge contingency going down the river.

6 At the end of five days, we had 810 people who  
7 literally stood there waiting for shelter. Now, going down the  
8 river at that time, Edward Do was the chairman at that time of  
9 the Board of Supervisors and he looked at Frank Kim on the  
10 second day and said, we've got motel rooms for 400 people for  
11 30 days, we've got 800 people out here and he made the  
12 individual decision on that river without going to the Board,  
13 Frank, get me 400 more motel rooms.

14 Now, eventually he went back to the Board and got  
15 permission, but he made that decision unilaterally on the  
16 river.

17 Okay. You've heard about 60 percent and you've heard  
18 about 60 percent plus 1. Where does that come from as I get  
19 back to Ben Carson in a moment.

20 When we resolved the Orange County case, Carol took  
21 the position, that's Carol Sobel, Judge, we had a thousand  
22 people on the river, remember, we had 810 who wanted shelter,  
23 remember. So, Judge, we will settle for 81 percent. In other  
24 words, we will settle with different cities at 81 percent. Not  
25 a hundred percent, because my position was, you can't ask for a

1 hundred percent because your cities and counties can't afford  
2 it. Because you don't have a hundred percent of your homeless  
3 who are going to shelter. Some are from out of state, some are  
4 going to be in trouble with the law, some are mental health  
5 issues who belong to the county that your city shouldn't be  
6 paying for.

7 We don't know the percentage, but the county's  
8 position was 60 percent. Now, you take 1,400 and take 810  
9 somebody do the math for me, it's about 60 percent give or  
10 take.

11 So our position was, and Carol was fearless by the  
12 way, she walked out of my chambers. She was angry. She said,  
13 Judge, you're settling for 60 percent with the county. I said,  
14 Carol, here's the bottom line, if it's 60 percent that I'm  
15 offering to the cities as a settlement, it will also be plus 1.

16 So if you understand this, you're geniuses. That  
17 means if we ever get to 60 percent of an encampment and we have  
18 a number of homeless left over, we have to stop. You have to  
19 then go find those additional spaces, shelter or housing for  
20 those homeless persons, it's just not a flat 60 percent.

21 So do you understand that so far? That's complicated  
22 stuff, let me repeat it very quickly. Look, a hundred percent  
23 of your homeless population is not going into shelter. You  
24 cannot ask your city or your county to build out at a hundred  
25 percent. It's a waste of their money.

1           And, in fact, if you build out shelter at a hundred  
2 percent, you should be devoting some of that money to long term  
3 supportive housing. Because a lot of these people are from out  
4 of state, a certain small percentage, some are couch surfing by  
5 the way, some are out there just having a party and can go a  
6 lot of different places.

7           So this is a random number, 60 percent. And that's  
8 because the 810 equated to 1,400. So in taking the county's  
9 number, Carol's position was, Judge, there's a thousand people  
10 there, 810 are left, that's 81 percent. The county's position  
11 is no, it's 60 percent, because you didn't start with a  
12 thousand people, you started with 1,400 people and 400 of them  
13 they went away.

14           I took the county's lowest number. Now Carolyn Brook  
15 with along with that to give it a test run. But remember, it  
16 wasn't 60 percent, it was 60 percent plus one. North County  
17 came on board, regionally 11 cities, Anaheim came on board,  
18 Santa Ana came on board, which were your 800 pound guerillas,  
19 that's where most of the homeless where.

20           The central and the northern part all came on board  
21 on settlements, guess what, the south county didn't. Okay.  
22 When the LA Times picked it up, it's my speculation that that  
23 is a national paper sold -- that this story about Orange County  
24 get nationwide. I get a call then from Ben Carson, okay, from  
25 his -- I'm sorry, from his chief of staff.



1           And flying to D.C. I thought that that was going to  
2 be a one-on-one meeting with him about why Orange County was  
3 successful at the time and what was happening, because  
4 everything else was going up, we were going down in numbers.

5           It turned out in that room, he'd assembled members of  
6 HUD, he'd assembled the top echelon of the VA and I can't name  
7 the other agencies that were there, but there had to be at  
8 least 20 people in that room. It was in the executive offices  
9 across the street from the White House.

10           When you submitted this list to me last night, if you  
11 have VA officials coming from D.C., they may have been involved  
12 in that meeting. But that had nothing to do with the West LA  
13 VA Center. But I want to make full disclosure about the  
14 contacts that I've had, because I don't recognize some of your  
15 names on the defense part, but they could've been officials  
16 from HUD or the VA in that room, and I may say in the middle,  
17 you know, I recognize you, you were the room, but the  
18 discussion was primarily between Carson and myself, okay.

19           Now, I'll tell you there was a plan A and a plan B.  
20 I don't know what plan A was, but it was being offered to  
21 Garcetti, mine was supposed to be plan B, that the  
22 administration at that time was going to follow the outfit for  
23 plan A for Los Angeles, whatever plan A is, I have no idea what  
24 that was at the time. Okay?

25           So in a sense, plan B, our plan got moved off to the

1 side. Okay. The reason I bring that all up is you've got two  
2 people that I've disclosed to you before, Dr. Sharon and  
3 Dr. Stephen Braverman.

4 And it came to my attention through my special  
5 masters and not through this witness list, and you folks have  
6 to be aware that I've been involved in several cases involving  
7 homeless settlements, so I've probably talked to 4 to 500  
8 people in this city literally and I'm not under estimating  
9 that, from county to city officials, to staffers to fire  
10 department to police to you name it.

11 And now we have a case that's a subset of that, the  
12 homeless population or homeless veterans in the VA. I don't  
13 recall, I think I can represent, that I've never had a  
14 conversation about your West LA facility, other than Stephen  
15 Braverman, and I'm going to come to that in just a moment.

16 First, your motion came to me concerning Dr. Sherin,  
17 which we're going to take up today and I knew him as the  
18 director of the mental health facilities here and he was  
19 involved and sat in the audience and gave testimony and I call  
20 it the El Doplín Hotel (phonetic), but it's some hotel here in  
21 the city.

22 And I know him professionally from that testimony.  
23 He'd also introduced me to Doctor or to -- who's the UCLA  
24 Chancellor that just left?

25 **MR. SILBERFELD:** Gene Block.

1           **THE COURT:** Who?

2           **MR. SILBERFELD:** Gene Block.

3           **THE COURT:** Use the mic, I can't hear you.

4           **MR. SILBERFELD:** Sorry, Gene Block.

5           **THE COURT:** No. The UCLA, the -- he's leaving in  
6 July. He was just back testifying about the altercation over  
7 on the UCLA Campus. Yeah, no, you're right, it's Gene Block.  
8           Yeah. And we had a discussion about homeless along  
9 with Rick Caruso down at USC and the homeless problem they had  
10 there and the students, because at some point we were looking  
11 at student housing, could we get that. We even tried to look  
12 at the parking lot over at the -- over where by Mages or  
13 whatever his name is, is building the basketball arena and Rams  
14 over there, trying to get homeless into that parking lot area  
15 under the underpass on -- near Venice.

16           Okay. One is Braverman. Three years ago, five years  
17 ago, you had a homeless encampment along San Vincente. The  
18 veterans at that time were not being let in to the facility.  
19 He was kind enough to take me with his staff throughout the  
20 grounds, which is the first time I had seen it since I was a  
21 student at UCLA, okay. That's why I'm aware of the grounds but  
22 I'm not aware of them today.

23           The second is Dr. Sherin -- who's the mayor of  
24 Sacramento, Steinberg?

25           **MR. SILBERFELD:** Darell Steinberg.

1                   **MR. ROSENBAUM:** Darrell Steinberg.

2                   **THE COURT:** I got a call from Steinberg, complete  
3 disclosure to you, who wanted to talk about what was happening  
4 in Los Angeles and I wanted to know what was happening up in  
5 Sacramento, because initially their stats looked pretty good.

6                   So he flew down and I wasn't aware, but he assembled  
7 a Board. In that audience was Sherin sitting there as one of  
8 his board members. I represent to you there was no discussion  
9 about West LA or the veterans, nor did I know he would be a  
10 witness at the time until now I see him on the witness list.  
11 So I want complete disclosure about that.

12                   I also guarantee you that I will recognize more than  
13 one witness in this trial, if we have this trial. But I will  
14 fully disclose to you what my involvement is with that witness  
15 and if there's been any representation. And I'm going to ask  
16 are any of you going to call a person named Stephen Peck?  
17 Gregory Peck's son?

18                   **MR. ROSENBERG:** No, Your Honor.

19                   **THE COURT:** Boomerang? Okay. Okay.

20                   I've had discussions with him about the VA because he  
21 actually came to Orange County and testified on behalf of  
22 veterans and their treatment along the Santa Ana riverbed, but  
23 he's not a witness for either one of you; is that correct?

24                   **MR. ROSENBAUM:** No, Your Honor.

25                   **THE COURT:** Okay. He runs an organization down there

1 that's part of a builder, but we haven't gotten into the  
2 financing, I don't really understand it yet in total, except  
3 through your briefing, but if he's testifying, he's a former  
4 colleague in the Marine Corps who I know and beyond that, I  
5 don't recognize any of the other names.

6 But I could have VA officials come in, depending upon  
7 who you're calling out of D.C. who was part of that effort  
8 although it was a different administration, because I don't  
9 know the capacity that they were serving in, okay. And I  
10 certainly know Sherin from past dealings with him in terms of  
11 the mental health, in fact, we've been on different sides of  
12 different issues. Because I'm consistently asked why don't we  
13 have more mental health, and his explanation at the time was  
14 through the Mercer Report, that he's asked for that.

15 And our conversation centered around not veterans,  
16 but the fact that he had asked way back when the Mercer Report  
17 occurred, where at least 500 mental health, acute by the way,  
18 mental health mixed with subacute in 2018 or 2019.

19 The county initially said he could have them, but  
20 only supplied 164, which I have to think was very frustrating  
21 for him. He was also asking for 3,000 and depending upon the  
22 way you read the Mercer Report, it's either 3,500 or 3,000,  
23 because there's a 500 -- not a program, of acute, and he  
24 recognized he didn't want more because he hoped that they would  
25 move to subacute, but he needed 3,000 additional spaces, the

1 county wasn't giving it to him. In other words, he felt his  
2 hands were tied at the time.

3 And so in another case, in another hearing that you  
4 may not be aware of involving the county this Court took the  
5 position and relied heavily on this Mercer Report that  
6 Dr. Sherin and I talked about ad nauseum about the resources he  
7 needed but weren't being voted on by the county.

8 Now intermixed with all of this, is eventually the  
9 conflict between the county and the city. And no matter what  
10 you say behind the scenes as they all lock arms, they have  
11 adverse inferences or adverse positions on many occasions.

12 And that is the city seems to be stepping forward in  
13 terms of architecture, but they can't adequately service your  
14 homeless population unless they have the mental health and the  
15 substance abuse that goes along with. Do you understand where  
16 I'm at? Maybe? Yeah.

17 Okay. That's a long winded explanation and a  
18 complete disclosure to you of the conversations I've had and I  
19 expect, folks, I'm going to run across these people because I'm  
20 in a monitoring position with the LA Alliance and with the  
21 county right now in terms of mental health.

22 So I could have, although I'm going to try to avoid  
23 now that I know he's a witness, even Sherin sitting in the  
24 audience. And I certainly don't want to meet with Steve  
25 Braverman again if he's going to be a witness. And that's why

1 I recently got an invitation to come out to the VA for some  
2 opening, and I turned it down. And if I go out there, I warned  
3 you, because you both invite me, you know, we're in litigation,  
4 okay. So we'll try to avoid all of those in the future.

5 Now, do you have any questions of me? If so, that's  
6 the best disclosure I can make ethically to each of you.

7 **MR. SILBERFELD:** Nothing from the plaintiffs, Your  
8 Honor.

9 **THE COURT:** Okay. You folks?

10 **MR. ROSENBERG:** Nothing from the Government, Your  
11 Honor.

12 **THE COURT:** Okay. Now, let me take this issue  
13 concerning the objections regarding the report of Dr. Sherin.  
14 Tentatively, I tend to agree with you on this. I don't see why  
15 this Court would be making a ruling before a deposition. I  
16 don't think it's a full and complete record regardless of the  
17 input from the special masters. It may be that I take that  
18 position illegally or I don't. But I'm a little concerned that  
19 I don't have a complete record and the deposition hasn't been  
20 taken, so that you can make a complete record for both of you.

21 Now, I assume that you're going to object, so please  
22 object and then let's decide how we're going to do this quickly  
23 and get him in here for testimony.

24 **MR. SILBERFELD:** Certainly. We have no objection to  
25 Dr. Sherin testifying by deposition and we want to preserve to

1 the Government and we've said this multiple times to them both  
2 separately and in front of the special masters, that we want  
3 them to preserve their rights to make Daubert motions --

4 **THE COURT:** Right.

5 **MR. SILBERFELD:** -- or in limine motions as they see  
6 fit. However, the threat of prosecution under 18 U.S.C. 207  
7 that the Government has made against Dr. Sherin requires before  
8 he testifies and deposition is testimony, before he takes an  
9 oath and so much as states his name, he needs at least  
10 protection to that extent so that he is not subject to  
11 prosecution under 18 U.S.C. 207.

12 So this is a sequencing issue. It is not --

13 **THE COURT:** Okay. Just a moment. How do we  
14 accommodate both of you? How do we give you a complete record  
15 so you can make a fulsome argument and how do we give you that  
16 opposition? Because what's not going to happen is, is he's not  
17 going to be in a position of not being deposed.

18 **MR. SILBERFELD:** We agree.

19 **THE COURT:** He's going to get deposed, so you both  
20 have a record of that and any threat we need to get rid of.  
21 And that way you can decide if he's ethically, you know, bound,  
22 et cetera, you can make a complete record. How do we  
23 accommodate both of you?

24 **MR. ROSENBERG:** So I want to --

25 **THE COURT:** But I'd see you two meeting and



1 conferring. Walk over to each other, have a conversation  
2 first. If not, I can make a decision very quickly for you.

3 Oh, by the way, while you're meeting I represent to  
4 you, we've been in 25 or 26 encampments involving 5,000 people  
5 minimally in Orange County. I know it's unorthodox for a judge  
6 to be there, but when a judge is there, we don't have a  
7 violence problem. We don't have a problem getting the homeless  
8 to go to an accommodation type because the Court's standing  
9 there.

10 And I represent to you with 5,000 people in 25 plus  
11 encampments, we haven't had one problem. Now here, apparently  
12 we don't operate that way. We just have non-invitation from  
13 your city council to go out there, fine. But when those 1983  
14 cases roll in, or things being confiscated and nobody's there,  
15 then it's up to the old adversarial system and nobody's on the  
16 spot to stop the violence or to see if possessions are being  
17 taken. So the adversarial system isn't working well I think  
18 with this homeless issue.

19 **MR. ROSENBERG:** Just one moment.

20 **THE COURT:** Oh, take your time. If you don't make  
21 the decision, I will. It'll take me one second, okay. So  
22 govern yourselves before I have to do it.

23 **(Pause)**

24 **MR. SILBERFELD:** What we've been discussing is if the  
25 Government, not the VA, not HUD, and certainly not the

1 intervenor, but if the United States Government will concede  
2 that his appearance at a deposition is not the basis of any  
3 future prosecution, he can testify.

4 **THE COURT:** Well, let me ask you, let me take the  
5 pressure off both of you. Can I make an order --

6 **MR. SILBERFELD:** Yes.

7 **THE COURT:** -- to take the Government off the hook,  
8 you know, so you can maintain your position, but we can get the  
9 deposition --

10 **MR. SILBERFELD:** Right.

11 **THE COURT:** -- and you can fully develop a record so  
12 that if there is an ethical violation, this training as you've  
13 said, was he aware of this, we can get down to the nuts of  
14 this.

15 **MR. SILBERFELD:** Yeah, the order will solve the  
16 problem under 18 U.S.C. 207.

17 **THE COURT:** That's just a suggestion, but otherwise,  
18 because this deposition by the way is going to take place. I  
19 can't get a complete record without it.

20 **MR. ROSENBERG:** So, Your Honor, just a couple of  
21 points.

22 **THE COURT:** No, no, give me -- time out.

23 **MR. ROSENBERG:** First -- yeah.

24 **THE COURT:** Give me a solution.

25 **MR. ROSENBERG:** I need to clarify one thing that

1 counsel said.

2 **THE COURT:** Okay.

3 **MR. ROSENBERG:** There has never been a threat from  
4 anyone on this litigation team or from anyone in the Government  
5 regarding Dr. Sherin's testimony.

6 **THE COURT:** Right. Okay. So there's been no threat,  
7 no problem.

8 **MR. ROSENBERG:** I just want to be crystal clear about  
9 that.

10 **THE COURT:** I don't believe that there was.

11 **MR. ROSENBERG:** All that we did was make Dr. Sherin  
12 aware through plaintiff's counsel of the potential  
13 applicability of the statutes.

14 **THE COURT:** So let's take off the chilling effect  
15 that it could have, so you have a complete record and you have  
16 a complete record. If you can reach an accommodation, so be  
17 it, otherwise, I'm just going to order it.

18 **MR. ROSENBERG:** I don't -- standing here as a Civil  
19 Division Attorney at DOJ I cannot speak for what other  
20 components within DOJ or what VA might do.

21 **THE COURT:** Okay. So my order is as follows.  
22 Dr. Sherin is ordered to be deposed. Simple as that.

23 And now you two work out an accommodation. Set  
24 towards each other and give me a date and time and then call  
25 Dr. Sherin so we don't waste, you know, money and paper.

1           **MR. SILBERFELD:** We have a date.

2           **THE COURT:** What's the date?

3           **MR. SILBERFELD:** A week from Thursday, so that would  
4 be --

5           **THE COURT:** What's the date, I'm not smart enough to  
6 figure that out.

7           **MR. SILBERFELD:** The 18th of July.

8           **THE COURT:** 18th, okay. Now, will somebody call  
9 Dr. Sherin?

10          **MR. SILBERFELD:** I will do that.

11          **THE COURT:** Okay. Call him.

12          **MR. SILBERFELD:** I can't call him now because --

13          **THE COURT:** Sure you can, here. I have the numbers  
14 for half the people --

15          **MR. SILBERFELD:** Your Honor, I have a cell phone. I  
16 happen to know where he is, he's in Mexico.

17          **THE COURT:** Oh, you can't call him now obviously.

18          **MR. SILBERFELD:** I can't call him right now.

19          **THE COURT:** Okay.

20          **MR. SILBERFELD:** But he's told me that he'll make  
21 himself available.

22          **THE COURT:** Okay. The 18th, that way you both can  
23 have a record, I've got a good record, I don't have to make a  
24 premature ruling based upon an R and R from my special masters.

25          **MR. SILBERFELD:** It's perfectly fine and always has

1 been.

2 **THE COURT:** Is that fair for the defendants?

3 **MR. ROSENBERG:** That works for us, Your Honor. I do  
4 have a --

5 **THE COURT:** And that takes you off --

6 **MR. ROSENBERG:** -- housekeeping question.

7 **THE COURT:** Yeah, that takes you off the hook in  
8 terms of acquiescing to anything.

9 **MR. ROSENBERG:** After the deposition is completed,  
10 the Government would evaluate whether it wants to file a motion  
11 in limine --

12 **THE COURT:** Exactly.

13 **MR. ROSENBERG:** -- or a Daubert motion.

14 **THE COURT:** Bring this right back to me at that time.

15 **MR. ROSENBERG:** So should we -- we're going to have -  
16 - I assume that the Court has moved the final pretrial  
17 conference from Monday until Tuesday of next week. That final  
18 pretrial conference will be two days before the deposition.

19 **THE COURT:** Yeah.

20 **MR. ROSENBERG:** So perhaps we can just discuss the  
21 scheduling of any potential Daubert motion at that time.

22 **THE COURT:** Yes.

23 **MR. SILBERFELD:** And we'll cooperate on that, not a  
24 problem.

25 **THE COURT:** Okay. Now, does that resolve that for

1 today then?

2 **MR. SILBERFELD:** Yes.

3 **MR. ROSENBERG:** It does from the Government's  
4 perspective, Your Honor.

5 **THE COURT:** I think it gives you a really good  
6 record. Gives the Court a really good record in making a  
7 decision. Okay.

8 On the plaintiff's witness list I could have met  
9 Ms. Meshad. I don't think I've met Reynolds. Johnson  
10 personally, I don't think I've had any conversations with him.  
11 Fields, I don't recognize. Powers, other than the filings.  
12 Wright, Hammitt. Kuhn, John Kuhn I could have met and that's  
13 what I'm not certain of, if he was part of Braverman's group  
14 back in 2018, 2019. Braverman, yes, I've met him and spoken to  
15 him on more than one occasion I believe.

16 **MR. ROSENBERG:** Judge Carter?

17 **THE COURT:** Yeah.

18 **MR. ROSENBERG:** I believe that would have been before  
19 John Kuhn's time with you.

20 **THE COURT:** Okay. I don't know, I'm just tossing it  
21 out to you. Harris, I don't believe I've had any meeting with  
22 him. Dennis, I don't recognize him, unless he was part of the  
23 Washington, D.C. group. That was room was packed, I was  
24 surprised Carson had that many agencies involved and they were  
25 going to go over and talk to Trump about that at the time, but

1 apparently he was off going out the back door some place.

2 Simms, Soberoff, I don't recognize them. Johnson, I  
3 don't recognize. Henwood, if Henwood is involved at all in  
4 some of the statistical --

5 **MR. SILBERFELD:** He is, Your Honor.

6 **THE COURT:** -- analysis.

7 **MR. SILBERFELD:** Yeah.

8 **THE COURT:** I may. I've had contact with USC and --

9 **MR. SILBERFELD:** He's at USC.

10 **THE COURT:** -- some of their stats and it started  
11 with the freeway overpasses and underpasses and what the  
12 numbers were, and I'll be blunt, I didn't trust the double  
13 counting going on by the county and the city at the time, they  
14 were double counting, okay.

15 **MR. SILBERFELD:** Dr. Henwood is at USC and he is  
16 involved in the count.

17 **THE COURT:** Okay. I've probably seen him then.  
18 Sherin, I've disclosed him. Durham, once again I leave that to  
19 you, if he's part of Carson's group at all or a holdover, I  
20 could have seen him in D.C., okay.

21 Culhane, I don't recognize him. Carillo, no, I don't  
22 recognize. Duprai (phonetic), I don't recognize. Laris, I  
23 don't recognize. VanNatter, I don't recognize him. Jennifer  
24 Yahmishra or Yoshimaru, I don't recognize. Barbara Davis. Is  
25 Barbara Davis part of the West LA Homeowner's Association?

1           **MS. SAVAGE:** Not to my knowledge, Your Honor.

2           **THE COURT:** I received a letter from somebody from  
3 the West LA Homeowner's Association a year and a half ago, a  
4 year ago when the case first started.

5           **MS. SAVAGE:** Was it from a Marcy Schwartz?

6           **THE COURT:** You know, I don't know. I basically  
7 looked at it and over here, I get lots of mail, some good, some  
8 not too good. It went over here.

9           **MS. SAVAGE:** I doubt that, Your Honor, but that  
10 didn't come up in her deposition.

11           **THE COURT:** Okay. And then I've got DiFrancisco. My  
12 only meeting has been with Gene Block over at UCLA and that  
13 generally involved homeless students and what we were going to  
14 try to do not only with homeless students at USC and UCLA but  
15 also Hilda Solis (phonetic) tried to be active out at Los  
16 Angeles because there's a huge number of homeless students who  
17 are out there.

18           On the defendant's witness list, Braverman, who I  
19 have contact. Robert Merchant, he could have been part of that  
20 group, I just don't know. John Kuhn, could have been part of  
21 that group.

22           And I've been out there on other occasions when the  
23 veterans were moved into the VA facility first of all in a  
24 parking lot with designated areas, and then eventually into  
25 tiny homes, which is just adjacent to the parking lot. And



1 what's his name, is it Katzenberg?

2 **THE CLERK:** Huh?

3 **THE COURT:** Is it Katzenberg? Who's Spielberg's  
4 partner, Katzenberg?

5 **MR. SILBERFELD:** Jeffrey Katzenberg.

6 **THE COURT:** Yeah, he was active and I've met with him  
7 also on a number of occasions, but he's not a witness here, is  
8 he?

9 **MR. SILBERFELD:** No, Your Honor.

10 **THE COURT:** Okay. And it was mostly about the San  
11 Vicente issue and the homeless out there and he was becoming  
12 somewhat active at the time.

13 Sally Hammett, I'll have to leave that to you, I  
14 don't recognize the names. Keith Harris, I don't recognize the  
15 name. Although there have been a number of meetings at Patriot  
16 Hall where I've had asked if Mayor Bass and I were going to  
17 meet, I chose that location because I didn't want her coming to  
18 federal court and I didn't want to go to any city or county  
19 offices.

20 So the Patriot Hall folks opened that up, but that's  
21 county run, so the county graciously contacted Patriot Hall and  
22 that's where we've had some of our meetings, okay.

23 Michael Dennis, Andrew Strain, Chelsey Black, Steven  
24 Marter, Barry Guze, Steven Drum. I don't recognize those  
25 names, folks, but they very well could have been in the room or

1 there could have been some contact, because there's a lot of  
2 folks who attended different hearings between the city, the  
3 county, HUD was involved at one point with a plan that didn't  
4 go very far, an offer being made to the city about four years  
5 ago and I can't remember if it was the Biden administration or  
6 the Trump administration.

7 Okay. Any questions of me? That's as full of a  
8 disclosure I can make, other than all the developers that I've  
9 met with that have nothing to do with you.

10 **MR. SILBERFELD:** No, Your Honor.

11 **THE COURT:** Okay. Well then let's take the summary  
12 judgment motion. Can I get a copy of it? Now, this is a  
13 tentative, I want you to be harsh with me, I don't want you to  
14 hold back, okay. If you have something to say, don't worry  
15 about decorum and be nice, just get right into the argument  
16 with no chilling effect. Okay. I don't take things  
17 personally, trust me.

18 So, counsel, who would like to speak first? There  
19 will be two rounds.

20 **MR. ROSENBAUM:** I can start, Your Honor.

21 **THE COURT:** Please.

22 **MR. ROSENBAUM:** Is this microphone working?

23 **THE COURT:** Yes, it is, thank you.

24 **MR. ROSENBAUM:** Good morning again, Your Honor --

25 **THE COURT:** Good morning.

1           **MR. ROSENBAUM:** -- Mark Rosenbaum on behalf of the  
2 plaintiffs. We are submitting on all of Your Honor's rulings,  
3 with the exception of the AMI ruling and the question of facial  
4 discrimination.

5           **THE COURT:** Okay.

6           **MR. ROSENBAUM:** That's what I'll be addressing.

7           Let me begin by saying as I'm sure all the parties,  
8 all counsel for all the parties agree, this is a very  
9 thoughtful order, we appreciate it, there was a lot of paper in  
10 front of the Court, there always is on an MSJ and we appreciate  
11 the time and effort that you and your clerks put into this,  
12 thank you.

13           **THE COURT:** Thank you.

14           **MR. ROSENBAUM:** Your Honor, as I just indicated and  
15 may it please the Court, I want to address the question of the  
16 Court's ruling in particular on pages 19 and 20 of the  
17 tentative with respect to the AMI matter and the Court's  
18 determination that it was going to hold off for another day,  
19 hold off for trial.

20           The question about whether or not we're dealing with  
21 a policy or practice or program that is facially  
22 discriminatory. If the Court please, I want to step back just  
23 a moment to lay out some of the background and then get right  
24 to the questions of law that Your Honor's order raises.

25           I want to say with respect to this, and I'm looking

1 in particular at pages 19 and 20 of the Court's order, where  
2 the Court talks about the Government's representations as to  
3 our position. Those representations are inaccurate and they  
4 have serious legal consequences going to the Court's decision.

5 This is not about a byzantine set of rules or  
6 regulations, it's not about a complicated policy or practice,  
7 although as I'm going to demonstrate, the Ninth Circuit has  
8 addressed policies and practices and programs and found facial  
9 discrimination in violation of Section 504 of the  
10 Rehabilitation Act far more complicated than what we are  
11 addressing here this morning.

12 There are certain areas where there is clear  
13 agreement between the parties and with the Court. That is the  
14 heart and the soul of this case, as everybody agrees, is  
15 bringing an end to the homelessness of disabled veterans by  
16 providing permanent support of housing in order that their  
17 disability, and that's the key, isn't it, that their disability  
18 not impede their access to desperately needed mental health and  
19 physical health services, to which they are legally entitled.

20 The Court acknowledged that this rule, this core  
21 issue in our very first meeting. It repeated it eloquently in  
22 the order denying the Government's motion to dismiss, it  
23 repeats it again in this order, this tentative order today.  
24 And we don't understand the VA or HUD to oppose this rule.

25 But the position of the Veterans Administration and

1 HUD, as to the imposition of the AMI, the Area Median Income,  
2 which counts disability compensation as income for purposes of  
3 determining eligibility for permanent support of housing, that  
4 position is fatally irreconcilable with the end of ensuring  
5 permanent support of housing for unhoused disabled veterans.

6 It's why this issue is so important to what this case  
7 is all about and to what frankly the mission of the federal  
8 court is all about.

9 That is, and this is it in a nutshell, Your Honor,  
10 the very disability that must be accommodated so as to secure  
11 permanent support of housing is the very reason that our most  
12 disabled unhoused veterans cannot access permanent support of  
13 housing under the policies and practices of the government.

14 That's the essence of the VA and HUD position this  
15 morning and in its papers. That the policies and practices,  
16 the use of disability compensation as income, their position is  
17 that is lawful. Your Honor characterized the use of AMI, as  
18 I'm describing it at page 25 of the Court's order dismissing  
19 their motion as perverse.

20 And with all respect, Your Honor, that  
21 characterization was generous. The position that the  
22 Government is taking in this case, turns the Rehabilitation Act  
23 and the requirement of permanent support of housing upside  
24 down, flips it on its head, says to the most disabled veterans,  
25 those most in need of permanent support of housing, you are

1 ineligible for that housing. And to state that proposition, to  
2 state that defense is to refute it.

3           The encouragement, the acceptance, the reliance by  
4 the VA of enhanced use leases, that have baked into them an  
5 income limitation that includes this requirement, that  
6 disability compensation be treated as part of that income in  
7 order to deny eligibility for permanent support of housing on  
8 the VA grounds and in project based housing outside the grounds  
9 in the community and then separately for HUD vouchers for  
10 tenant based permanent supportive housing, Your Honor, that is  
11 facial discrimination and it is in violation of Section 504 of  
12 the Rehabilitation Act.

13           I want to add, Your Honor, that it is also in  
14 violation of 38 CFR Section 15.130(b)(3) that says that the  
15 agency may not directly or through contractual or other  
16 arrangements utilize as criteria or methods of administration  
17 the purpose or effect of which would one, subject qualified  
18 individuals with handicaps to discrimination on the basis of  
19 handicap, or defeat or substantially impair accomplishments of  
20 the objectives of a program or activity with respect to  
21 individuals with handicaps. That regulation reinforces what  
22 Section 504 mandates.

23           Let me take care of a little bit of housekeeping with  
24 respect to this argument. To begin, for purposes of this  
25 motion, Your Honor is aware it states it in the order, every

1 first law student knows that what we're looking for is those  
2 undisputed facts. And the undisputed facts, after extensive  
3 discovery, is that inclusion of veterans with the highest  
4 disability ratings who are being denied access to permanent  
5 supportive housing is one that does inestimable damage to those  
6 veterans. Keeps them on the streets, subjects them to  
7 worsening of their conditions, results in death, keeps them  
8 from access to those services.

9 Deputy Medical Director John Kuhn testified at pages  
10 174 and 175 of his deposition that this was a problem of  
11 justice. And that he was not supportive of those income  
12 requirements.

13 Dr. Braverman whom Your Honor just mentioned, the VA,  
14 now currently the VA Desert Pacific Healthcare Network director  
15 when I deposed him, he said we are limiting some veterans who  
16 by their service would most benefit from being in the units.

17 And when I asked him if that was the position of  
18 Secretary McDonough, he said, yes, Secretary McDonough agrees  
19 generally that we would like to see a situation in which 100  
20 percent service connected veterans would be able to go into  
21 their units and I'm quoting from pages 145 to 146, 147.

22 Michael Dennis, whom Your Honor also just mentioned  
23 is a witness, a listed witness by the Government at page 79  
24 said the same thing. It's undisputed here, Your Honor. It's  
25 disputed that as AMI is utilized by the VA and by HUD that a

1 threshold is set, an income limitation is set, which we have no  
2 problem with in terms of affordable housing for these purposes,  
3 but that that income calculation includes disability  
4 compensation such that 30 percent AMI, which is where it's set,  
5 give or take 30 percent, means that those veterans who have the  
6 highest disability ratings, those veterans who are most in need  
7 of permanent supportive housing are categorically made  
8 ineligible for permanent supporting housing on the VA grounds  
9 and in the project based housing that I described.

10 The evidence is undisputed. I'm referring here to  
11 the Harris deposition at page 55, which we've cited. And their  
12 own Hackold (phonetic) letter that 38 of the 46 buildings where  
13 there's permanent supportive housing offered utilize more or  
14 less than 30 percent AMI requirement and the result of which is  
15 that disability compensation is included, the result of which  
16 is that these veterans are excluded.

17 Looking at the VA's own eligibility criteria, looking  
18 at their own criteria, the individuals whom we are talking  
19 about are first, first among eight priority groups used to  
20 determine eligibility for benefits, that's 38 CFR --

21 **THE COURT:** Would you repeat that?

22 **MR. ROSENBAUM:** Of course. The VA has, as I know  
23 Your Honor knows, a set of priorities --

24 **THE COURT:** Uh-huh.

25 **MR. ROSENBAUM:** -- and there are eight listed. The



1 first in terms of those veterans who are treated as the highest  
2 priority are the veterans whom we are -- talked about. Those  
3 veterans who have a singular or combined rating of 50 percent  
4 or greater, based on one or more service connected  
5 disabilities. That's our class. That's who we're talking  
6 about and that is who are literally and figuratively out in the  
7 cold.

8 **THE COURT:** All right. Now, I'm going to stop and  
9 ask you a question. This is an naïve question. If I'm 48  
10 percent, does this apply?

11 **MR. ROSENBAUM:** You know it depends on the  
12 particular --

13 **THE COURT:** Exactly.

14 **MR. ROSENBAUM:** -- program.

15 **THE COURT:** If I'm 52 percent. If I'm 52 percent,  
16 does it apply?

17 **MR. ROSENBAUM:** Yes, yes, yes.

18 **THE COURT:** Now, in other words, I understand a  
19 hundred percent --

20 **MR. ROSENBAUM:** Yes.

21 **THE COURT:** I understand 80 percent.

22 **MR. ROSENBAUM:** Yes.

23 **THE COURT:** I'm not sure where that line's drawn.

24 **MR. ROSENBAUM:** The 50 percent is it's the top  
25 priority and those individuals would also be ineligible under

1 the programs that we're talking about.

2 **THE COURT:** All right. I may come back and ask a  
3 question about it.

4 **MR. ROSENBAUM:** That's fine.

5 The problem is this, Your Honor. The problem is that  
6 the undisputed evidence, and I'm looking at it from the point  
7 of view of the way the VA looks at it. I'm not talking about  
8 the way that, for example, the low-income housing tax credit  
9 program defines it.

10 The problem is that the VA has said it has outsourced  
11 the construction of permanent supportive housing. Your Honor  
12 is well aware of that. It has outsourced it and then the  
13 developers to whom it has outsourced the construction of that  
14 housing has sought funding that imposes these requirements. So  
15 the problem is that the VA is saying yes. More than yes, it is  
16 encouraging, it is promoting, it is acquiescing. It is saying,  
17 go out developers, if that's the funding you get, we've got no  
18 problem, notwithstanding the testimony of Kuhn and Braverman  
19 and the VA witnesses who see it for what it is.

20 But the policy, the program, the practice is that the  
21 VA is saying that's how it's going to get done on our grounds.  
22 And the problem is, when it's off the grounds, the VA is saying  
23 for project-based developments that's okay, and that's the  
24 problem.

25 I'm going to come to the vouchers because I can

1 address that in a moment. Now, what's the case law on this?  
2 And the Government has said, Your Honor cites it at 19 -- page  
3 19, and page 20 at line 19 and page 21 at line 9 --

4 **THE COURT:** Just repeat those lines for me.

5 **MR. ROSENBAUM:** Sure. My -- I'm going to focus on  
6 the statement in Your Honor's order -- tentative order --

7 **THE COURT:** Repeat those lines for me.

8 **MR. ROSENBAUM:** Sure. Page 20, line 19, the  
9 Government responds that Plaintiffs cannot point to a single  
10 facially discriminatory policy and their alternative meaningful  
11 access claim which applies if the policy were facially neutral  
12 fails as a matter of law because we don't have a reasonable  
13 modification. I'm not dealing with the second half of that.

14 **THE COURT:** Okay.

15 **MR. ROSENBAUM:** I'm dealing with the facial  
16 discrimination part.

17 **THE COURT:** Okay.

18 **MR. ROSENBAUM:** And they say we can't face -- pin it  
19 to a single policy, and that policy is staring them in their  
20 face. That policy is their bread and butter when it comes to  
21 how these buildings will be constructed and financed. They  
22 might as well when they outsource this building, this  
23 construction, this seeking the project base, they might as well  
24 put up a sign --

25 **THE COURT:** Why do developers set this standard? Why

1 doesn't the VA?

2 **MR. ROSENBAUM:** Because they want more money.

3 Because they want those tax credits. But the --

4 **THE COURT:** No, just a moment. Just a minute. The  
5 VA doesn't want the tax credits. The developers want the tax  
6 credits. That's not my question --

7 **MR. ROSENBAUM:** The VA doesn't want to do the work --

8 **THE COURT:** I'm going to repeat my question.

9 **MR. ROSENBAUM:** Okay.

10 **THE COURT:** Why isn't the VA setting this policy?  
11 Why are developers setting this policy?

12 **MR. ROSENBAUM:** Exactly right.

13 **THE COURT:** No, I asked the question. And your  
14 response?

15 **MR. ROSENBAUM:** And the answer is because the VA  
16 doesn't want to do --

17 **THE COURT:** All right. I'm going to be asking the  
18 same question of you folks when you argue.

19 **MR. ROSENBAUM:** And the VA is going to say to you,  
20 and I'm going to get to this. The VA is going to say to you,  
21 we have no choice.

22 **THE COURT:** What?

23 **MR. ROSENBAUM:** They're going to say we have no  
24 choice. That's the only way you can get it done. That's going  
25 to be their argument.

1           **THE COURT:** I mean in the marketplace, there's no  
2 choice.

3           **MR. ROSENBAUM:** That's their argument.

4           **THE COURT:** I see. Okay.

5           **MR. ROSENBAUM:** And they're also going to say that by  
6 law --

7           **THE COURT:** I just want to -- you got a note from  
8 your --

9           **MR. ROSENBAUM:** -- they can't build and that's  
10 nonsense.

11           **THE COURT:** Counsel, counsel -- you got a note from  
12 your colleague. Look to your right -- or your left. Go to  
13 your left, there's a note. Now read your note. He's helping  
14 you.

15           **MR. ROSENBAUM:** And the VA says it can't build  
16 itself.

17           **THE COURT:** It can't build itself.

18           **MR. ROSENBAUM:** That's what it says and I'm going to  
19 address that as well.

20           **THE COURT:** Now, is there any VA program in the  
21 country where there's direct financing by the VA? Or is it all  
22 developer -- in other words is West L.A. the outlier? Is it  
23 the norm? I don't know across the country nor do I know what  
24 I'm going to hear, and I'm looking through these papers at a  
25 summary judgment motion. And I'm asking you, is this the norm?

1 Is this -- the position of the VA, which I'm going to ask,  
2 nationwide or is this an outlier situation with West L.A.?  
3 Okay?

4 **MR. ROSENBAUM:** The -- let me answer on behalf of  
5 Plaintiffs that question. It's an important question. The  
6 answer is so far as we know, the VA has taken the position  
7 across the board that it cannot build.

8 **THE COURT:** And my question once again is that  
9 locally or nationally?

10 **MR. ROSENBAUM:** That's nationally.

11 **THE COURT:** So that's a national policy, you believe?

12 **MR. ROSENBAUM:** That's my understanding, Your Honor.  
13 And the VA has also taken the position that it's going to  
14 outsource to developers --

15 **THE COURT:** So I'm going to repeat back to you what I  
16 just absorbed. I just absorbed the following, so you know what  
17 I'm absorbing. Judge, there's a national policy that this can  
18 only be development through a developer with credits and they  
19 will set the standard.

20 **MR. ROSENBAUM:** Not quite. The VA has said -- I  
21 apologize if I wasn't sufficiently clear. The first part of  
22 what you said, I agree with. The VA has said we have to  
23 outsource this. The VA has not said that the developers have  
24 to utilize LIHTC or any program to get them those tax credits  
25 that include disability counting as income. But the Government

1 has said where the developers, as Your Honor acutely points  
2 out, has said, look, where developers say this is the way we  
3 want to go. We want to -- we want those tax credits, and the  
4 state and the local entities that are in charge of allocating  
5 the benefits and financing this have put these requirements in.  
6 Those requirements include using disability compensation as  
7 income.

8           And what the VA has said across the board is that's  
9 okay with us. And that's the problem here. That the  
10 Government cannot outsource what section 504 requires and  
11 what -- as I started my argument this morning, that everybody  
12 agrees that permanent supportive housing has to be done, not  
13 just as a moral matter, but in order to satisfy 504. That's  
14 the genius of Your Honor's order denying the motion to dismiss.

15           And what is an across-the-board policy is that where  
16 they outsource it to developers, developers go to state and  
17 local entities to get the financing. The financing comes back  
18 with a requirement that disability income be included, knocking  
19 out eligibility for the most disabled veterans. The VA's  
20 position is it's okay with us. Not our doing.

21           **THE COURT:** And is this a uniform policy to your  
22 knowledge --

23           **MR. ROSENBAUM:** Yes, it is.

24           **THE COURT:** -- across the country?

25           **MR. ROSENBAUM:** Yes, it is.

1           **THE COURT:** Is there any direct financing by the VA  
2 that doesn't depend upon developer credits? In other words,  
3 was VA financing it themselves?

4           **MR. ROSENBAUM:** Not that I'm aware of.

5           **THE COURT:** In other words, you're a developer. I'm  
6 the VA. I'm going to offer you the following. You build it  
7 for \$300,000, you get \$100,000 profit or whatever.

8           **MR. ROSENBAUM:** Great question. The Government says  
9 in its brief, it uses the word typically. It says typically  
10 that's what they do. Are there some outlying questions?

11           **THE COURT:** I'll ask them.

12           **MR. ROSENBAUM:** I -- you can ask. But Your Honor is  
13 on to something really important, which is the VA says our  
14 hands are tied. We don't build. We can't build. And what the  
15 VA says with respect to the financing is they want to do it.  
16 It's okay. And that's the problem. You cannot outsource  
17 discrimination. You cannot outsource discrimination.

18           When I read the regs, that's exactly what the regs  
19 say. You cannot contract in a way that permits discrimination  
20 in violation of our most basic anti-discrimination disability  
21 laws. And that's the problem.

22           Now, there are three cases, Your Honor, that dispose  
23 of this issue, that address these issues. And with Your  
24 Honor's patience, I want to go through those three Ninth  
25 Circuit cases.



1           The first case is the BAART case, Bay Area Addiction  
2 Research and Treatment, 1999 decision of the Ninth Circuit by  
3 Judge Tashima. And Judge Tashima in this decision teaches us  
4 how to construe these issues, how to look at these issues. And  
5 as Your Honor correctly places -- Your Honor cites BAART in its  
6 tentative order. And Your Honor completely gets correctly what  
7 the issue is here with facial discrimination. How do you  
8 figure it out?

9           And at page 734 of the BAART decision, the Court  
10 says, look, there is no issue of reasonable modification  
11 whether the Plaintiff's proposed solution would constitute a  
12 reasonable or unreasonable modification. Why is that? Because  
13 the Court says, and I'm quoting now, "The only modification of  
14 a facially discriminatory law that would avoid discrimination  
15 on the basis of disability would be the actual removal of the  
16 portion of the law that discriminates on the basis of  
17 disability." Such an important proposition.

18           And Your Honor will recall that in BAART, the Court  
19 was looking at a policy of Antioch, California that said that  
20 there would be no construction of methadone clinics within 500  
21 feet of residential areas.

22           And what Judge Tashima did in walking through this  
23 504 case was to say, look, there's nothing on the face of that  
24 zoning requirement that mentions disability, that includes  
25 disability. At page 733 of the decision, the Court

1 specifically says you don't have to do it. It's a functional  
2 test. What's going on here?

3 And in BAART, which held the facial discrimination to  
4 void that Antioch ordinance, the Court said the impact of that,  
5 the consequence of that, is that if you suffer from a  
6 disability --

7 **THE COURT:** BAART wasn't a summary judgment motion  
8 though, was it?

9 **MR. ROSENBAUM:** Say it again.

10 **THE COURT:** This decision wasn't handed down and  
11 given to Judge Tashima on a summary judgment.

12 **MR. ROSENBAUM:** No, but it tells us what the rule is.

13 **THE COURT:** Okay. It tells us what the rule is, but  
14 here we're at a summary judgment. And the issue for the Court  
15 as a gatekeeper is there a material issue of fact.

16 **MR. ROSENBAUM:** All right. So let's go to the second  
17 case and that's the Townsend case. That case is not cited in  
18 Your Honor's tentative order. That's a decision 2003 by Judge  
19 Berzon and the facts of that case are very close to the facts  
20 of our case. In the Townsend case --

21 **THE COURT:** Is this from a -- is this off of a  
22 summary judgment? I think here Townsend, if my memory is  
23 correct, is a developed record once again after trial, but I  
24 want you to check. I could be wrong. One of you do that for  
25 me?

1           **MR. ROSENBAUM:** It is not a summary judgment motion.

2           **THE COURT:** No, it comes after trial with a developed  
3 record.

4           **MR. ROSENBAUM:** I don't think -- no sir, it did not,  
5 Your Honor. It came on a -- the facts were undisputed as to  
6 what the issue was and that's my point here.

7           **MS. SAVAGE:** It came on appeal from summary  
8 judgment.

9           **THE COURT:** Thank you. My apologies. I'm incorrect  
10 and I appreciate that.

11           **MR. ROSENBAUM:** I appreciate it more than you do,  
12 Your Honor.

13           **THE COURT:** So it came off of a summary judgment  
14 ruling; is that correct? Okay.

15           **MR. ROSENBAUM:** Okay.

16           **THE COURT:** All right.

17           **MR. ROSENBAUM:** So I now --

18           **THE COURT:** Thank you.

19           **MR. ROSENBAUM:** -- we're going to defer the rest of  
20 my argument to Ms. Savage.

21           Here was the situation in Townsend. The State of  
22 Washington -- in the State of Washington, persons whose income  
23 was at or below 300 percent of the social security income  
24 federal benefit rate were deemed categorically needy. That was  
25 the classification.

1           Mr. Townsend was a diabetic. He had peripheral  
2 vascular disease. He was a bilateral amputee. He was in his  
3 80s. And Mr. Townsend's income increased by \$46. That moved  
4 him out of the categorically needy under the Washington health  
5 care scheme and moved it into a category that was called  
6 medically needy.

7           **THE COURT:** You dropped your voice. Medically?

8           **MR. ROSENBAUM:** Medically needy. And when it went to  
9 medically needy, the nature of Mr. Townsend's health care went  
10 from a location where he could get residential treatment, where  
11 he was within a residential community, to a community where all  
12 the state had to show was that it had reasonable standards that  
13 comported with the purpose of the Medicaid Act, and that  
14 therefore Washington had discretion as to what it wanted to do.

15           And once Townsend's income moved just over that  
16 level, Townsend went from categorically needy to medically  
17 needy, and the State of Washington said to him, you have to  
18 move to a nursing home or you're going to lose your Medicaid  
19 benefits. And Townsend's argument was, once you move me to  
20 that nursing home, then I'm going to be segregated within the  
21 meaning of Section 504 and I'm going to have my rights under  
22 the Rehabilitation Act denied. And so he was saying, I am  
23 being moved from a disability -- a long-term care situation  
24 that was community-based into this nursing home.

25           Now Townsend's lawyers litigated the case as a

1 disparate impact case. But what is key to the Court's ruling  
2 and what is dispositive of this case is Footnote 2. Footnote  
3 2, Judge Berzon says this, Washington's law explicitly  
4 providing only nursing home based long-term care services to  
5 the medically needy may be read to facially discriminate  
6 against disabled persons because those who are in need of the  
7 kind of long-term assistance at issue here, for example,  
8 assistance in performing essential life activities, are  
9 disabled within the meaning of the ADA.

10 Now Your Honor's tentative -- I mean no disrespect to  
11 the Court.

12 **THE COURT:** Be disrespectful, don't worry about  
13 that.

14 **MR. ROSENBAUM:** All right. Well, then I'm going to  
15 let it go.

16 **THE COURT:** Just get to the argument. I want these  
17 arguments with vigor from both sides. Don't worry about  
18 offending me.

19 **MR. ROSENBAUM:** Okay. I'm about to offend you.

20 **THE COURT:** Good.

21 **MR. ROSENBAUM:** The Government's argument that this  
22 complicated financing, this Byzantine financing, there's never  
23 been a case that looked anything like it, is wrong, wrong,  
24 wrong, wrong. Because in the Townsend case, the Court, in  
25 order to find that the case or the issue was susceptible to a

1 facial discrimination argument, the Court had to dig in and see  
2 what was involved there.

3 It had to do three things. It had to look at the  
4 Medicaid statute. It had to look at the Washington  
5 Administrative Code defining income categories. It had to look  
6 at the Medicare waiver program requiring medically needy  
7 persons to receive care in nursing homes. It had to go through  
8 all of that.

9 But, Your Honor, I'll be straight with the Court,  
10 that's not a big deal. What the Court was saying was that the  
11 argument, as I understand the Government to make in this case,  
12 that you've got to spell out disability in the policy or  
13 practice or the statute or the rule that you're talking about,  
14 it doesn't make any sense. Because the issue is, going back to  
15 BAART, can you change that rule without removing what the  
16 statute or the ordinance or the rule or the policy is all  
17 about?

18 **THE COURT:** Just one moment. Do you folks need to go  
19 to lunch? Goodbye. See you at one o'clock. You're  
20 banished. Go to lunch. We know how to operate that, believe  
21 it or not. That magic machine. No, no, no. I'm not going to  
22 be accused of abuse, Michael. No, you're banished. Colin,  
23 come up and operate this thing.

24 Do you folks want to go through the lunch and finish  
25 at least this argument and this segment and then grab a quick

1 bite to eat? And the same courtesy to you, no disturbance on  
2 your side? Can we do that?

3 **MR. KNAPP:** I'm fine, Judge.

4 **THE COURT:** Okay? You okay? All right.

5 I'm insisting. That's an order. The court reporter,  
6 go have a nice lunch. Just make sure that that continues on.

7 Will -- Una, come up and operate this.

8 And if you're that way, counsel, I'll ask after you  
9 conclude your argument, so we can have one segment, okay? So  
10 please continue.

11 **MR. ROSENBAUM:** I appreciate the courtesy.

12 **THE COURT:** And if you need lunch at any time, just  
13 tell me.

14 **MR. ROSENBAUM:** Got it. So my point is this, Your  
15 Honor, what BAART and especially Townsend teach us, see, you  
16 don't look for specific language that cries out with a  
17 disability. Obviously, that's facial. But there's no way that  
18 Judge Berzon and the Court could have found facial  
19 discrimination in terms of what was going on in the State of  
20 Washington and its health care system without looking at the  
21 three measures that I talked about, without figuring out how  
22 does this really work. What's really happening here? Is this  
23 a situation where if you take the disability impact out, the  
24 policy remains? That's what reasonable modifications are  
25 about. Can you find a reasonable modification and keep it?

1           This is different. This asks the question, can you  
2 remove what is the offending problem here and the policy and  
3 practice or statute stays? And you can't do that in our  
4 situation any more than you could do it in Townsend. Because  
5 what was baked into medically needy was that you had to go to a  
6 nursing home. And that was the segregation problem.

7           If you change the definition of medically needy so  
8 that individuals could get residential treatment in a way that  
9 they could be integrated, it wasn't medically needy anymore.

10           **(Court confers with Clerk)**

11           **MR. ROSENBAUM:** You with me, Your Honor?

12           **THE COURT:** Not yet.

13           **MR. ROSENBAUM:** Okay.

14           **THE COURT:** Let's make that the transition.

15           **MR. ROSENBAUM:** Okay.

16           **THE COURT:** I want my staff to at least have lunch.

17           **MR. ROSENBAUM:** Just don't tell Ms. Savage that she  
18 can leave.

19           **THE COURT:** See, Carlin's so loyal, she'll stay. And  
20 so will the court reporter. So I'm going to have you just wait  
21 because they're going to go have lunch.

22           Okay. Thank you very much, Counsel.

23           **MR. ROSENBAUM:** Thank you, Your Honor.

24           So my point -- my last point with respect to  
25 Townsend, just to bear with me and let me repeat and simplify,



1 my point is this. Townsend cannot exist, that footnote, that  
2 definition cannot exist with their definition of facially  
3 discriminatory.

4 **THE COURT:** I haven't thoroughly examined  
5 Townsend. I promise I'll go back and look at it again.

6 **MR. ROSENBAUM:** Great. Great. But the case turns,  
7 in terms of facial discrimination, on the distinction between  
8 categorically needy and medically needy. And the problem  
9 was --

10 **THE COURT:** Counsel, you believe that there's no  
11 material issue of fact, and you're more comfortable from your  
12 position, even if you were right, and I'm not saying you are at  
13 all, that the Court should hand this down at summary judgment  
14 and not develop a record at trial?

15 **MR. ROSENBAUM:** I am comfortable that this is classic  
16 facial discrimination.

17 **THE COURT:** And why wouldn't I develop a record at  
18 trial? In other words, as you say, this is Byzantine from your  
19 viewpoint.

20 **MR. ROSENBAUM:** I'm not saying it is Byzantine. I'm  
21 saying it's not Byzantine. I'm saying there's nothing  
22 Byzantine about it.

23 **THE COURT:** Well, the financing is Byzantine, you  
24 said.

25 **MR. ROSENBAUM:** But the issue isn't how -- you know,

1 the fact that the developers intend to use LIHTC. That's not  
2 the issue.

3 **THE COURT:** Okay. If you're comfortable with summary  
4 judgment, please continue.

5 **MR. ROSENBAUM:** As I said, the issue, which isn't  
6 Byzantine at all, is that the Government says you can do that.

7 **THE COURT:** Okay.

8 **MR. ROSENBAUM:** And the language in LIHTC is clear  
9 that disability compensation will be treated as income. End of  
10 story. We don't need to take apart LIHTC. That's not the  
11 issue here.

12 The issue is what they are outsourcing as their basis  
13 and blessing and saying this is okay. And, Your Honor, first  
14 of all, it is a matter of classic facial discrimination. And I  
15 would not be doing my duty otherwise if I did not say that.

16 But the other point is there isn't any factual  
17 dispute here. There's no dispute that this is the methodology  
18 that's being utilized. There is no dispute that if you're 100  
19 percent disabled, 90 percent disabled in that top category,  
20 you're gone. You're on the streets. You can't qualify for  
21 this housing. There's no dispute on it. There's nothing to  
22 try a case about on that because there's no factual dispute.

23 They can't say that 100 percent disabled people can  
24 get permanent supportive housing. That's what's so powerful  
25 about the testimony of Kuhn and Braverman and Dennis. They

1 acknowledged it. They don't like it. They said it has  
2 precisely the impact.

3 So at the end of the trial, we're not going to be one  
4 jot further in terms of developing the record. The record is  
5 set. That's the way it goes.

6 **THE COURT:** Except you take this from depositions  
7 testimony that the Court would rely upon in making such a  
8 ruling. And depositions aren't of any great value because  
9 oftentimes, one side pursues aggressively and the other side  
10 simply lays back if they're their witness and they don't  
11 examine at all.

12 **MR. ROSENBAUM:** I invite Your Honor -- first of all,  
13 these are experienced counsel. But I invite Your Honor to look  
14 at that deposition testimony again.

15 **THE COURT:** I will again.

16 **MR. ROSENBAUM:** There's no wiggle room there. And  
17 frankly, that's what Kuhn said. That's what Braverman said.  
18 That's what Dennis said. That's what the secretary said. If  
19 it were up to us, we think it's a matter of justice. We  
20 acknowledge that these individuals don't qualify. There's  
21 nothing to develop here because those facts are clear. And  
22 you're dealing with very experienced counsel here.

23 And they didn't cross-examine their witness and say,  
24 well, you didn't really mean it. Actually, if you look at the  
25 testimony, if I remember it right on Braverman, when I asked

1 him, what's the position of the secretary? And he said, that's  
2 in agreement with what I'm saying. And then Mr. Knapp did ask  
3 a question. Take a look at Mr. Knapp's question. And  
4 Mr. Knapp says, did you mean that that's what the secretary  
5 said and believe? And he says, yes, the secretary agrees.

6 So we can have a one-month trial. We can have a ten-  
7 month trial. It's not -- that record's not going to change.

8 Let me go to the third case, Your Honor. And the  
9 third case is Lovell. Now --

10 **THE COURT:** Just a moment. So my record would be the  
11 hearsay statement that the secretary agrees.

12 **MR. ROSENBAUM:** Well, I'd say -- I'd say --

13 **THE COURT:** On a summary judgment motion.

14 **MR. ROSENBAUM:** I'd say it's a statement against  
15 interest, because their position is that what they're doing is  
16 lawful.

17 **THE COURT:** But if the Court goes forward and if  
18 there is a material issue of fact --

19 **MR. ROSENBAUM:** That was pretty cool, Your Honor.

20 **THE COURT:** -- I would certainly have a developed  
21 record in the trial, wouldn't I?

22 **MR. ROSENBAUM:** Your Honor, I don't mean to be  
23 disrespectful, but I'm a good lawyer. Mr. Silberfeld is a  
24 terrific lawyer. We can't do any better than what the record  
25 is now.

1           **THE COURT:** Okay.

2           **MR. ROSENBAUM:** The record is there. And as I said,  
3 we can win this on Kuhn. We can win this on the -- take a look  
4 at the income requirements. I didn't need Kuhn. I didn't need  
5 Braverman. I didn't need Dennis. I didn't need McDonough,  
6 because requirements say what they say, and they acknowledge  
7 it.

8           Look at their brief. Their brief says, the best they  
9 can come back on the brief is to try to make this Byzantine and  
10 complex. It's not complex at all. But then they say it  
11 doesn't affect that many.

12           Well, that's not how 504 works. 504 doesn't work by  
13 saying, if most disabled people are not harmed, it doesn't  
14 matter that a few are harmed. And my God, if there is one  
15 group in this country that can't afford to be in the minority,  
16 because that means being on the streets, it's our veterans.

17           That goes to my final point, Your Honor, final case.

18           **THE COURT:** Well, you were going to cite three cases.

19           **MR. ROSENBAUM:** Yeah. I said BAART, Townsend --

20           **THE COURT:** Townsend.

21           **MR. ROSENBAUM:** -- and now Lovell.

22           **THE COURT:** Okay. Lovell. Okay.

23           **MR. ROSENBAUM:** Lovell is a decision in 2002 by Judge  
24 Fletcher, Willie Fletcher. It was a facial discrimination  
25 claim. It dealt with the Hawaii health insurance program. It

1 had gone from a fee-for-services program to an HMO program.

2 Then Hawaii set up this program called Quest. And  
3 Quest said, if an income did not exceed 300 percent of federal  
4 policy level, then you could take advantage of it. You could  
5 enroll in Quest unless you were ABD: aged, blind, or disabled.

6 Now, I will concede that that's direct in the sense  
7 that the disability is mentioned, which did not happen in BAART  
8 and certainly didn't happen in Townsend.

9 But I bring Lovell to Your Honor's attention as to  
10 understanding the rule here. Because Lovell cites BAART, cites  
11 the very pages of BAART that I've been relying upon. And at  
12 page 1053, Judge Fletcher says, it is undisputed that disabled  
13 people who but for their disability were eligible for health  
14 care benefits from the state under Quest are categorically  
15 excluded.

16 That's our problem. That's our problem. But for the  
17 disability, but for the disability compensation that follows  
18 from that disability, our folks could be able to take advantage  
19 of the permanent supportive housing.

20 At page 1045, the Court says, the State excluded ABD  
21 persons from Quest because, "the lack of actuarial data and the  
22 anticipated high cost due to their special needs produce a lack  
23 of predictability, which would result in health care insurers  
24 refusing to participate in Quest. The State asserts that it  
25 would be unable to implement the program without such

1 providers."

2           And I raise that with the Court because that mimics  
3 the Government's argument here. The Government says, and I'm  
4 going to come to it in a moment -- the Government says, our  
5 hands are tied. And Your Honor very astutely points out in  
6 terms of what the policy is, what they're saying is off the  
7 table.

8           And in the Lovell case, the Ninth Circuit says, we  
9 don't get to that question. We don't get to that question at  
10 all because that's what it means to have facial  
11 discrimination.

12           Now, let me say this. If you think about it -- if  
13 you think about it, what the Government is saying here is, we  
14 can't give permanent supportive housing to those individuals  
15 who are most in need of permanent supportive housing. That's  
16 their argument.

17           If Your Honor goes on the VA grounds, the 233 units  
18 that are there, those units disqualify the most disabled  
19 veterans. That's what I meant when I said Your Honor was  
20 generous when Your Honor said that what is taking place here is  
21 perverse. Perverse looks good compared to what this is. This  
22 is cruel. This is insane that you would keep out those  
23 individuals who are most in need of the housing.

24           Now, I don't need to do this, but let me just say  
25 this, Your Honor, with respect to the argument that they make

1 in their pages that they can't build housing and they cite to  
2 the West L.A. Leasing Act, I hope when counsel gets up, they  
3 can show me that language.

4 Because here's what the West L.A. Leasing Act says in  
5 2016. Section 2(a), the Secretary of Veterans Affairs may  
6 carry out leases described in section (b) at the Department of  
7 Veteran Affairs West L.A. campus. And then (b) lists as the  
8 first one, (b)(1), building permanent supportive housing.

9 That's not a ban. That just says here's one avenue  
10 that you can get permanent supportive housing. And how I know  
11 I'm right on that? Well, one reason I know I'm right on that  
12 is because that's what it says textually.

13 The second reason I know about it is that it would be  
14 bizarre if the VA is saying to this Court, we know we have a  
15 duty to supply permanent supportive housing. We just can't get  
16 the people who are most disabled. And the law makes us do  
17 that. Could Congress ever conceive it? Congress knows how to  
18 say must. Congress knows how to say this is the exclusive  
19 method. And it didn't do it.

20 And look at part (b)(2), (b)(2) talks about the other  
21 uses of the leases. And it lists (A) through (I) examples:  
22 promotion of health and wellness, education, vocational  
23 training, peer activities, assistance with legal issues,  
24 volunteerism, transportation, family support services, other  
25 services and support.



1           Your Honor, the VA satisfies those all the time  
2 through methods other than EULs. Clearly, this isn't a  
3 prohibition or the VA could subsidize these rents. There's  
4 nothing in the law here. There's nothing in common sense that  
5 says that they couldn't subsidize it. There's nothing in  
6 common sense that says if you want to outsource this, then my  
7 God, how many vets die while this outsourcing is taking place  
8 because they have to be on the streets?

9           But if they want to say there's outsourcing, they  
10 could say you can outsource, but you can't use a method -- you  
11 can't use a method that discriminates in doing so. Their own  
12 reg says it. Common sense says it. As I said, that's why it's  
13 facial discrimination. If they want to subsidize it, they can  
14 subsidize it. If they want to build it themselves, they can  
15 build it themselves. If they want to do general contracting,  
16 they can do that. But they've chosen not to do that.

17           And what they can't do is choose a method that says  
18 you could use a method that you know the way it works out is  
19 that the most disabled are discriminated against any more than  
20 they could say you can outsource it to someone that will keep  
21 blacks or women out of permanent supportive housing.

22           And the last point I want to make is this, Your  
23 Honor. I haven't talked much about the tenant-based  
24 housing. There, HUD has lifted the requirement to 80 percent  
25 income. And the Government's argument in its brief is, well,

1 by lifting it to 80 percent, which tells you, by the way, what  
2 happens at 50 percent and 30 percent, but by lifting it to 80  
3 percent, they say in their brief, well, we got 97 percent of  
4 the vets. That's their interpretation of 504? That you can  
5 serve 97 percent? That's cold comfort to the 3 percent.

6 And in fact, if the difference is that small, then  
7 damn it, they should be covered as well. And that is facial  
8 discrimination as well, because their HUD -- they have  
9 vouchers.

10 **THE COURT:** And the three percent would be your most  
11 disabled?

12 **MR. ROSENBAUM:** Exactly right. Which is another  
13 answer, and my final point, Your Honor, you've been very  
14 courteous with time with me.

15 And that's my final point, which is, why should we do  
16 it now? One, it's because the law requires it. Because this  
17 is facial discrimination. They cannot distinguish these  
18 cases. They can't distinguish common sense in terms of how  
19 they work. But it's time to bring to an end.

20 I can read to Your Honor, we cited it, President  
21 Biden, President Trump, Secretary McDonough, Secretary  
22 Fudge. Look, I give you the press releases, I give you their  
23 statements, give you the budget, plenty of money about housing,  
24 plenty of money about homelessness. In fact, in the press  
25 statement from the President, bullet point five, our \$369

1 billion budget proposal. \$369 billion. That's not chump  
2 change.

3           Bullet five says, bolster efforts to end veteran  
4 homelessness. The VA and the Biden-Harris Administration  
5 believe that every veteran, not 97 percent, certainly not the  
6 ones with respect to the housing, every veteran should have  
7 permanent, safe, and sustainable housing with access to health  
8 care. Was that just rhetoric?

9           Their legal position is, well, yeah, that's what the  
10 President says. But if we want to do less than 100 percent,  
11 fine.

12           It is so important for this Court to say, based on  
13 the undisputed facts that describe a policy and a practice  
14 which their own people condemn, it is so important for a  
15 federal court to say, now, this has got to stop. We cannot use  
16 eligibility requirements that say to our most disabled who have  
17 served their country and picked up, as Your Honor has said over  
18 and over and over again, the most grievous wounds the  
19 Government can leave you out of permanent supportive housing by  
20 a facial policy and program that says you are not eligible.

21           Frankly, Your Honor, I can't think of a more  
22 important statement for this Court to make and the time to make  
23 it is now. Thank you.

24           **THE COURT:** All right. Thank you. Now go over and  
25 consult with your colleagues, make certain that you've covered

1 all of the arguments in the first round. There'll be a second  
2 round.

3 **MR. ROSENBAUM:** Thank you.

4 **THE COURT:** So just step over for a moment as a  
5 courtesy and consult with your colleagues.

6 **MR. ROSENBAUM:** One moment, Your Honor.

7 I just want to reinforce -- I just want to reinforce  
8 a point, which is all the points I made to Your Honor about how  
9 the facts play out in terms of this policy, whether this income  
10 limitation is given, there isn't any dispute about it. They  
11 dispute whether or not they have any other alternatives. I  
12 have -- I don't -- and it's facial discrimination. I don't  
13 have to deal with that. Your Honor doesn't have to deal with  
14 that. That's what Lovell is all about.

15 Even when Hawaii said, you know, the walls will come  
16 crumbling down, the Court said, we don't have to deal with  
17 that. But in fact, that's a falsehood too. But in terms of  
18 the core legal issue, this is wrapped in a bow for a summary  
19 judgment motion, and I encourage the Court to look at the cases  
20 and the deposition testimony I talk about, ask them if in fact  
21 the income requirements are other than what I've described, and  
22 then I implore the Court to rule on behalf of these Plaintiffs.

23 Nothing further.

24 **THE COURT:** Okay. Thank you very much. Counsel,  
25 what are you comfortable with? Are you comfortable arguing now

1 or would you like to go to lunch for a little while and come  
2 back?

3 **MR. KNAPP:** I might want to take a bathroom break.

4 **THE COURT:** Sure. Tell me what's good for you.

5 **MR. KNAPP:** I could come back in like four minutes.

6 **THE COURT:** No, five. I'm just joking with  
7 you. How -- what would you like?

8 **MR. ROSENBERG:** One moment.

9 **THE COURT:** Sure. Go to lunch if you want to. Come  
10 back. Argue now.

11 **MR. ROSENBERG:** My colleague, Mr. Knapp and  
12 Mr. Lowenstein will be taking the lead on the argument today.

13 **THE COURT:** Sure.

14 **MR. ROSENBERG:** And I think ten minutes, if that  
15 works for the Court.

16 **THE COURT:** Say 15. How's that? Is that acceptable  
17 to everybody? Are you folks comfortable with that? All right,  
18 then let's get back to work. We'll see you in 15 minutes.

19 **(Recessed at 12:22 p.m.; to reconvene at 12:37 p.m.)**

20 **THE COURT:** Okay. Then we're back on the record. All  
21 counsel are present. Counsel, this would be on behalf of the  
22 Defendant.

23 **MR. KNAPP:** Good afternoon --

24 **THE COURT:** Good afternoon.

25 **MR. KNAPP:** -- Your Honor. Cody Knapp for the

1 federal Defendants. Like my colleague, Mr. Rosenbaum, I'd like  
2 to express appreciation for the thought and care that the Court  
3 and its staff have put in --

4 **THE COURT:** Well, thank you. Appreciate it.

5 **MR. KNAPP:** With that said, I think we're going to  
6 disagree with a number of points that are made with it.

7 **THE COURT:** And do it vigorously. Do it with  
8 passion. Don't be concerned, okay?

9 **MR. KNAPP:** Of course. Yeah, I don't think these are  
10 going to shock Your Honor, because I know Your Honor is very  
11 familiar with the issues in the case. I'll start addressing  
12 the AMI points that have been discussed. So --

13 **THE COURT:** Move that microphone just a little bit  
14 closer to you.

15 **MR. KNAPP:** Here, I'll just try --

16 **THE COURT:** Just because we're on CourtSmart.

17 **MR. KNAPP:** I'll try to stand a little closer. Does  
18 that work?

19 **THE COURT:** Yeah, or move the microphone if you  
20 want. That way you're not having to bend over. I guess it  
21 doesn't move, does it?

22 **MR. KNAPP:** I was going to say, yeah.

23 **THE COURT:** No, just because we're on  
24 CourtSmart. All right, thank you.

25 **MR. KNAPP:** So I'll address some of the AMI issues

1 that we've been discussing so far today. My colleague,  
2 Mr. Lowenstein, will address the other Rehabilitation Act  
3 claims. And then at the end, I'll come back and wrap us up with  
4 the trust issues.

5 **THE COURT:** Okay. And there'll be two rounds  
6 also. The next round will be shorter, though.

7 **MR. KNAPP:** So I do want to start off with just a  
8 couple of framing remarks. The Department of Veterans Affairs  
9 and the Department of Housing and Urban Development are  
10 committed to ending veterans homelessness. The redevelopment  
11 of the VA's West Los Angeles campus is a piece of that set of  
12 efforts by the agencies. And those agencies' efforts are  
13 bearing fruit.

14 I mean, if we compare veterans homelessness rates  
15 from 2010 to now, veterans homelessness has decreased by over  
16 50 percent. If you compare last year's pit count numbers to  
17 this year's pit count numbers, actually, it looks like veterans  
18 homelessness has decreased by over a third. Whereas,  
19 homelessness across the board for other populations has only  
20 decreased by 2 percent.

21 So with that framing, the federal government is  
22 engaged on these issues, cares about them, and I understand  
23 Plaintiffs' claims. They are well-meaning, but they threaten  
24 to disrupt and distract from those efforts.

25 As to the AMI issues, my friend, Mr. Rosenbaum, has

1 focused on the facial discrimination claim that they've  
2 raised. I'll note -- the way that you can tell that this isn't  
3 a facial discrimination issue is that their subclass  
4 representative is housed on the campus.

5           Nothing in the complex interactions between HUD's  
6 income definition, between the VA's Enhanced Use Leasing  
7 Authority, and between the state and local funding streams that  
8 developers utilize when they contract for those Enhanced Use  
9 Leases to construct housing on the campus, categorically  
10 excludes individuals on the basis of their disabilities. Those  
11 are income-based limitations.

12           And nothing about the disability benefits that are  
13 paid by VA to individuals who have a service-connected  
14 disability excludes them from the VASH program that provides  
15 them with housing assistance and supportive services alongside  
16 their housing.

17           I'll just give Your Honor some numbers. I mean, the  
18 HUD-VASH program allows participants, and in fact HUD is now  
19 mandating that PHAs permit individuals to obtain vouchers up to  
20 80 percent of the area median income. In Los Angeles, that's  
21 about \$70,000 for one adult.

22           An individual with 100 percent service-connected  
23 disability, their benefit amounts to about \$43,000, well below  
24 the 80 percent threshold that HUD sets and that actually is the  
25 limit for participation in the HUD-VASH program.



1           There's nothing about the VASH program itself that  
2 resembles the cases that Mr. Rosenbaum has cited to you  
3 today. In each of those cases: Townsend --

4           **THE COURT:** Lovell, BAART --

5           **MR. KNAPP:** -- Lovell -- or Lovell and BAART, in each  
6 case there was a categorical exclusion that could not be  
7 disentangled from an individual's disabled status.

8           In Lovell, it was -- I mean, the regulation straight  
9 up said, if you are blind, you cannot participate. In  
10 Townsend, it was a distinction between medically needy and  
11 categorically needy. Those are categorizations that changed  
12 solely based on disability.

13           Here, the important, the actual eligibility criteria  
14 is income. Now, in conjunction with other sources of income,  
15 it can be the case that a veteran makes too much money when you  
16 combine other benefits they might be entitled to, other earned  
17 income or assets that they have earnings on, when those combine  
18 with benefits that they get from VA, that can sometimes push  
19 them over the eligibility thresholds for a HUD-VASH  
20 voucher. But that is not about -- that's not a distinction  
21 that HUD, VA, or anyone has made based on their  
22 disability. It's about their income, because this is a program  
23 for low-income individuals, and the closer you get to an  
24 average income, the less likely you are to be a low-income  
25 person.

1 I'll also just note, to the extent that there are  
2 impacts on the campus with the permanent supportive housing  
3 that is currently available on the campus, where some  
4 individuals with 100 percent service-connected disability can't  
5 access those, those aren't traceable to VA and HUD. They are a  
6 result, as Your Honor lays out in this order, and as Your Honor  
7 has referenced today, of a complex set of interactions between  
8 the various funding streams that developers rely upon in order  
9 to construct that housing.

10 Now, plaintiffs suggest that the way around that is  
11 for VA to effectively not contract with developers who use  
12 those funding streams. The end result of that would be no  
13 permanent supportive housing on the campus. They point to no  
14 example anywhere in the country where the VA has been able to  
15 utilize developers who don't rely on those state and local  
16 funding streams.

17 Simply put --

18 **THE COURT:** Just a little louder, just because we  
19 have CourtSmart.

20 **MR. KNAPP:** Simply put, there would be no means of  
21 constructing this housing. You know, they say -- I actually  
22 don't know where they think the money would come, other than an  
23 express appropriation from Congress, to construct housing  
24 directly, and Congress has not done that. They don't point to  
25 any authority that authorizes the VA to directly construct

1 housing.

2           And as Your Honor is well familiar, federal agencies  
3 are creatures of statute. They can't act beyond them. And if  
4 you can't point to a direct authorization from Congress that  
5 says, construct housing, and here's a pot of money to do it  
6 with, there's just no authority to do it.

7           As to HUD, I really do struggle to see what the  
8 theory of liability is as to that agency. HUD has mandated  
9 that PHAs, including the local PHAs here in Los Angeles, allow  
10 participation in the HUD-VASH program up to an 80 percent  
11 income threshold. I believe that would include, certainly,  
12 based on the numbers that I read to you earlier, any individual  
13 who was solely receiving disability benefits from VA would  
14 allow them to obtain a voucher.

15           We -- to the point that Your Honor was making  
16 earlier, that there may be evidence that would come into trial  
17 to help give some context to these issues, and help the Court  
18 understand how they're working on the ground, we heard, I  
19 believe it was last week, I'm losing track of time, but HACLA  
20 has indicated to us that they've actually had success with  
21 tenant-based vouchers with the new payment standards that HUD  
22 has authorized, which authorized payment up to 160 percent of  
23 the fair market rent in the zip codes around the West Los  
24 Angeles VA campus, that they've had success with veterans  
25 finding units there and being able to use their vouchers.

1           So this isn't a situation where permanent supportive  
2 housing on the campus is the only way to be proximate to the  
3 services that the veterans are seeking.

4           I'll also note, this is an issue that seems to have  
5 shifted a bit. I've always understood Plaintiff's claim to be  
6 for medical services. The reason that they require housing on  
7 or near the campus is so that they can access medical services.  
8 But the way I've heard the argument framed this morning is that  
9 housing is the service that they want. And I don't think that  
10 that's a proper framing, and I don't think that the  
11 Rehabilitation Act makes that sort of relief available to them.

12           I'll also note, with just one final point, and I'll  
13 entertain any questions Your Honor might have for me, but it's  
14 not like the federal government has ignored this problem. And  
15 I will say, VA and HUD appreciate that it's an unintended  
16 consequence of this complex set of interactions, and they're  
17 engaged in trying to solve the issue on behalf of veterans. So  
18 VA, HUD, and Treasury are working on a legislative fix to  
19 propose to Congress that would, in effect, resolve the  
20 limitations imposed under the low-income housing tax credit  
21 program.

22           **THE COURT:** And what is that?

23           **MR. KNAPP:** It would fix the low-income housing tax  
24 credit issue.

25           **THE COURT:** How? How?

1           **MR. KNAPP:** By excluding veterans' benefits for  
2 purposes of accessing project-based housing that is constructed  
3 using that source of income. Now, that doesn't completely  
4 solve the issue because the state and local funding streams  
5 come with their own attachments. HUD is engaged with local  
6 authorities, so is VA.

7           I mean, this is an issue that our clients are talking  
8 to local authorities about, how they can amend their own  
9 regulations to free up that funding so that it doesn't have  
10 this unintended impact. Those are efforts that are ongoing.  
11 This is an issue that we want to solve. It's just not one that  
12 we can solve through the Rehabilitation Act.

13           And if Your Honor has any questions for me on the AMI  
14 issue, I'm happy to entertain them. Otherwise --

15           **THE COURT:** Let me wait. Let me come back if I do.  
16 And thank you.

17           And would you state your name for the record? I know  
18 who you are from the initial introduction, but just because we  
19 have CourtSmart.

20           **MR. LOWENSTEIN:** Of course, Your Honor. Jody  
21 Lowenstein for the Defendants.

22           **THE COURT:** Thank you.

23           **MR. LOWENSTEIN:** As my colleague, Mr. Knapp, said,  
24 I'll be addressing Defendants' motion for summary judgment with  
25 respect to Plaintiff's first and third causes of action alleged

1 under Section 504 of the Rehabilitation Act. And I'd like to  
2 take the third cause of action first, which we refer to in our  
3 briefing as Plaintiff's meaningful access claim.

4 And I think it'd be helpful, before getting into the  
5 issues and responding to some of the points in Your Honor's  
6 tentative, to step back and discuss a little bit about how a  
7 Section 504 meaningful access claim works and then how that  
8 maps onto what Plaintiffs are alleging.

9 So the starting point is the Supreme Court's decision  
10 in Choate. Choate explained that only unjustifiable disparate  
11 impacts that have the effect of denying disabled individuals  
12 meaningful access to their benefits rises to the level of  
13 actionable discrimination under Section 504. And as Choate  
14 itself explains, unjustifiable disparate impacts are those that  
15 can be remedied by a reasonable modification of the challenged  
16 policy.

17 Now, the Ninth Circuit, in cases like Zukle and  
18 Payan, make clear that a plaintiff must identify a reasonable  
19 modification, and this is a principle cited in Your Honor's  
20 tentative, to make out a prima facie case of disability  
21 discrimination under Section 504. In other words, absent a  
22 reasonable modification requested by the plaintiffs, there is  
23 no Section 504 discrimination.

24 So what do Plaintiffs allege here? Their meaningful  
25 access claim, in essence, alleges, as I understand it, that

1 Defendants have a policy of not providing enough permanent  
2 supportive housing units on or near the West L.A. campus to  
3 house the entire class, a policy they contend effectively  
4 prevents class members from meaningfully accessing their  
5 disability health care benefits.

6 But the question presented by Defendant's motion  
7 accepts, just for argument's sake, the premises underlying  
8 those allegations. But the meaningful access claim would still  
9 fail, even if accepting the truth of those allegations because  
10 Plaintiffs have not identified a reasonable modification of the  
11 challenged policy that is necessary to provide meaningful  
12 access. That is an essential element of their Section 504  
13 meaningful access claim for which they bear the burden of  
14 production.

15 Now what Plaintiffs do request by way of a  
16 modification is an affirmative injunction from this Court  
17 requiring VA to develop 4,000 permanent supportive housing  
18 units on the West LA campus within the next six years, a three-  
19 fold increase in the number of units that VA currently has  
20 planned for the campus and to have VA maintain and support  
21 those units thereafter.

22 Now that's derived from the reports of three  
23 proffered experts, all three of which -- from Plaintiffs, all  
24 three of which seemingly have the collective opinion that  
25 that's what's necessary.

1           So the question in resolving Defendants' motion for  
2 summary judgment is, is there a genuine dispute of fact  
3 regarding whether or not that is a reasonable modification.  
4 And there's really two ways of looking at that issue.

5           First, Plaintiffs did not even attempt to defend the  
6 reasonableness of their requested modification in opposing  
7 Defendants' motion, despite bearing the burden of proof on that  
8 issue. I don't see anywhere where they explain why requiring  
9 VA to increase the number of planned units on the campus from  
10 1,215 permanent supportive housing units to 4,000 is a  
11 reasonable modification. I see no argument in their brief. I  
12 see no evidence to support that.

13           Now what Plaintiffs do do, and Your Honor  
14 respectfully -- I believe the Court also -- Court's tentative  
15 also makes this legal error, is that reasonableness is distinct  
16 inquiry from necessity. Plaintiffs make the argument in their  
17 brief that a reasonable modification is just one that is  
18 necessary to provide meaningful access. But as the Ninth  
19 Circuit has explained in cases like Fortune, Bowman, and  
20 Lentini, and Bowman and Lentini are cited in Your Honor's  
21 tentative, those are distinct inquiries.

22           Now Plaintiffs may have presented, and I know Your  
23 Honor highlights a piece of evidence about Ms. Wright, about  
24 whether it is necessary for her to be near the campus in order  
25 to access her benefits, but evidence regarding whether it is



1 necessary for one individual to be near the campus to access  
2 her benefits says nothing about whether or not requiring VA to  
3 install nearly 3,000 more permanent supportive housing units on  
4 the campus is a reasonable modification here.

5 Plaintiffs have presented no evidence. They've  
6 raised no genuine issue of material fact on that issue. That  
7 failure should be dispositive of Defendant's motion under basic  
8 summary judgment principles.

9 As the Supreme Court explains in Celotex, the plain  
10 language of Rule 56(c) mandates the entry of summary judgment  
11 against the party who fails to make a showing sufficient to  
12 establish the existence of an element essential to that party's  
13 case, and on which that party will bear the burden of proof at  
14 trial.

15 That's the exact situation we have here. Plaintiffs  
16 have not raised a genuine dispute on that issue. Plaintiffs'  
17 failure to marshal any evidence to create a genuine issue of  
18 material fact in opposing Defendant's motion should be  
19 dispositive.

20 Now even if we were to assume for argument's sake  
21 that Plaintiffs made the showing that was required of them,  
22 that would still leave Defendants' affirmative defenses. A  
23 defendant, and again stepping back to the section -- just basic  
24 Section 504 principles, a defendant can definitively rebut a  
25 plaintiff's initial showing that a modification is reasonable

1 by demonstrating either that the modification would require a  
2 substantial alteration, the modification would require a  
3 fundamental alteration of a program or activity, or that the  
4 modification would impose an undue burden. If a defendant can  
5 make that showing, then the request of modification is, as a  
6 matter of law, not reasonable.

7           Here, in support of Defendant's motion, we have  
8 developed what I believe is a considerable record in support of  
9 our substantial alteration defense, our fundamental alteration  
10 defense, and our undue burden defenses. But I think there's an  
11 important point that the Court's tentative does not take  
12 account of, and that is in opposing Defendant's motion,  
13 Plaintiffs never actually addressed Defendant's substantial  
14 alteration argument or undue burden arguments. They never  
15 addressed the merits of those. They never highlighted any  
16 genuine issue of disputed fact on those defenses. I don't see  
17 where they ever actually make an argument against the substance  
18 of those arguments. I don't see where they ever acknowledge  
19 the legal standard of a substantial modification.

20           And for that standard, I'd point the Court to the  
21 footnote cited in our brief in Choate that explains the  
22 distinction between a fundamental alteration defense and a  
23 substantial alteration defense.

24           Now, the ordinary rule it seems in this district is  
25 that arguments that a party fails to meaningfully contest in

1 this optimization brief are considered conceded. This Court  
2 has applied that principle and has done so against Defendants  
3 in this case.

4           While it might be a regrettable result for  
5 Plaintiffs, there's no apparent reason why that principle  
6 should not govern here, particularly where Plaintiffs had a  
7 full and fair opportunity to oppose these arguments. But of  
8 course, we don't need to hang our hat on any concession because  
9 the undisputed facts before the Court more than support  
10 Defendant's affirmative defenses.

11           And I think we just need to look at the  
12 campus. Plaintiffs are demanding, like I said, a three-fold  
13 increase in the number of permanent supportive housing units  
14 that VA currently has planned for development on the campus,  
15 that VA has determined through its master planning process, is  
16 the appropriate amount to plan for development at this juncture  
17 subject to future reassessment.

18           Now, we think that's a substantial alteration, a  
19 substantial adjustment, substantial change, however you want to  
20 frame it, of VA's comprehensive plan for the campus. And as  
21 Plaintiffs' own proffered expert has concluded, radical changes  
22 to the campus would need -- would be necessary to execute their  
23 proposed plan. And we absolutely agree.

24           Now Your Honor, your tentative does not address the  
25 substantial modification standard. And again, like I said, the

1 Supreme Court in Choate explained that, and as well as in  
2 Davis, explained that there is a distinction between a  
3 fundamental alteration defense and a substantial alteration  
4 defense.

5           And on the unrebutted evidence in the record, I'm not  
6 sure how requiring VA to essentially scrap its comprehensive  
7 plan and create a new one that would be able to support 4,000  
8 permanent supportive housing units on the campus is not a  
9 substantial alteration of that plan and of that activity.

10           And we think that the fact that there is -- that  
11 Plaintiffs have raised no genuine dispute of fact on that issue  
12 and their own proffered expert seems to agree with us, should  
13 be again dispositive of Defendant's motion for summary  
14 judgment.

15           Finally, on the meaningful access claim, I'd like to  
16 just briefly address our undue burden argument. As we  
17 explained in our briefing, Plaintiffs request for modification  
18 would impose really a panoply of administrative logistical and  
19 financial burdens that when taken cumulatively we believe  
20 cannot be justified under a Section 504 disparate impact claim.

21           Now Plaintiffs did not contest that argument.  
22 Nowhere in their briefing do they ever mention a single one of  
23 those arguments it seems. And they don't raise a genuine issue  
24 of material fact on it, but it is worth -- I think it's worth  
25 here highlighting a few issues with respect to undue burden.

1           The first is that Plaintiffs requested housing before  
2 it could ever -- before it could ever begin development, VA  
3 would need to surmount several onerous regulatory hurdles and  
4 Your Honor highlights a couple of those in the tentative.

5           The unrebutted evidence shows that NEPA would require  
6 VA to complete an EIS to evaluate the environmental impacts of  
7 developing thousands of additional permanent supportive housing  
8 units on the campus, including expansion of infrastructure  
9 expansion of the utility systems.

10           Now that is -- comes from a declaration from the  
11 executive director for the Office of Asset Enterprise  
12 Management, who oversees the full portfolio -- VA's real --  
13 full real estate portfolio, property portfolio, including the  
14 EUL program.

15           According to that official, that EIS process that  
16 would be required by Plaintiff's request of modification would  
17 likely take more than three-and-a-half years to  
18 complete. That's unrebutted. Plaintiffs present no evidence  
19 to create a genuine issue of dispute on that fact.

20           And it would take more than three-and-a-half years to  
21 complete, given the complexities and impacts of developing  
22 substantially more housing on this campus, in addition to what  
23 is already ongoing, the development plans that are already  
24 ongoing.

25           Now, I'm not an environmental lawyer, but what I do

1 know about NEPA is that VA would need to take into  
2 consideration the cumulative impacts of past projects, current  
3 projects, and reasonably foreseeable future projects on this  
4 campus. Again, that regulatory hurdle would be an extreme  
5 time-consuming process.

6 And if Plaintiffs -- what Plaintiffs are requesting  
7 is that these 4,000 units are ready to go in six years, that  
8 just cuts off at least three-and-a-half years of that  
9 timeline.

10 Now, in addition to NEPA, Section 106 of the National  
11 Historic Preservation Act would require VA to complete historic  
12 preservation consultations for Plaintiff's proposed undertaking  
13 with the state historic preservation officer and other  
14 stakeholders. Those consultations would either address the  
15 entire proposed undertaking as a whole, or on an action-by-  
16 action basis. That's per -- for every demolition, for every  
17 site alteration, for every new construction, and they would do  
18 so under a programmatic agreement. And then they would need to  
19 obtain agreement from the state historic preservation officer  
20 before moving forward with any of those actions.

21 Now, given the fact that installing nearly 3,000 more  
22 permanent supportive housing units on this campus, in addition  
23 to what is already planned --

24 **THE COURT:** Why is the state preservation of  
25 consequence? Isn't this federal property?

1           **MR. KNAPP:** This is federal property.

2           **THE COURT:** Then why are we intertwined with  
3 state? I don't understand that. Help me.

4           **MR. KNAPP:** Of course. So under Section 106 of the  
5 National Historic Preservation Act, a federal undertaking,  
6 that's a term of art, in order for a federal agency to  
7 undertake the proposed action, if it would impact certain  
8 historic preservation structure, or certain structures that are  
9 preserved, and particularly here what we have is a historic  
10 district that is listed in the National Register. So that is  
11 the linchpin. That is why the National Historic Preservation  
12 Act is triggered, because this is a historic district. The  
13 entire north --

14           **THE COURT:** I'm sorry. National Historic  
15 Preservation Act or state. You mentioned the state, and my  
16 question was directed towards the state. How is the state  
17 intertwined in this? What authority do they have to dictate to  
18 the government?

19           **MR. KNAPP:** So the state historic preservation  
20 officer is given a seat at the table under the National  
21 Historic Preservation Act.

22           **THE COURT:** Okay. Seat at the table.

23           **MR. KNAPP:** Yeah.

24           **THE COURT:** What's the authority of that state  
25 historic preservation officer?

1           **MR. KNAPP:** That state historic preservation  
2 officer --

3           **THE COURT:** Is it advisory, or can they quash?

4           **MR. KNAPP:** So my understanding of the regulations is  
5 that they have a substantial authority during that consultation  
6 process.

7           **THE COURT:** What does that mean?

8           **MR. KNAPP:** So as they're analyzing the historic  
9 preservation interests, what the impacts are, what the  
10 mitigation measures are, they have a part in that consultation  
11 process, and the federal agency has to achieve an agreement  
12 with the Historic Preservation Officer before moving forward on  
13 the undertaking. Now, I --

14           **THE COURT:** So let me repeat back to you what I've  
15 absorbed, and then correct me. What section is that? The  
16 state, as you said, 106?

17           **MR. KNAPP:** If I might take a second to find --

18           **THE COURT:** Yeah, please. Yeah. Just find that  
19 section for me. And I don't understand that, so that's why I'm  
20 asking.

21           **MR. KNAPP:** Of course. So --

22           **THE COURT:** No, just the section first. Give me the  
23 section. I think you said 106, but I'm not certain.

24           **MR. KNAPP:** That's the statute. I'd like to get Your  
25 Honor the regulatory provision that governs that process.



1           **THE COURT:** Okay, just take your time. I want to  
2 hear that before anything else. I want to look at it.

3           In other words, I want to know what the authority of  
4 the state is, if it's input, you know, consultation, or if  
5 there's mandated federal regulations that say shall or must. I  
6 want you to pull this up for me in a minute.

7           **MR. KNAPP:** Your Honor, I believe it is 36 CFR 800.3.

8           **THE COURT:** Okay.

9           **MR. KNAPP:** It's going to be in 36 CFR 800.

10          **THE COURT:** Folks, come on up. If you're helping  
11 him, don't be shy about that. Come on up and take just a  
12 moment, counsel. They're doing a lot of work for you right  
13 now. It's appreciated.

14          **(Pause)**

15          **THE COURT:** I'm going to read to you, counsel, for  
16 just a moment. And I'm reading from 800.3(b). Coordinate with  
17 other reviews. "The agency official should coordinate the  
18 steps of the Section 106 process as appropriate with the  
19 overall planning schedule for the undertaking and with any  
20 reviews required under other authorities, such as the National  
21 Environmental Policy Act, the Native American Graves Protection  
22 and Repatriation Act, the American Indian Religious Freedom  
23 Act, the Archaeological Resources Protection Act, and agency-  
24 specific legislation, such as Section 4(f) of the Department of  
25 Transportation Act.

1            "We're consistent with the procedures in this  
2 subpart. The agency official may use information developed for  
3 other reviews under federal, state, or tribal law to meet the  
4 requirements of Section 106."

5            Now, I haven't researched that thoroughly, but I  
6 would read that as the federal entity needs to at least  
7 consult. They're at the table with the state preservation, but  
8 they're not mandated. In other words, it's simply input.

9            So take your time with that, and I'll research it  
10 further if this is -- now we can look at the Transportation Act  
11 and each of these acts independently. There may be mandatory  
12 language such as shall or must, but right now, it seems to be  
13 what I call a comity. In a sense, just -- let's consult, let's  
14 get input from the state, but we -- federal agencies still  
15 control.

16            And we're going to pull up the National Environmental  
17 Policy Act right now as well, counsel. I could be wrong, but  
18 we don't see any mandatory language yet, counsel.

19            **MR. KNAPP:** Your Honor, my understanding -- now, you  
20 asked first for --

21            **THE COURT:** It's as simple as this. Can the state  
22 entity -- the state preservation entity, although they're  
23 invited to the table, quash the federal government agency and  
24 we don't see any mandatory language. We see them being  
25 consulted, it's a courtesy, it's a comity, we want their input,

1 but federal plan, federal property, federal controls.

2 **MR. KNAPP:** Let me answer that directly. My  
3 understanding is no, a state historic preservation officer  
4 cannot -- he's not the final word, is my understanding of how  
5 the regulation works.

6 **THE COURT:** No, it's not the final word. They can't  
7 stop it. I want to make it really simple.

8 In other words, if the federal government says X with  
9 federal land, I don't see anything in 106 that says that  
10 there's any authority for the state entity to stop this  
11 process.

12 **MR. KNAPP:** They -- my understanding is that they do  
13 not have the authority to stop it in its tracks. However,  
14 there is some nuance here, because --

15 **THE COURT:** Show me where that is in the statute.

16 **MR. KNAPP:** Sure. So well --

17 **THE COURT:** No, no just -- just show me where that is  
18 in the statute.

19 **MR. KNAPP:** Well, then --

20 **THE COURT:** The word must or shall, all I'm looking  
21 for is the relationship between the entities, and right now if  
22 I was writing the opinion, without doing more research, I would  
23 write that this is an act of comity between the federal  
24 government that absolutely controls, getting input from the  
25 state, but the state has no ability to countermand the decision

1 of the federal government.

2 **MR. KNAPP:** Again, that's my --

3 **THE COURT:** And show --

4 **MR. KNAPP:** -- understanding of how the regulations  
5 work. The nuance that I just want to provide is that in 36 CFR  
6 800.7, that does outline that if the State Historic  
7 Preservation Office and the federal agency cannot reach an  
8 agreement, that there are formal comment procedures for a  
9 federal advisory council. However, a federal agency, I don't  
10 believe, has to go through that process.

11 A federal agency very well may respect the  
12 determination of a state historic preservation officer and not  
13 proceed any further. That is, my understanding, is the federal  
14 agency's prerogative, and that's the nuance that I wanted to  
15 provide. I can't say I'm not going to get in front of the VA  
16 and say what they would do in that hypothetical scenario.

17 However, the point that I think this Court can rely  
18 on is that this is a process that VA would need to proceed  
19 through. That is the requirement, is that the state historic  
20 preservation officer gets say in this process. And given the  
21 fact that on this historic district listed in the National  
22 Register, given the fact that, and this is unrebutted  
23 testimony, demolitions and significant site alterations would  
24 be necessary to incorporate thousands of additional permit  
25 supportive housing units on the campus, these consultations

1 will be challenging. Far more challenging than the  
2 consultations that have occurred to date.

3 And in order to reach agreement with the state  
4 historic preservation officer, they would have to have on the  
5 table the likely outcome of demolishing significant structures  
6 on this historic campus. Any mitigation measures that would be  
7 necessary, assuming the state historic preservation officer  
8 does, in fact, give the go-ahead on demolitions, would be far  
9 more costly.

10 And I think a very important point here is that  
11 demolitions and significant site alterations could irrevocably  
12 damage the campus' historic nature and potentially lead to it  
13 being delisted. That is in the PEIS, we cited in our brief,  
14 it's unrebutted by Plaintiffs. And in the Supreme Court case  
15 Tennessee v. Lane, which again we cited in our brief, the  
16 Supreme Court stated very clearly, an entity need not take  
17 measures that would threaten historic -- this is not a direct  
18 quote, but this is a principle. An entity need not take  
19 measures that would threaten historic preservation interests to  
20 comply with the statute's reasonable modifications  
21 requirement.

22 And if the Court wants more context on the  
23 implications of demolition and site alterations, I'd point the  
24 Court to the PEIS Section 4.3, which gives some context to that  
25 issue.

1           Now, just the last point on undue burden that I'd  
2 just like to emphasize is, regulatory burdens aside, I think  
3 it's worth discussing the impacts that the construction on the  
4 campus is currently having and how increased construction to  
5 accommodate Plaintiffs' demand for housing would exacerbate  
6 those issues.

7           The unrebutted evidence shows the campus currently is  
8 experiencing a host of construction-related challenges. Those  
9 are construction noise, utility shutdowns, road closures,  
10 project delays, and just general congestion. Those things  
11 disrupt campus life for veteran residents, and they disrupt  
12 operations, including the provision of important services to  
13 veterans.

14           Again, unrebutted testimony says that veteran  
15 residents have regularly voiced concerns at community meetings  
16 about how construction impacts their daily lives, noting the  
17 challenges of transitioning out of homelessness and into living  
18 in a heavy construction zone.

19           Now, it's just common sense that adding more active  
20 construction projects to that campus to try to meet a six-year  
21 timeline, and again, three-and-a-half years, this is  
22 unrebutted, three-and-a-half years would be knocked out of that  
23 timeline because of what -- at least three-and-a-half years  
24 because of what NEPA requires.

25           So to jam a bunch of active construction projects

1 onto this campus would exacerbate those issues for veteran  
2 residents, for veteran patients, for staff, and the provision  
3 of health care to veterans on that campus.

4 That's set out in the Declaration of Brett Simms. We  
5 see no evidence presented by Plaintiffs that that would not  
6 occur. And so to avoid that result, given the number of  
7 housing and other construction projects already in the hopper,  
8 it would likely take more than seven years before the campus  
9 can accommodate new unplanned projects without having even more  
10 deleterious effects on campus life and campus operations.

11 **THE COURT:** That seven years that you just mentioned,  
12 is that the date where the construction would cease and the  
13 buildings would exist, or is that seven years, as you  
14 mentioned, just the beginning of the process?

15 **MR. KNAPP:** That seven years is before the campus  
16 could initiate new unplanned projects without having --

17 **THE COURT:** Make it simple. What does that mean?

18 **MR. KNAPP:** There are considerable housing projects  
19 and other construction projects already planned for the campus  
20 into the future.

21 **THE COURT:** Okay.

22 **MR. KNAPP:** A lot of those are permanent supportive  
23 housing. We also have, I believe, initiating -- it's going to  
24 be initiated or commencing in 2025, the building of a new  
25 critical care tower, a new hospital.

1           **THE COURT:** So in seven years, what would be  
2 completed?

3           **MR. KNAPP:** Well, I'm not sure what exactly would be  
4 completed. All this statement is, and all this determination  
5 is, is that before the initiation of new construction projects  
6 could start to be planned or initiated, it would be seven years  
7 before they could do that without having even more adverse  
8 effects on the campus. That is the --

9           **THE COURT:** Okay. Let me repeat that back to you  
10 because I'm not absorbing it, and that's my fault, not yours.

11           Are you saying that there would be a seven-year lag  
12 before some amount of substantial construction started, and if  
13 so, what would occur in that seven-year period of time? What  
14 would be constructed, and what would occur at the seven-year  
15 period? What I don't understand is what the plan is.

16           And I understand the argument, look, Judge, we've  
17 got -- if you speed this up, it's going to be difficult for  
18 veterans who are living there. There's substantial  
19 construction going on.

20           My question back to you is, I don't understand the  
21 timeline when you mentioned seven years. I don't know what  
22 that means.

23           **MR. LOWENSTEIN:** Let me do my best to try to explain  
24 what that tries to capture.

25           Right now, VA has a multitude of construction



1 projects --

2 **THE COURT:** Right.

3 **MR. LOWENSTEIN:** -- currently on the campus --

4 **THE COURT:** Right.

5 **MR. LOWENSTEIN:** -- planned and planned for the  
6 future. Many of those are permanent supportive housing  
7 construction projects. Those are on the hopper. Those are  
8 going to proceed over the next several years.

9 VA also has --

10 **THE COURT:** Well, you are here over initially I think  
11 your initial bargain or agreement was 1200 units; was that  
12 correct? The 2015 settlement, about 1200 units.

13 **MR. SPEAKER:** Yes.

14 **THE COURT:** Would those 1200 units be completed by  
15 what date?

16 **MR. LOWENSTEIN:** My understanding is that they're on  
17 schedule to be complete by 2030.

18 **THE COURT:** Okay, by 2030. So is the argument then  
19 that if there was eventually a verdict in favor of the  
20 Plaintiffs, and the Court then set forth injunctive relief of  
21 some type, that if that timeline was disturbed, your argument  
22 would be today that any additional units above 1200 units  
23 shouldn't start before 2030?

24 **MR. LOWENSTEIN:** (No audible response.)

25 **THE COURT:** In other words, up to 2030 we're going to

1 complete 1200 units and, Judge, anything above that would have  
2 the same argument that you just proposed, and that is a  
3 substantial disruption to the veterans living there,  
4 construction, increased traffic, etcetera.

5 So if we had 50 more units or a thousand more units,  
6 Judge, your injunctive relief shouldn't --

7 **MR. LOWENSTEIN:** Well, --

8 **THE COURT:** -- set forth anything before 2030.

9 **MR. LOWENSTEIN:** -- I think it is on a spectrum,  
10 right. The more units that would need to be constructed over  
11 Plaintiffs' proposed six-year period, the more adverse --

12 **THE COURT:** Sure.

13 **MR. LOWENSTEIN:** -- impacts of the cumulative effects  
14 of many active construction projects on this campus --

15 **THE COURT:** Okay.

16 **MR. LOWENSTEIN:** -- in addition to construction of a  
17 new critical care tower unit --

18 **THE COURT:** Okay.

19 **MR. LOWENSTEIN:** -- on the south campus.

20 **THE COURT:** Next question then is, the argument that  
21 historical preservation is important, I agree with that.

22 But will historical preservation stop the ability of  
23 the VA to increase housing?

24 Let me give you this example. I have a building,  
25 it's designated historical but it's not habitable. And so does

1 that building then have historic preservation that outweighs  
2 the need for habitability and the end result is that building  
3 remains vacant and we can't demolish it because if we demolish  
4 it, it's taking areas that we need?

5 And so what I'm driving at, the argument could be  
6 that historical preservation is getting in the way of housing  
7 veterans and the building remains vacant.

8 **MR. LOWENSTEIN:** Your Honor, those assessments of --  
9 you know, I really can't do that assessment myself. I --

10 **THE COURT:** I can't either.

11 **MR. LOWENSTEIN:** -- can't do it in a --

12 **THE COURT:** That's why -- I don't know the answer.

13 **MR. LOWENSTEIN:** I can't do it in a hypothetical.

14 However, our point is principally when a --

15 **THE COURT:** How many historical buildings are out  
16 there?

17 **MR. LOWENSTEIN:** I'm not sure about how many because  
18 there is a --

19 **THE COURT:** Well go over and ask. You're -- come on  
20 up here from -- folks. Now, about how many historical  
21 buildings are out there? Come on up. Just go over and talk.

22 In other words, if historical preservation is going  
23 to hold up 70 buildings being rehabbed and they remain vacant,  
24 then tough choice has to be made.

25 They're either going to be historically preserved

1 with no habitability or they're going to be rehabbed as  
2 historical buildings, or they're going to be demolished.

3 And I'm not holding you folks to an absolute number.  
4 I'm just trying to get an idea. I don't know.

5 Versus you've got a historical church out there, that  
6 thing looks horrible, for both of you, you ought to get  
7 together and immediately resolve to pain the church, okay? I  
8 can bet you there's a number of veterans out there that will  
9 paint it for you.

10 **MR. LOWENSTEIN:** Your Honor, after consulting with my  
11 knowledgeable colleague, --

12 **THE COURT:** Okay. Well, thank you, knowledgeable  
13 colleague, okay, appreciate it.

14 **MR. LOWENSTEIN:** -- our understanding is that there  
15 are two historic buildings that are actually listed on the  
16 National Register.

17 **THE COURT:** Okay.

18 **MR. LOWENSTEIN:** However, because this is a historic  
19 district, the entire historic district is what -- well, the  
20 whole north campus and part of the northwest section of the --

21 **THE COURT:** And who eventually decides that? In  
22 other words, does the VA take this to Congress, does -- how do  
23 we decide in a historic district what's really going to be  
24 preserved and what's not?

25 And how does that affect the ability to get veterans

1 into housing if, in fact, there's a preservation right but it's  
2 not habitable?

3 **MR. LOWENSTEIN:** So the initial determination of how  
4 historic preservation interest on a historic district will  
5 impact that process of determining how to get veterans into  
6 housing and how much housing and where that housing goes, the  
7 initial determination was from Congress and the National  
8 Historic Preservation Act.

9 Now, how that actually plays out in a specific  
10 context is determined through the process that we pointed your  
11 honors to in the Code of Federal Regulations --

12 **THE COURT:** I don't understand that process.

13 **MR. LOWENSTEIN:** It's a process by which the federal  
14 agency who is proposing an undertaking --

15 **THE COURT:** Who, the VA?

16 **MR. LOWENSTEIN:** And here would be the VA --

17 **THE COURT:** Okay.

18 **MR. LOWENSTEIN:** -- if they needed to --

19 **THE COURT:** And what do they do?

20 **MR. LOWENSTEIN:** They would consult with a lot of  
21 stakeholders.

22 **THE COURT:** Well who? I need to understand this.

23 Who?

24 **MR. LOWENSTEIN:** Well, I know --

25 **THE COURT:** Sounds like bureaucracy kind of helping

1 each other, helping --

2 **MR. LOWENSTEIN:** We know the State --

3 **THE COURT:** -- end each other.

4 **MR. LOWENSTEIN:** -- Historic Preservation Officer has  
5 a seat at that table.

6 **THE COURT:** Okay.

7 **MR. LOWENSTEIN:** We know that tribes are invited to  
8 that table.

9 **THE COURT:** Sure.

10 **MR. LOWENSTEIN:** In this process -- or let me step  
11 back --

12 **THE COURT:** Probably transportation because it's one  
13 of the -- they mention Section 4.

14 **MR. LOWENSTEIN:** Sure. In prior historic  
15 preservation consultations regarding what was occurring on the  
16 campus, other community entities were involved --

17 **THE COURT:** And has that occurred thus far? Has  
18 there been such a meeting or effort to sort out this argument  
19 about preservation, which is important, versus getting veterans  
20 into either preserved, habitable buildings, or the tough call  
21 about whether they're going to be demolished?

22 **MR. LOWENSTEIN:** I have two answers for you.

23 With respect to the current plan, the current number  
24 of --

25 **THE COURT:** No, no, that's not my question. I --

1           **MR. LOWENSTEIN:** Okay.

2           **THE COURT:** -- don't -- I'm not interested in plans.  
3 I'm not interested -- I'm interested has any action of this  
4 kind taken place? If so, when was this request made? When do  
5 they meet? Who are they?

6           **MR. LOWENSTEIN:** So my understanding of what occurred  
7 in the past is that the State Historic Preservation Officer and  
8 the VA, in consultation with other stakeholders, entered into  
9 what is known as a programmatic agreement.

10          **THE COURT:** When?

11          **MR. LOWENSTEIN:** That programmatic --

12          **THE COURT:** When?

13          **MR. LOWENSTEIN:** I do not have the exact date for  
14 you, Your Honor. Would you like me to get it?

15          **THE COURT:** No. They're right by -- folks, come on  
16 up. Just want to hear this process. And you two have been at  
17 it in litigation since 2012. I'd just like to hear the reality  
18 of what's occurred in this period of time.

19                 If this preservation act is important, which we all  
20 agree it is, if that's bumping up against the ability of  
21 veterans to get housed, and if it is, if we're rehabbing these  
22 preserved buildings or, if the tough call is made that we have  
23 to demolish some of them.

24                 **(Judge/Clerk confer.)**

25          **THE COURT:** Okay. Now just a moment. In May, 2019

1 VA executed a programmatic agreement with the California State  
2 Historic Preservation Officer and the advisory counsel and  
3 historic preservation.

4 The consultation process also included Native  
5 American tribal representatives and other local stakeholders.

6 This agreement outlines project review procedures for  
7 ongoing DMP projects, and seeks to avoid, minimize, and/or  
8 mitigate adverse effects to historic properties. That happened  
9 in 2019.

10 What's happened since?

11 **MR. LOWENSTEIN:** So under that programmatic  
12 agreement, as we explained in our briefs, --

13 **THE COURT:** I'm sorry, what's happened since?

14 **MR. LOWENSTEIN:** On an action-by-action basis is how  
15 VA consults with the state historic preservation officers, my  
16 understanding of how that programmatic agreement works.

17 So that means if there's a demolition, if there's a  
18 significant site alteration, if there's a renovation, for each  
19 one of those actions, before it moves forward, VA and the  
20 State's Historic Preservation Officer have to reach an  
21 agreement on that action. That has occurred for the --

22 **THE COURT:** Right.

23 **MR. LOWENSTEIN:** -- current projects --

24 **THE COURT:** So I assume 207, for instance, and I  
25 forget the building, two off to the side, but that -- those



1 buildings had to go through the process. That's where we have  
2 some of the 223 veterans that are housed --

3 **MR. LOWENSTEIN:** That's my understanding those --

4 **THE COURT:** -- as you go up -- right here.

5 So they've gone through that process, and they've  
6 decided to preserve those buildings, they've rehabbed them,  
7 they haven't demolished them.

8 **MR. LOWENSTEIN:** That's correct.

9 **THE COURT:** Now, if they can do that with those  
10 buildings, the argument is, Judge, preservation may get in the  
11 way, why can't we do those with the rest of the buildings?

12 Or if there's something that's just rat-infested,  
13 walls are falling down, you know, then we tear it down.

14 And I don't know where we're at in this process when  
15 you argue preservation, which we all agree to, versus  
16 preservation getting in the way of habitability and moving  
17 veterans in.

18 **MR. LOWENSTEIN:** Your Honor, a number -- my  
19 understanding is, is that a number of buildings will be  
20 renovated through that process. However, --

21 **THE COURT:** Which --

22 **MR. LOWENSTEIN:** -- the question is, is are there  
23 enough buildings on that campus to house a total of 4,000 --

24 **THE COURT:** Right.

25 **MR. LOWENSTEIN:** -- permanent supportive housing

1 units on a historic district that if you were to build a ten-  
2 story tall building, how would that impact the historic  
3 preservation or the historic equalities of that campus?

4           Would that lead to delisting of that district from  
5 the National Register?

6           So I'm not going to get ahead of the agency and try  
7 to do that assessment in my head on building by building.  
8 However, it's the process that needs to occur, --

9           **THE COURT:** Okay.

10           **MR. LOWENSTEIN:** -- the process that needs to go  
11 through.

12           And the unrebutted evidence says that there would  
13 need to be demolitions to make that room, and significant site  
14 alterations. And those could potentially impact the historic  
15 fabric of that district.

16           **THE COURT:** So there are two individually listed  
17 National Register properties, the Wadsworth Chapel, which I've  
18 been referring to, and the street car people. That doesn't  
19 mention any of the other buildings.

20           **MR. LOWENSTEIN:** If I may, because it's a historic  
21 district, there are, my understanding, nearly 50 contributing  
22 buildings. They not -- may not be individually listed on the  
23 National Register but those nearly 50 buildings contribute to  
24 the historic nature of the district itself.

25           There are also I believe nearly 20 historic

1 structures, roadways and, well, other structures or features of  
2 that campus that also contribute to it being a historic  
3 district.

4 So while there may only be my understanding is two  
5 specifically historic listed buildings, there's much more to  
6 determining what makes that a historic district.

7 **THE COURT:** Okay. All right, thank you.

8 **MR. LOWENSTEIN:** Thank you, Your Honor.

9 **THE COURT:** So, in a sense, preservation could remain  
10 hanging in a sense with blockage concerning habitability for  
11 veterans.

12 In other words, if these sites are going to be  
13 preserved, and they're not rehabilitated (sic) or rehabbed, I'm  
14 sorry, that then would preclude veterans from being housed.

15 **MR. LOWENSTEIN:** If -- in Your Honor's hypothetical,  
16 if a building was left unrehabilitated and not renovated for  
17 housing then, yes, that would not be -- that would not serve  
18 the purpose of housing.

19 **THE COURT:** Okay. Thank you.

20 **MR. LOWENSTEIN:** I'm going to now pass it back to my  
21 colleague Mr. Knapp who will be --

22 **THE COURT:** And before you do, just consult with your  
23 group, make sure that that -- this is the first round -- and  
24 have a conversation.

25 **(Pause)**

1           **MR. KNAPP:** Yeah, I'll just make one point related to  
2 my colleague's arguments to the very question that Your Honor  
3 was just asking about, you know, if these historic preservation  
4 concerns get in the way of housing, you know, is the ultimate  
5 result that people just don't get housed there.

6           That may be so. But that's a choice that Congress  
7 made, and it's a choice Congress made in the West Los Angeles  
8 Leasing Act.

9           **THE COURT:** Okay.

10          **MR. KNAPP:** That's Section 2(h)(2) --

11          **THE COURT:** Just a moment.

12          **MR. KNAPP:** -- which requires compliance with this  
13 very process.

14          **THE COURT:** Okay, 2-H.2 or 2(h)(2)?

15          **MR. KNAPP:** Two, "H," two.

16          **THE COURT:** Thank you very much. I'll take a look at  
17 that.

18          **MR. KNAPP:** Your Honor, I do want to get to the trust  
19 claims because, --

20          **THE COURT:** Sure.

21          **MR. KNAPP:** -- you know, I see that as really our  
22 last opportunity here since Your Honor has proposed to grant  
23 summary judgment against us on those arguments.

24                 There's a number of issues with the Court's analysis.  
25 And I know that it's consistent with the conclusions that the

1 Court reached at the motion to dismiss stage.

2 You know, we respect the conclusions that Your Honor  
3 has reached, but we think that they're deeply wrong.

4 I'll point out that the focus of the Court's analysis  
5 should be on statutory language. I think that the existence of  
6 this 1888 deed and the sort of original purposes for which the  
7 land was donated to the National Home for Disabled Volunteer --  
8 Volunteer Disabled Soldiers has motivated a lot of the thinking  
9 around this issue.

10 But the focus, because we're talking about a federal  
11 entity that is bound to act within statutory bounds, the focus  
12 of the analysis should be on statutory language.

13 And, you know, Plaintiffs state that the West Los  
14 Angeles Leasing Act and its subsequent amendments provide that  
15 language, provide language that gives rise to fiduciary duties  
16 above and beyond the language of those statutes. And I just  
17 don't think that that's a plausible reading of the West Los  
18 Angeles Leasing Act.

19 **THE COURT:** Okay.

20 **MR. KNAPP:** That is a very narrow provision that  
21 governs how VA can lease the property out to third parties. It  
22 doesn't include any mandatory language about constructing  
23 housing.

24 And their best case -- and this goes back to the  
25 *Valentini* litigation, so *Valentini* agreed with us on this point

1 at the motion to dismiss stage, said there's no statute that  
2 gives rise to the sorts of fiduciary duties that the plaintiffs  
3 in that case with the same counsel here were advocating for.

4 They -- and that court said, and Plaintiffs have  
5 cited it again in this case, said that *Fitzgerald versus Baxter*  
6 *State Park Authority*, Maine Supreme Court case, was the most  
7 analogous setting to what was going on here.

8 And the court said in *Valentini*, there's no statutory  
9 language anything like what existed in *Fitzgerald v. Baxter*.

10 Plaintiffs have come in in this case, and they say  
11 the West Los Angeles Leasing Act fills that gap. But now we  
12 are in a different situation.

13 I'll just encourage the Court to look at the  
14 underlying statutes that were at issue in *Fitzgerald*. They  
15 look nothing like the West Los Angeles Leasing Act. I'll read  
16 you some of the language.

17 In 12, this is the main revised statutes, Title 12,  
18 Section 900 states, in statutory language, seldom has a more  
19 generous gift been presented to a people than has been given by  
20 Percival Proctor Baxter to the people of the State of Maine.

21 It is incumbent upon them, the recipients, to  
22 preserve the trust impressed upon them, to ensure for  
23 themselves and for future generations the fullest use of the  
24 Baxter State Park --

25 **THE COURT:** Just a little slower so we pick that up.

1 Read that last portion again. I'm not sure we got it on  
2 CourtSmart.

3 **MR. KNAPP:** It is incumbent upon them, the  
4 recipients, to preserve the trust impressed upon them, to  
5 ensure for themselves and for future generations the fullest  
6 use of Baxter State Park, consistent with the desires of the  
7 donor. That's Section 900.

8 Section 901 states, the authority is authorized to  
9 expend such sums so received for such purposes, and shall hold  
10 and use such lands as specified in the trust.

11 Section 906 says nothing in Section 900 or any other  
12 law shall be interpreted or construed to modify, nullify, or  
13 affect in any way any of the provisions in any deed of trust  
14 made by Percival Proctor Baxter conveying land in Baxter State  
15 Park to the State of Maine.

16 Nothing in the West Los Angeles Leasing Act cross-  
17 references the original donation of this land to the national  
18 home. Nothing in it purports to incorporate those original  
19 purposes.

20 The West Los Angeles Leasing Act is a relatively  
21 routine statute governing how an agency can use the land that  
22 has been assigned to it by Congress.

23 I'll point out that -- and this is something  
24 Plaintiffs never engaged with, and I don't see it in Your  
25 Honor's order. And I apologize if I might have missed it.

1 But they never grapple with Congress's elimination of  
2 the national home. And in Section 38 USC, Section 8113, with  
3 the fact that Congress expressly provided that any incumbrance  
4 on national home property would be extinguished so as to ensure  
5 that the United States had full use of the property,  
6 unencumbered by any prior deeds or things like a trust.

7 And so we would encourage Your Honor to go back to  
8 those sources because we think that they really -- that's where  
9 the -- your -- the Court's attention should be focused, is on  
10 whether the West Los Angeles Leasing Act provides for the  
11 assumption of duties under a trust. And it just doesn't do so.

12 Even if we do focus on the deed, though, I think it's  
13 important to put that deed in context because it doesn't do the  
14 work that Plaintiffs would have it do and that the Court's  
15 tentative order purports to have it do.

16 The language in that deed which speaks of permanent  
17 maintenance of a branch home of the National Home For Disabled  
18 Volunteer Soldiers simply parrots the statute that authorized  
19 the establishment of the Pacific branch.

20 We've cited to Your Honor a 1915 California Supreme  
21 Court case, *Victoria Hospital Association*, --

22 **THE COURT:** Right.

23 **MR. KNAPP:** -- that stands for the proposition that  
24 when a deed -- a purported deed of trust simply parrots the  
25 purposes for which the charitable organization the land is



1 being donated to, simply parrots the charitable purposes of the  
2 organization, that doesn't give rise to trust obligations.

3 And we think that's true here. All -- the purpose  
4 was for the national home to use the property for the purposes  
5 that the national home was established for.

6 Congress later got rid of the national home. Without  
7 a national home, those purposes no longer existed.

8 At bottom, and this gets to a reason why I do think  
9 this deserves some reconsideration by the Court, is I think  
10 this creates some problems for us as we move ahead to trial.

11 I don't see any daylight between the APA claims,  
12 which are about compliance with the West Los Angeles Leasing  
13 Act, and what should be any obligations under the trust to the  
14 extent that the trust is given life by the West Los Angeles  
15 Leasing Act.

16 **THE COURT:** Okay.

17 **MR. KNAPP:** It seems like Plaintiffs would like to  
18 sort of use their trust claims as a backdoor to reestablish the  
19 national home that Congress disestablished.

20 That might be a good idea as a policy matter. But  
21 that's a judgment for Congress to make in statute, not  
22 Plaintiffs through novel theories of trust or this Court.

23 And if we're to go to trial about the terms of breach  
24 of the terms of any fiduciary duty that the VA owes under the  
25 1888 deed, we should know exactly what those duties are and

1 whether they're any different from what's in the text of the  
2 West Los Angeles Leasing Act.

3 If they aren't, then these claims are simply  
4 coextensive with their APA claims. And as Your Honor has  
5 noted, the record there is closed.

6 There should be no testimony at trial about  
7 compliance with the West Los Angeles Leasing Act as that's what  
8 the APA requires.

9 But if there is some other duties that the VA is  
10 subject to, and the testimony at trial will be relevant to a  
11 finding of breach, we should know what those duties are. And I  
12 don't see them spelled out in the Court's order.

13 I would suggest that the reason for that is because  
14 there aren't any duties that stem from the West Los Angeles  
15 Leasing Act beyond its text. But that means that these  
16 fiduciary duty claims should fail outright.

17 And I'm happy to answer any questions Your Honor has.

18 **THE COURT:** No, just go over and consult your  
19 colleagues for a moment.

20 **(Mr. Knapp/co-counsel confer.)**

21 **MR. KNAPP:** Yeah, we're happy to submit on our papers  
22 and --

23 **THE COURT:** Okay.

24 **MR. KNAPP:** -- our argument today. I understand --

25 **THE COURT:** There'll be a second row.

1           **MR. KNAPP:** -- we'll have a second round, yeah.

2           **THE COURT:** It'll be much more brief.

3           Then counsel on behalf of the Intervenors,  
4 Bridgeland, do you have any arguments you'd like to make?

5           **MR. GUADIANA:** No argument, Your Honor.

6           **THE COURT:** I didn't think it involved you but it  
7 may. All right.

8           Then, counsel, I have a plea in a criminal matter at  
9 1:30, which was 15 minutes ago.

10           Why don't you go out, get lunch, sort out your  
11 thoughts, come up with a suggested time of half an hour maybe  
12 on your rebuttal arguments, something like that. And why don't  
13 we meet in -- I'll just stay in session. What would be  
14 comfortable for you for lunch?

15           **MR. ROSENBAUM:** May I ask Your Honor what about Your  
16 Honor having lunch or --

17           **THE COURT:** No, I'm not going to have lunch. How  
18 about 2:15, 2:30?

19           **MR. ROSENBAUM:** You tell us. Either one's fine with  
20 us.

21           **MR. KNAPP:** Yeah. We're happy to come back whenever.

22           **THE COURT:** Well, between 2:15 and 2:30. When you  
23 folks appear we should be done with that criminal matter. I'll  
24 just stay in session, okay?

25           **(Court takes up other matters from 1:44 p.m. to 2:24 p.m.)**

1           **THE COURT:** Then we're back on the record. All  
2 counsel are present. And, counsel, the concluding argument on  
3 behalf of the Plaintiffs.

4           **MR. ROSENBAUM:** Good afternoon again, Your Honor.

5           **THE COURT:** Afternoon.

6           **MR. ROSENBAUM:** I want to focus and turn us to the  
7 facial discrimination issue that we had dialogue about this  
8 morning, and respond specifically to counsel's discussion of  
9 that issue.

10           The -- what I found most significant about that  
11 argument was the manner by which it supported all the points  
12 that you and I discussed.

13           Let me start out with acknowledgement that after  
14 listening to counsel and reviewing their papers again, there  
15 isn't any dispute, there isn't any factual dispute about the  
16 policy that we are asserting facially discriminates in  
17 violation of Section 504.

18           And that is that the VA and HUD, but the VA in  
19 particular, is sanctioning the use of income limitations and  
20 within those income limitations, disability compensation,  
21 counting it as income, for purposes of eligibility for  
22 permanent supportive housing.

23           I want to correct one thing counsel actually began  
24 his argument with because I think it's important for several  
25 reasons.

1 This is all about healthcare. The housing, as Your  
2 Honor's articulated in the order denying the motion to dismiss,  
3 is a means for reasonable access to get to that healthcare.  
4 And that's what we're talking about, and that's what the stakes  
5 are.

6 And maybe somewhat as a side matter counsel began his  
7 argument by pointing out that one of our Plaintiffs is in  
8 building 208. I don't think he said 208 but it is. Exactly  
9 right.

10 And the reason is, Your Honor, because they raised  
11 the AMI limit so that the disability compensation would not  
12 disqualify the eligibility.

13 Prior to that the individual was not eligible for  
14 that permanent supportive housing. And it was only with that  
15 action that the individual got in.

16 The newest building that is about to be completed or  
17 supposed to be completed is one that will have 70 apartments on  
18 the property. And it has a 50 percent AMI. And we have --

19 **THE COURT:** Is that 207?

20 **MR. ROSENBAUM:** I don't think it has a number yet,  
21 Your Honor. It's run by New Directions.

22 **THE COURT:** If you look at the quad, one's completed  
23 here, the one you look straight in, and then the -- to the  
24 left, that building was --

25 **MR. ROSENBAUM:** Can I just consult --

1           **THE COURT:** Yeah.

2           **MR. ROSENBAUM:** -- with Mr. Reynolds?

3           **THE COURT:** I think that's -- is it 211 --

4           **MR. ROSENBAUM:** Four, zero, one.

5           **THE COURT:** What is it, 401?

6           **MR. ROSENBAUM:** Yes, sir, yes, Your Honor.

7           **THE COURT:** Where is that located?

8           **MR. ROSENBAUM:** It's near McArthur Field.

9           **THE COURT:** Okay. So it's not part of the complex of  
10 the three.

11           **MR. ROSENBAUM:** Exactly right. I can --

12           **THE COURT:** All right.

13           **MR. ROSENBAUM:** -- show it to you on a map but, yeah.

14           **THE COURT:** Okay. And what building's that?

15           **MR. ROSENBAUM:** And that has a 50 percent AMI --

16           **THE COURT:** And that's building 401.

17           **MR. ROSENBAUM:** Correct.

18           **THE COURT:** Okay.

19           **MR. ROSENBAUM:** And it includes disability as part of  
20 income. And we have been working with an individual,  
21 Mr. Reynolds in particular, --

22           **THE COURT:** Who?

23           **MR. ROSENBAUM:** Mr. Reynolds, who is one --

24           **THE COURT:** Okay.

25           **MR. ROSENBAUM:** -- of our witnesses, who was blown up

1 in Iraq -- Afghanistan. And he's already been told he can't  
2 get in because he has a hundred percent disability.

3 So the reason I started there is because those  
4 representations demonstrate that we're exactly right in terms  
5 of the facial policy that we're attacking, and that there are  
6 severe consequences.

7 **THE COURT:** So let me ask. From the papers, it  
8 appears that there isn't consistency in each building. A  
9 better way of saying it is that each developer can set a  
10 different standard.

11 **MR. ROSENBAUM:** I would put it a little bit  
12 differently. I agree with the Court. That's why when I was  
13 speaking to Your Honor this morning, I said 30 percent plus or  
14 minus.

15 And the reason I said that is because there are  
16 different arrangements --

17 **THE COURT:** Right.

18 **MR. ROSENBAUM:** -- in terms of what the funding is.  
19 But here's what's indisputable, --

20 **THE COURT:** No, let me come back to that --

21 **MR. ROSENBAUM:** Okay, sorry.

22 **THE COURT:** -- because I'm -- if I don't know, I need  
23 to ask.

24 **MR. ROSENBAUM:** Okay.

25 **THE COURT:** You've got developer one and developer

1 two. Developer one rehabs building one. Developer two rehabs  
2 building two. Is there a requirement that their standards, I'm  
3 just going to say AMI, are the same?

4 **MR. ROSENBAUM:** No.

5 **THE COURT:** Exactly. And therefore the developer can  
6 individualize in a sense what the standard is for admittance  
7 into their particular building.

8 **MR. ROSENBAUM:** No.

9 **THE COURT:** Then explain that to me.

10 **MR. ROSENBAUM:** The developer is accepting the  
11 limitations that if the -- in order to get the funding from  
12 state and local entities.

13 **THE COURT:** Right.

14 **MR. ROSENBAUM:** The developer says -- goes to one set  
15 of entities, and they impose certain limitations.

16 **THE COURT:** Go to what and I --

17 **MR. ROSENBAUM:** They go to a state or local entity --

18 **THE COURT:** Okay.

19 **MR. ROSENBAUM:** -- that allocates the tax credits.

20 And they set certain limitations. And the developer says,  
21 yeah, you know, in order to get the tax credits --

22 **THE COURT:** But is there consistency or can there be  
23 inconsistency -- and I keep reading this in your briefing as  
24 inconsistency.

25 **MR. ROSENBAUM:** There is consistency in the fact that



1 what we are attacking here is the usage to any degree of  
2 disability compensation as income.

3 **THE COURT:** I understand that.

4 **MR. ROSENBAUM:** If Your Honor's asking, you know, do  
5 those numbers vary depending on it, yes.

6 **THE COURT:** That's what I'm asking.

7 **MR. ROSENBAUM:** But the statutory problem here, the  
8 final four problem here, the facial discrimination problem here  
9 is that wherever that is set, there are going to be veterans  
10 with disability compensation who aren't going to be eligible.  
11 And that is the problem here.

12 Now, *Townsend*, which they did not answer, *Townsend* is  
13 directly on point. And I want to -- so let me just say I was  
14 looking at page 20 of their brief. They say that there is no  
15 facial discriminatory policy. I just told Your Honor what it  
16 is.

17 Then they go to *Townsend*. I'm so glad that they  
18 raised it in the way that they did because it amplifies our  
19 point.

20 In *Townsend*, the problem was all about income.  
21 That's why Mr. Townsend didn't get it, didn't get the  
22 categorically needed category of assistance, medical assistance  
23 that he desperately wanted in order to avoid segregation under  
24 the meaning of 504.

25 The court said, Washington's law explicitly providing

1 only nursing-based home-based long-term care services to the  
2 medically needy -- that's where he ended up because of the  
3 income increase, \$46 -- may be read to facially discriminate  
4 against disabled persons because of those who need the kind of  
5 long-term assistance at issue that is assistance in performing  
6 essential life activities are disabled within the meaning of  
7 the ADA.

8 And I'll be honest with Your Honor, this did not  
9 really occur to me until I was listening to the argument.

10 **THE COURT:** Say that again.

11 **MR. ROSENBAUM:** What I'm about to tell you, I  
12 apologize, did not occur to me until the argument, until Your  
13 Honor pointed some things out with the questions and, quite  
14 frankly, until counsel made some concessions which were  
15 undisputed as a matter of fact.

16 Mr. Townsend, as Judge Birdsong pointed out, was  
17 disabled before he got reclassified, and he was disabled  
18 afterwards. And that's the basis on which the court says this  
19 is facial discrimination. It nails the disabled individual,  
20 Mr. Townsend.

21 We have double the problem because our veterans are  
22 disabled before and after these income limitations that include  
23 disability compensation.

24 In both cases, what's keeping them from the permanent  
25 supportive housing to which they are legally entitled is

1 income. And that's *Townsend*.

2 What makes our case statutorily more toxic is that  
3 the problem is multiplied because it is disability compensation  
4 that is pushing our individuals over the limits.

5 That's why when I answered Your Honor's question,  
6 that's why I said, you know, wherever it is, there's some  
7 veteran, way too many, some veteran who's getting pushed over.

8 And that's where *Love*ll (phonetic) controls --

9 **THE COURT:** Who has the authority to raise the  
10 limitation of that individual versus the gentleman you  
11 mentioned who got into building 401? Who has that; the VA, the  
12 Congress, who makes that decision?

13 **MR. ROSENBAUM:** Great question. The problem is that  
14 the VA, by outsourcing the construction of the provision of  
15 permanent supportive housing and saying to developers, you're  
16 on your own, go find your income stream, go find your way of  
17 getting tax credits, opens the door to discrimination.

18 **THE COURT:** Well, just a moment. I'm -- I don't know  
19 so I'm going to ask again. My fault. I didn't understand.

20 **MR. ROSENBAUM:** I'm probably not explaining it right.  
21 I'm sorry.

22 **THE COURT:** No, it's me. It's not you.

23 I think you mentioned the gentleman's name and it  
24 went by me, Mr. Wright. I'm not sure. Who went into building  
25 401, which of your clients?

1           **MR. ROSENBAUM:** Johnson.

2           **THE COURT:** Okay, Johnson. And you argued in your  
3 papers and you argued today that there was a raise in the  
4 limitation so this individual could get in. And I forget if it  
5 was 80 percent or 50 percent.

6           **MR. ROSENBAUM:** Yeah.

7           **THE COURT:** It doesn't matter now. I'll go back and  
8 look at your documents.

9           **MR. ROSENBAUM:** Yeah.

10          **THE COURT:** Who --

11          **MR. ROSENBAUM:** Go, I'm listening.

12          **THE COURT:** -- had the authority to raise that  
13 limitation?

14          **MR. ROSENBAUM:** HUD.

15          **THE COURT:** Who?

16          **MR. ROSENBAUM:** HUD.

17          **THE COURT:** Who? I'm just kidding you. I got it,  
18 HUD. Now where's HUD? Who represents HUD? Okay.

19          **(Laughter)**

20                 He's smiling over there.

21                 So not the VA.

22          **MR. ROSENBAUM:** I'm guessing there was -- you know,  
23 they didn't just -- I -- it wasn't a surprise. They knew they  
24 had a problem in this case. And but, yes, it was HUD.

25          **THE COURT:** Okay, HUD. Because in the original

1 documents for both -- on the motion to dismiss, there was an  
2 argument that somewhat crossed about HUD's responsibility and  
3 the VA's responsibility.

4 **MR. ROSENBAUM:** Yeah.

5 **THE COURT:** And I struggled with that for a while.

6 And when HUD does this, what's the developer's role,  
7 if anything, other than tax credits? Does the developer have  
8 any say in this?

9 And, if so, in this system that I'm not quite certain  
10 I yet fully understand, but I promise you I will, what role  
11 does the developer play at that point?

12 **MR. ROSENBAUM:** I don't know for sure. This is --

13 **THE COURT:** Fifty percent limitation we need to get  
14 it to 80? What role does the developer play. Or is this  
15 simply HUD making a recommendation?

16 **MR. ROSENBAUM:** I think HUD says this is the way it  
17 is, and the developer says, okay, I'm not going to get as much  
18 as I thought, I can live with this. And the developer's  
19 getting a lease.

20 **THE COURT:** No, just a moment.

21 **MR. ROSENBAUM:** It's getting a lengthy lease.

22 **THE COURT:** Now, HUD comes -- in your papers, the  
23 inference that you draw or ask the Court to draw is, look, we  
24 got a lawsuit, we've got one of our Plaintiffs here, HUD or VA  
25 or whoever makes this decision and, therefore, this hopefully

1 from the Defendants' standpoint eradicates one of our  
2 Plaintiffs because now they're in housing.

3 All I care about right now is if HUD's making that  
4 decision, I don't understand at that point in time what the  
5 developer's position is because the developer still has some  
6 control.

7 The developer's going to have to acquiesce to this  
8 one person or this one raised limitation coming in. And  
9 they're going to lose money on it. Strike that. They're not  
10 going to get as much money on it.

11 There's only two explanations for that.  
12 Speculatively, developer's not going to push HUD because  
13 there's a lot of people coming into the building and one  
14 doesn't matter.

15 And your argument would be, Judge, that shows that  
16 they're, you know, trying to take some of our Plaintiffs out  
17 because they've gotten housing, out of this lawsuit.

18 And I'm just wondering if you're right, why one and  
19 not all? In other words, if you go from 50 percent to 80  
20 percent, then why aren't you going to 80 percent across the  
21 board, whether that's satisfactory to you or not as the  
22 Plaintiff?

23 One explanation could be because it lowers the income  
24 stream to the developer. Your explanation is going to be,  
25 well, no, they're singling out one of my Plaintiffs.

1           **MR. ROSENBAUM:** My explanation is going to be exactly  
2 what Your Honor said, multiplied by the fact that the  
3 developer's still doing fine, it's just one individual in  
4 there --

5           **THE COURT:** Now what's the return if I move to --

6           **MR. ROSENBAUM:** Can I just complete --

7           **THE COURT:** No, no, just a moment.

8           **MR. ROSENBAUM:** I'm sorry.

9           **THE COURT:** If I don't know, I get to ask, and we've  
10 got all day and all night, believe it or not. What I don't  
11 know, I just don't know.

12                     Johnson moved to what, 80 percent?

13           **MR. ROSENBAUM:** Correct.

14           **THE COURT:** What's the return?

15           **MR. ROSENBAUM:** Sixty percent.

16           **THE COURT:** Sixty, okay, just a moment. I wrote down  
17 80. Sixty percent.

18                     What's the return to the developer between 50  
19 percent -- was he 50 percent before?

20           **MR. ROSENBAUM:** Yeah.

21           **THE COURT:** Okay. What's the return on the developer  
22 between 50 percent and 60 percent; how much did he lose, \$20 a  
23 month, a hundred dollars a month?

24           **MR. ROSENBAUM:** I don't know. But --

25           **THE COURT:** Okay.

1           **MR. ROSENBAUM:** -- if your point is --

2           **THE COURT:** No, no, hold on. You don't know what my  
3 point is yet.

4           If I took all the people going into building 401 and  
5 hypothetically I had 50 people going in there, let's make it  
6 easy, a hundred people so we can do the math, and I move from  
7 50 percent with whatever return I had as a developer to 60  
8 percent, what's my profit margin on 60 percent?

9           **MR. ROSENBAUM:** Can I --

10          **THE COURT:** And what was my profit margin on 50  
11 percent?

12          **MR. ROSENBAUM:** Can I answer that? I don't know  
13 what -- I don't have the numbers.

14          **THE COURT:** Okay.

15          **MR. ROSENBAUM:** But I'd like to be able to try to  
16 answer the question for you.

17                 When I spoke to you this morning, I said that one way  
18 besides building housing that the VA could take care of this --  
19 guys -- that the VA could take care of this is by subsidy.

20                 This isn't that much. They acknowledge that there --  
21 they -- their -- when I -- when Mr. Silberfeld deposed --

22          **THE COURT:** Well that's -- you're heading -- for both  
23 of you, here's the crucial question. It may be a huge amount  
24 of money. It may be a de minimis amount of money.

25                 I just don't know what the return to the developer is



1 between going for 50 percent to 60 percent. In other words, it  
2 may be chump change, maybe nothing where you can move a hundred  
3 people in and raise the standard.

4 Now, that's never going to satisfy you because you'll  
5 always come back and argue, Judge, there's two percent or one  
6 percent or three percent left and, therefore, it's facially  
7 discrimination.

8 But by the same token, I'm just wondering what the  
9 dollars are to raise from 50 percent --

10 **MR. ROSENBAUM:** No, but --

11 **THE COURT:** -- to 60 percent or to even 80 percent.  
12 I don't know what kind of money we're talking about.

13 **MR. ROSENBAUM:** But Your Honor raises another  
14 important point which I probably didn't stress sufficiently  
15 this morning, and that is HUD always has the capacity to waive  
16 any of these requirements. That's how the 80 percent got with  
17 the tenant based. So they always could do this.

18 But the underlying point -- I love Your Honor's point  
19 in terms of, you know, they'll do it for Johnson because makes  
20 the case a lot easier for them in their judgment.

21 But the point that I want to make to the Court is  
22 we're messing with a violation of the law. And it -- obviously  
23 we're grateful that Johnson is in the housing. I can't tell  
24 you how hard Mr. Reynolds worked on that.

25 But that doesn't cure the law because there's a

1 facial policy. And what counsel did not say to you was we  
2 can't do this. They don't have an explanation for Johnson.

3 And Your Honor absolutely pins the point. If you can  
4 do it for Johnson, you can do it for all the veterans who have  
5 these issues.

6 I mean, what did they do? They --

7 **THE COURT:** Well, but the defense's argument -- this  
8 is -- the defense's argument is going to be, and I think you've  
9 ably argued, look, substantial, fundamental, or undue burden,  
10 whatever it is, this modification could be costly. I can't get  
11 my hands around --

12 **MR. ROSENBAUM:** But they can't --

13 **THE COURT:** -- what that cost is and how --

14 **MR. ROSENBAUM:** But they --

15 **THE COURT:** -- substantial a burden that is.

16 **MR. ROSENBAUM:** But I -- you tell me if I'm evading  
17 your question. I hope you know me well enough to know I don't  
18 do that.

19 **THE COURT:** Okay.

20 **MR. ROSENBAUM:** But the point of facial  
21 discrimination is that you don't get to that analysis.

22 **THE COURT:** No, I understand that. But in --

23 **MR. ROSENBAUM:** And --

24 **THE COURT:** -- a pragmatic sense, eventually we may  
25 be dealing with a lot of money or a little bit of money. And I

1 can't get my hands around that.

2 If it's a couple million dollars with a \$400 million  
3 or billion whatever budget, we've -- it's chump change. But if  
4 it's --

5 **MR. ROSENBAUM:** And --

6 **THE COURT:** -- expensive, I don't know that. I can't  
7 get my hand around those numbers that the developer has on a  
8 return, between 50 percent, 60 percent, or 80 percent.

9 **MR. ROSENBAUM:** Let me say two things about that.  
10 One is just to repeat, *Lovell* specifically said -- because  
11 that's what they argued in *Lovell*. It's going to break the  
12 bank here, oh, I can't afford it, we're going to go out of --

13 **THE COURT:** Well, it's not a substantial or undue  
14 burden if it's millions of dollars. It may be a substantial  
15 burdens if it's hundreds of millions of dollars.

16 **MR. ROSENBAUM:** Well, but *Lovell* said it doesn't  
17 matter what it is.

18 **THE COURT:** I understand that.

19 **MR. ROSENBAUM:** The second point that I want to make,  
20 and I don't say this rhetorically, I say it with what I think  
21 is the guts of this case, how much is a veteran's life worth?

22 When they say that a veteran is supposed to be on the  
23 street while they figure out what the budgetary impact is on  
24 them, they're saying that that issue, that concern is worth  
25 more than a veteran's life.

1           How much is it worth to keep a veteran on the street  
2 for one day, for one year, --

3           **THE COURT:** But that's not the ultimate --

4           **MR. ROSENBAUM:** -- for seven years?

5           **THE COURT:** -- question I'm asking. Assume that the  
6 argument by the defense is, look, Judge we're on a time  
7 schedule at 1200 units right now. We can get this completed by  
8 2030.

9           But we've got an undue burden if there's a  
10 modification to that. And my question is, how much is that  
11 modification costing?

12           **MR. ROSENBAUM:** And --

13           **THE COURT:** And I don't think any of us know, do we?  
14 Because we don't know the return on 50 percent, 60 percent, or  
15 80 percent.

16           **MR. ROSENBAUM:** No. We don't -- but we don't know.

17           **THE COURT:** And how am I going to find that out?

18           **MR. ROSENBAUM:** Well that'll be -- the trial will be  
19 about -- that's why Your Honor is exactly correct in the large  
20 504 ruling to say there are disputed facts.

21           We're going to present evidence in terms of what  
22 could be done, what could be done on that land. And the issues  
23 are going to be more substantial than it's too noisy.

24           **THE COURT:** Okay.

25           **MR. ROSENBAUM:** But in terms of the AMI issue, that

1 issue remains the same.

2 **THE COURT:** I know.

3 **MR. ROSENBAUM:** And *Lovell* says at 1053, it is  
4 undisputed that disabled people who but for their disability  
5 were eligible for healthcare benefits from the state under  
6 quest are now being categorically excluded.

7 And what I'm saying to Your Honor is that on the AMI  
8 issue, that is exactly what we have here, doubly, first by  
9 putting them in a situation where disabled persons can't get  
10 in --

11 **THE COURT:** But Defendants argued in their argument  
12 and said that you didn't address the -- and it was never  
13 addressed, this issue concerning a substantial burden if this  
14 modification was made.

15 And so I don't know what that means yet in terms of  
16 real practical terms.

17 **MR. ROSENBAUM:** But you don't get to that issue  
18 unless you determine that there's not facial discrimination.

19 **THE COURT:** Okay.

20 **MR. ROSENBAUM:** And that's -- you know, that's why I  
21 present it that way.

22 And if you look at pages, you know, 20 and 21 of  
23 their brief, they describe the issues as legal issues. If in  
24 fact we get into a reasonable modification, you know, we'll  
25 take that on.

1 But in terms of facial discrimination, we don't get  
2 to that issue whatsoever.

3 And, as I said, they don't have a way around  
4 *Townsend*. Our clients are far more discriminated against than  
5 *Townsend*. Like I said, there's a double discrimination.

6 And they don't have an answer to *Lovell* and they  
7 don't have an answer to the basic Bart (phonetic) formulation  
8 of what facial discrimination is.

9 Facial discrimination means what? It means that when  
10 you look at the policy or the practice, you cannot change it,  
11 you cannot make a fundamental alteration without destroying  
12 what the nature of that statute or policy or practice is.

13 And they have not met their burden in terms of  
14 showing that this is not facial discrimination.

15 Now, I do want to say just a couple things. And the  
16 other thing that counsel did was that counsel conflated the  
17 project-based housing off the campus and the housing on the  
18 campus with the HUD VASH vouchers for tenant base. They  
19 conflated those.

20 And what counsel said is, give us a lot of credit, we  
21 raised it to 80 percent. And if you look at page 28, lines 21  
22 and 22 of their brief, they say, we get 97 percent.

23 **THE COURT:** Right.

24 **MR. ROSENBAUM:** And my point was, no, you can't do  
25 that. You cannot say -- I don't care if its 99 percent, you

1 cannot take the most disabled individuals and keep them out,  
2 whether it's one percent, three percent, or 30 percent.

3 And so with respect to the issue that they're  
4 conflating here, the vouchers, on that their income, their AMI  
5 policy which includes disability compensation, they can't make  
6 it work because it has to be a hundred percent.

7 It couldn't be more on its face. It has to be a  
8 hundred percent or it's in violation of 504.

9 Now I want to deviate from the facial discrimination  
10 argument just to answer some misconceptions that were presented  
11 to Your Honor this morning.

12 If you look at their brief, their brief states that  
13 the reason we can't build is the West L-A-V-A Leasing Act. And  
14 that's just not true, Your Honor.

15 I read the statute to Your Honor this morning. I  
16 know Your Honor is super familiar with it. But there's no  
17 mandate there. There's no requirement. There's no must.  
18 There's no exclusivity with respect to the building of  
19 permanent supportive housing.

20 And as I also pointed out, if you look at the part  
21 two, (b) (2) I think it was, where they list all the purposes,  
22 "A" through "I," they're doing that ten ways to Sunday in terms  
23 of what's there.

24 And if it were exclusive restriction under their  
25 theory of the statute, they couldn't do it. So then they shift

1 ground and they say, we don't have the authority to build that  
2 housing.

3 Did they point Your Honor to any statute that said  
4 it? No. There is no such statute. Did they present Your  
5 Honor any sort of statement from Congress they can't do it?  
6 No.

7 In fact, Your Honor, if you look at 38 USC 8162 which  
8 deals with enhanced use leases, it says (a)(1) the secretary  
9 may, in accordance with the subchapter, enter into leases with  
10 respect to real property that is under the jurisdiction or  
11 control of the secretary.

12 Any such under -- any such lease under this lease may  
13 be referred to as an enhanced use lease.

14 The secretary may dispose of such property that is  
15 leased to another party under the subchapter. The secretary  
16 may exercise the authority.

17 So the statute, the West L.A. leasing statute, puts  
18 no such restriction. Surely Congress knows how to do it.

19 And the enhanced use lease statute is about things  
20 that the secretary may do.

21 But you would expect if their argument was correct,  
22 that it would say this is the only way it can get done. The  
23 secretary must use -- you asked me this morning, is this --  
24 what's the story across the country.

25 You would expect if this were the only route, it



1 would say, for enhanced use leases, this is the only way the  
2 secretary can see that there is provision of permanent  
3 supportive housing, but the secretary may not build it, have to  
4 use the EULs. That isn't there.

5           And then there is the other powerful point that  
6 counsel referred to. Counsel said, you know, there's a lot of  
7 construction going on there on the campus including, for  
8 example, the critical care center.

9           Then -- and then he says, well, there's no authority  
10 on this. Well, there is no authority specifically stated to  
11 build a critical care center on the West LA campus.

12           There is no explicit authority to buy a wheelchair.  
13 There's no explicit authority to build wheelchair ramps.

14           What there is, is explicit authority to address  
15 mental health issues; all over the statutes.

16           What there is, is authority from Congress to address  
17 health issues. That's why they can build the critical care.  
18 It's not illegal. Of course they can build it because that's  
19 how you deliver medical care.

20           Of course you can pay for psychiatrists and  
21 therapists, because that's how you deal with mental health.

22           And the budget, 369 billion, says explicitly, use the  
23 money for healthcare, use the money for mental healthcare.

24           And then I read you bullet five of President Biden's  
25 statement in terms of what the budget was about, and bullet

1 five was address homelessness.

2 And they have authority out the wazoo to address  
3 veteran homelessness.

4 And counsel is exactly wrong when he says this is  
5 about building housing. No. It's about providing access to  
6 medical care. And they have conceded that.

7 In fact, in deposition, when I asked Dr. Braverman  
8 about it, he said, yeah, you don't get housing, your healthcare  
9 is going to deteriorate. That's what the Cole Hayne (phonetic)  
10 deposition was about.

11 That's what the Kewn (phonetic) deposition was about.  
12 That's what the Dennis deposition was about. That's their  
13 housing first policy which they properly tout in terms of its  
14 principles.

15 The whole principle of permanent supportive housing  
16 isn't not -- it's not to build a second home in Palm Springs,  
17 it's to get veterans in a place where they can get healthcare.  
18 And there's plenty of authority.

19 Now, like I said, none of that goes to facial  
20 discrimination, the argument I made. But I just want to  
21 disabuse that they're going to be out to lunch if they can't do  
22 it. They have it.

23 They could also say if you're going to use an  
24 enhanced use lease and you're going to get state and local  
25 funding, they can't have disability restrictions. I read Your

1 Honor the 36 CFR Section 15.130(b)(3). What could be clearer?

2 The agency may not directly or through contractual or  
3 other arrangements use criteria or methods of administrations  
4 the purpose or effect of which would subject qualified  
5 individuals with a handicap to discrimination on the basis of  
6 the handicap or substantially impair the accomplishments or  
7 objectives of a program with respect to individuals who have  
8 handicaps.

9 That's my point. You can't do this.

10 Do they have other methods? Under facial  
11 discrimination we don't even ask that question. But I'm saying  
12 to Your Honor there's plenty.

13 And their own regs -- they're basically saying, as I  
14 started my argument, and I'll conclude it now, they're  
15 basically saying this obscene contradiction that 504 means that  
16 veterans should have permanent supportive housing so that they  
17 can access healthcare, except we are going to sanction  
18 requirements that discrimination in the form of use of  
19 disability income be permitted to deny them that permanent  
20 supportive housing.

21 It's one of the few times in life when there's really  
22 a catch 22. But this is a catch that really, really  
23 discriminates and denies these veterans what they have.

24 Indeed, Your Honor, if there is a -- if -- there are  
25 multiple causes of veteran homelessness, but one of those

1 causes should not be the VA's use of provisions in what they  
2 are telling their outsource developers they can accept that  
3 discriminates based on disability compensation.

4 *Townsend* requires it, *Lovell* requires it, Bart  
5 requires it, Choat (phonetic) requires it when it talks about  
6 the basis. This is facial discrimination 101.

7 **THE COURT:** Okay, counsel, thank you very much. Why  
8 don't you consult with your colleagues for just a moment? And  
9 then after you've concluded, I've got questions for both of  
10 you, and they'll be brief, though. Why don't you check with  
11 your colleagues?

12 **(Pause)**

13 **MR. ROSENBAUM:** Can I make two more brief points,  
14 Your Honor?

15 **THE COURT:** Certainly.

16 **MR. ROSENBAUM:** Again, I know Your Honor knows this.  
17 You've heard it ad nauseum from me. We don't look past the  
18 facial discrimination.

19 But, in fact, when they talked about AMI in their  
20 papers, they don't raise undue burden. That isn't raised as a  
21 defense.

22 **THE COURT:** Okay.

23 **MR. ROSENBAUM:** And the other argument is the 97  
24 percent as counsel reminds me, I'm being conservative.

25 That's just with respect to the -- if there are other

1 limitations out there, which there often are, that include  
2 these sort of compensations, that 97 percent number is just  
3 focused on HUD VASH with that.

4 If the housing has other limitations, then that's  
5 even a larger number.

6 My point is three percent is three percent too many.  
7 But in fact that number understates what the actual number is.

8 **THE COURT:** Okay. Thank you --

9 **MR. ROSENBAUM:** Thank you.

10 **THE COURT:** -- very much. And don't go too far,  
11 okay. I just -- one question for both of you at the end I  
12 think.

13 So counsel. And once again just state your name  
14 because we've got CourtSmart.

15 **MR. KNAPP:** Cody Knapp for the federal Defendants.

16 **THE COURT:** Thank you.

17 **MR. KNAPP:** And I'm going to try to be brief because  
18 I realize we've been here quite a while and you have not had  
19 lunch so --

20 **THE COURT:** Oh, no, trust me, counsel, time means  
21 nothing to me.

22 **MR. KNAPP:** So I'll start with, you know, my friend  
23 on the other side has said we haven't pointed you to a statute  
24 that prohibits the VA from constructing housing. And that  
25 flips on its head the way the federal government works.

1           The federal government is one of limited powers that  
2 are specified in either the Constitution or in statute or in  
3 some other basis of law.

4           **THE COURT:** That's going to be my question just a  
5 moment when you've concluded for both of you.

6           **MR. KNAPP:** And, you know, I can -- cases that I have  
7 litigated personally, most of my job is losing cases where an  
8 agency has done something and can't point to an express  
9 authorization in a statute for what it did.

10          **THE COURT:** Okay.

11          **MR. KNAPP:** And so I'm just -- I will submit to the  
12 Court that what counsel has argued today flips on its head the  
13 way that this should work.

14                They should point to a statute that expressly  
15 authorizes the VA to directly construct housing; not the other  
16 way around.

17                I'll also note that Congress would probably be  
18 surprised to find that whenever it legislates the provision of  
19 mental health services and appropriates money for that purpose,  
20 that notwithstanding the existence of appropriations for the  
21 Department of Housing and Urban Development, all of that, that  
22 it's also created a housing program for everyone who receives  
23 those services.

24                Congress doesn't -- didn't legislate that way and  
25 would be surprised that it did here.

1           The funding that they're talking about as being  
2 available -- and I will be clear, I don't think that their  
3 analysis of the appropriations is actually accurate, the money  
4 is not available for those for the purpose of constructing  
5 housing directly by VA.

6           But that funding is a finite pool. It's not ever-  
7 expanding. And so to the extent that we're going to raid that  
8 piggybank to start building housing on the campus, it's to the  
9 detriment of the services that are being provided to veterans  
10 by doctors at the hospital, those mental health consultations.  
11 It's coming from that same pot of money.

12           I'll also note, you know, counsel addressed what I  
13 said earlier this morning, which is that I feel like there's a  
14 slippage in the service that they say they're being denied.

15           And he agreed with me that their claims have always  
16 been about access to medical services, to the mental health  
17 services that veterans are entitled to from the VA.

18           But they've not actually argued that they're denied  
19 any of those benefits based on their income. What they're  
20 saying is that the developers impose income-based limitations  
21 on access to housing.

22           That's access to the accommodation that they say is  
23 needed to get their services. It's not the service that  
24 they're seeking.

25           I'll also note counsel is very confused about the

1 role of the developers here. And that's just more evidence  
2 that -- of why this could go to trial and Your Honor could get  
3 a full record as to what the relationship is and what the  
4 responsibilities are of the developers in this setting.

5 HUD did not do anything to make Mr. Johnson eligible  
6 for that unit. That was based on the sorts of engagement that  
7 I described earlier today that VA has engaged in with its  
8 developers to help them find ways around the income-based  
9 limitations that they're subject to by their funders.

10 That involves going back to the funders, getting  
11 their agreement with raising the limitations that they're  
12 subject to.

13 That's not a decision by HUD, it's not a decision by  
14 VA. It's a decision by all these third parties that are not in  
15 front of the Court.

16 **THE COURT:** The developer?

17 **MR. KNAPP:** Sorry?

18 **THE COURT:** The developer?

19 **MR. KNAPP:** Yes.

20 Counsel is also confused about this three percent of  
21 people who are excluded. Those are individuals who are going  
22 to have incomes about 70K, above the 80 percent AMI threshold  
23 for HUD VASH. Those are not people who are being excluded  
24 based on the amount of their disability --

25 **THE COURT:** Okay.



1           **MR. KNAPP:** -- benefits. That amount is well beyond  
2 anything that's paid out based on a service-connected  
3 disability.

4           Your Honor asked a question about the impact of a  
5 change at the high level, you know, if we were to not --

6           **THE COURT:** Yeah, 50, 60, 80 percent.

7           **MR. KNAPP:** Yeah. And I think Your Honor's question  
8 was --

9           **THE COURT:** And the return.

10          **MR. KNAPP:** -- went to, you know, if we're excluding  
11 disability benefits from this calculation, what's the impact.

12          I'm not sure what the impact is for the developers  
13 because I don't represent them and I haven't looked at their  
14 budgets, and I don't know exactly --

15          **THE COURT:** Well, if we get to trial, --

16          **MR. KNAPP:** -- what their --

17          **THE COURT:** -- if the defense is undue burden,  
18 etcetera, we're going to get into that area.

19          **MR. KNAPP:** But our undue burden is -- and this is in  
20 Exhibit O on page three that we filed with the Court.

21          **THE COURT:** Okay.

22          **MR. KNAPP:** This is HUD's communication to the House  
23 Committee on Veteran's Affairs, HUD estimates that if they were  
24 to exclude -- and they don't have authority to do it.

25          But they estimate that the impact of excluding

1 disability benefits from Section 8 writ large, so that's all  
2 low income housing vouchers, not just HUD VASH, we're talking  
3 about \$190 million impact and a decrease of the number of  
4 vouchers that are available by 25,000. That's a substantial  
5 burden.

6           Again, I -- this is a problem that VA and HUD are  
7 aware of, that they are invested in solving.

8           You know, when we get to trial, Your Honor, you're  
9 going to hear from people who in good faith spend every day  
10 working on behalf of --

11           **THE COURT:** Yeah.

12           **MR. KNAPP:** -- veterans who are passionate about  
13 this, who want to get people the services that they're entitled  
14 to.

15           But they can't wish cast the way I've heard  
16 Plaintiffs' counsel do today. They have a limited set of  
17 authorities and a limited pot of money, and they can't rob  
18 Peter to pay Paul.

19           If Your Honor has any questions, I'm happy to  
20 entertain them but --

21           **THE COURT:** I just have one for both of you in a  
22 moment.

23           **MR. SPEAKER:** Nothing from me, Your Honor.

24           **THE COURT:** Counsel?

25           **MR. SPEAKER:** Nothing, Your Honor.

1           **THE COURT:** Okay. Would you go up to the lectern?  
2 Would you go up to the lectern? Either one, just pick one of  
3 you.

4           This probably has nothing to do with your lawsuit,  
5 but it might. Go join each other. It's a wonderful picture  
6 having you two together, okay? It's visual. All right.

7           So far I've heard words like "they," "the system  
8 works," "raiding piggybank," etcetera. And I'm having trouble  
9 with "they." In other words, I'm having trouble with who I'm  
10 dealing with.

11           I initially had that trouble in the papers between  
12 the VA and the HUD when some finger-pointing crossed, which I  
13 don't think that's going to be your position eventually.

14           When a veteran joints the military and takes an oath,  
15 that's to the United States. It's not to the State of  
16 California, by the way, it's not to Arkansas or Alabama. It's  
17 to the United States of America.

18           And yet when we come to veterans' benefits, I don't  
19 understand the system, and maybe I don't need to, where housing  
20 at least is going to be financed through tax incentives that  
21 drive me out to the marketplace, which creates bureaucracy and  
22 absolutely slows this process.

23           Who -- now I'm using "they" -- concocted this system?  
24 Why isn't this directly funded through HUD or the VA where they  
25 literally say to the developer, you develop it, this is "X"

1 amount of profit, we control it? Because housing it would seem  
2 would be constructed so much faster in that process.

3 And every time we drive it now out to the developer  
4 that goes to some funding stream on a county or city basis,  
5 we're creating a process that is inevitably flawed.

6 Who made this system up?

7 **MR. KNAPP:** Your Honor, I would submit that it's  
8 Congress. And it's in the West Los Angeles Leasing Act. The  
9 way that Congress envisioned projects being developed on the  
10 campus in the West Los Angeles --

11 **THE COURT:** Okay.

12 **MR. KNAPP:** -- Leasing Act was through third party  
13 enhanced use leases.

14 **THE COURT:** Okay. So you don't have the power -- and  
15 I'm not saying that I'm right. Leave the professional driving  
16 to the people who are professionals. I'm not the professional  
17 yet.

18 So you don't have the ability to change that system  
19 even if there was a better system.

20 **MR. KNAPP:** No, Your Honor.

21 **THE COURT:** You're stuck with local, state tax  
22 incentives. Folks, I can't imagine how you could slow the  
23 process anymore.

24 **MR. ROSENBAUM:** And I can't --

25 **THE COURT:** But, frankly, and this has nothing to do

1 with this motion, but maybe before or after the lawsuit you  
2 could go talk to somebody in Congress. And here's why.

3 Look, United States military hopefully doesn't  
4 outsource itself because they should be responsible to central  
5 command. Now I know Erik Prince ran around with Blackwater,  
6 etcetera. I get that.

7 But -- and veterans are really told that they're  
8 going to do the difficult immediately, and the impossible will  
9 take just a little bit longer. So they're used to that kind of  
10 reaction of immediacy.

11 I can understand a system after World War Two where  
12 five million or six million combatants came back and the United  
13 States couldn't support that kind of system.

14 In fact, Congress was very generous. They created  
15 the GI Bill, did a lot of good things out there, Congress, the  
16 VA, everybody.

17 But by the same token, now we're moving to a  
18 professional military. If you haven't looked, it's like the  
19 Marine Corp. It's all voluntary in every service.

20 Well, if you're going to lose to -- move to a  
21 professional military, there may be the argument eventually  
22 that there's a greater burden on Congress to support that one  
23 percent or two percent volunteering because you're able to  
24 avoid the draft.

25 And if you're consciously going to be able to avoid

1 the draft in this country, then there may be a greater duty to  
2 veterans, that one or two or three percent who are going to  
3 serve, to take care of them on the backside.

4 So let's all recognize if we went to a draft, I don't  
5 know that the country could support five or six million, you  
6 know, returning combatants. Don't know we have that kind of  
7 money.

8 But do we -- question I've got in the future for both  
9 of you who have access to government apparently, because  
10 they're not going to listen to some federal judge, there has to  
11 be a way for Congress to recognize that there has to be maybe a  
12 greater duty or at least shortening this process when we deal  
13 with veterans' benefits if we're going to move to an all  
14 voluntary force. So that's what we've done. Okay.

15 **MR. ROSENBAUM:** Your Honor, may I respond?

16 **THE COURT:** No, not -- I'm on a roll right now, okay?

17 **MR. ROSENBAUM:** Oh, I'm sorry.

18 **THE COURT:** Yeah. That has nothing to do, I know,  
19 with facially discrimination. I get it.

20 So I don't think we have the power, and I don't know  
21 that that's even a better system. But I do know this. If  
22 you're depending upon tax incentives, this process is going to  
23 be innately slow.

24 And therefore you're not bad people. You're  
25 handicapped in a sense.

1           So when we get into finger-pointing about who's the  
2 bad entity here, I think we're all in it for the same reason.  
3 We want to enhance veterans' benefits, okay?

4           And as soon as we get into the finger-pointing of  
5 who's the bad entity, I think it slows that process.

6           I really wish we had a senator got a transcript of  
7 this or somebody who had some power in Congress to really take  
8 legislatively what you're arguing on behalf of the Plaintiff.

9           But I don't know where this is going to lead us in  
10 litigation. I've got a lot of thinking to do.

11           Now, I'm going to --

12           **MR. ROSENBAUM:** Could I just respond briefly --

13           **THE COURT:** -- give you one last shot -- no, I'm  
14 going to give you all the time you want.

15           **MR. ROSENBAUM:** Okay.

16           **THE COURT:** Be patient with me.

17           **MR. ROSENBAUM:** Okay.

18           **THE COURT:** When I was litigating, I got to the  
19 elevator and I said, if I just would have told that stupid  
20 judge one more thing he or she would have understood what I  
21 said and would have found my way.

22           Okay. You're at the elevator. What else do you want  
23 to say? What's going to persuade me? And --

24           **MR. ROSENBAUM:** I don't think --

25           **THE COURT:** -- then your turn on the VA side.

1           **MR. ROSENBAUM:** I don't think that's the introduction  
2 that I was looking for, Your Honor.

3           **(Laughter)**

4           **THE COURT:** No, Al (phonetic) said that stupid judge,  
5 don't worry, that was under my breath, okay?

6           **MR. ROSENBAUM:** The -- my point is this, Your Honor.  
7 I don't agree with counsel that Congress was not aware of the  
8 points that Your Honor just made.

9           I went through the statute. You've been through the  
10 statute. Counsel says again that west L-A-V-A leasing act 2016  
11 mandates EULs in order to provide permanent supportive housing.

12           It does no such thing. I counted three times that  
13 the word "may" is there. It doesn't say "must," doesn't say  
14 "exclusive." That's how Congress could have ended up.

15           And assuming that Congress wanted to put veterans in  
16 precisely the position you talked about, having to wait for --  
17 search out state and local entities are giving out tax credits,  
18 and that's the only way it gets done, I think does a disservice  
19 to Congress.

20           Congress, you said, here is one method that could be  
21 channeled. But it didn't say that it was exclusive. And  
22 that's why I pointed to the rest of the statute. All sorts of  
23 things that the VA does that has -- that have no --

24           **THE COURT:** No, --

25           **MR. ROSENBAUM:** -- exclusive limitations.



1           **THE COURT:** -- counsel, my point, counsel, is  
2 Congress also could have had a direct contracting system with  
3 the builder.

4           And my point was that this is once again bureaucracy  
5 slowing this process when you have to go to local and state.  
6 And that has nothing to do with your argument today. I  
7 understand that.

8           And it's too bad we didn't have senators listening to  
9 this and Congressmen, because whatever a federal court does  
10 will probably go up on appeal, languish for a couple years,  
11 etcetera, maybe make a little bit of impact.

12           But this truly does call for some reform at the  
13 legislative level or some look at the legislative level because  
14 I don't know how much this case changes anything.

15           **MR. ROSENBAUM:** This case is going to change  
16 everything, Your Honor, because --

17           **THE COURT:** Okay.

18           **MR. ROSENBAUM:** -- when Your Honor rules as we expect  
19 it will be based on the evidence that we will present, that  
20 Section 504 presents, provides, requires the VA as an  
21 accommodation to provide permanent supportive housing, then the  
22 ball is in the government's court. Then the government has to  
23 come up.

24           I don't think there's anything right now, counsel  
25 certainly hasn't pointed to anything, that says that they

1 couldn't have the direct contracting that Your Honor talks  
2 about.

3           They want to build a bomber, they can have direct  
4 contracting for that. They ought to build a housing for the  
5 people who --

6           **THE COURT:** And if you prevail, --

7           **MR. ROSENBAUM:** -- did those bombers.

8           **THE COURT:** -- it'll go to the Ninth Circuit and  
9 hopefully maybe even the Supreme Court, and we'll be two or  
10 three years down the line; meanwhile, veterans won't get their  
11 housing.

12           My only point is the legislature could act faster.  
13 Congress could act in this if they really want to be involved.  
14 And that's both parties frankly. This is simple as that.

15           **MR. ROSENBAUM:** Okay. I just --

16           **THE COURT:** Yeah, okay.

17           **MR. ROSENBAUM:** You understand --

18           **THE COURT:** Thank you very much.

19           **MR. ROSENBAUM:** -- I just want to be clear --

20           **THE COURT:** Now, when you got to the elevator door,  
21 you said if I would have told that stupid judge one more thing,  
22 I could have persuaded him.

23           **MR. KNAPP:** We're good, Your Honor. I appreciate --

24           **THE COURT:** Okay.

25           **MR. KNAPP:** -- the opportunity to present before you

1 today.

2           **THE COURT:** Counsel, anything else? Otherwise I've  
3 got a lot of thinking and writing to do and maybe rewriting. I  
4 need to look at this entire area again, okay? Which I'll do.

5           I was -- give me this rest of this week and give me  
6 the weekend just because of our calendar. But we'll have  
7 something out to you, well, maybe as early as Friday. I don't  
8 think Thursday but certainly by Monday if I need the weekend,  
9 okay?

10           **MR. SPEAKER:** Thank you, Your Honor.

11           **MR. ROSENBAUM:** Thank you, Your Honor.

12           **THE COURT:** Thank you very much, counsel. You -- all  
13 of you have a good day.

14           And thank you for the excellent drafting. Thank you  
15 for the excellent briefing. I want to pay each of you that  
16 compliment on the record. I don't think it could be better  
17 briefing. And I don't think it could be better argued. So  
18 thank you very much. Have a good day now.

19           **MR. KNAPP:** Thank you, Your Honor.

20           **THE COURT:** Goodbye.

21           **(This proceeding was adjourned at 3:15 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



July 11, 2024

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Signed

Dated

*TONI HUDSON, TRANSCRIBER*