Case No. 16-16269

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THE CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, on behalf of itself, and ANN CUPOLO FREEMAN, RUTHEE GOLDKORN, and JULIE REISKIN, on behalf of themselves and a proposed class of similarly situated persons,

Plaintiffs-Appellants,

v.

HOSPITALITY PROPERTIES TRUST,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California, No. 3:15-cv-00221-JST, Honorable Jon S. Tigar

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

At the time that this appeal was filed, the Civil Rights Education and Enforcement Center ("CREEC") was a Plaintiff in the underlying action. CREEC has since voluntarily dismissed its claims before the district court. Because CREEC never sought to be a class representative in this case, its dismissal has no impact on this appeal. CREEC is a 501(c)(3) nonprofit organization. CREEC has no parent corporations and issues no stock. No parent company or publicly held company has a 10% or greater ownership interest in CREEC.

Dated: October 27, 2016 s/Timothy P. Fox

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INTRODUCTION

Appellants (the "Named Plaintiffs") appeal the district court's refusal to certify a class challenging Appellee Hospitality Properties Trust's ("HPT") widespread, consistent violations of Title III of the Americans with Disabilities Act at the hotels it owns by not providing required wheelchair-accessible transportation that is equivalent to the inaccessible transportation provided at its hotels.

Named Plaintiffs' claims, like those of the class, are based on violations of the same requirements of Title III, result from the same pattern of conduct by HPT, and implicate the same legal and factual issues. Further, the Named Plaintiffs submitted substantial and unrebutted proof that more than 90% of HPT's hotels are in violation of the accessible transportation requirements. This case, in which the Named Plaintiffs and the class seek only declaratory and injunctive relief, is a "prime example[]" of the type of injunctive relief case for which Federal Rule of Civil Procedure ("Rule") 23(b)(2) was intended, as Plaintiffs' claims are based on HPT's refusal to act on grounds generally applicable to a class of people who use wheelchairs or scooters. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011) (citation omitted). Indeed, courts routinely certify under Rule 23(b)(2) classes seeking injunctive relief based on violations of the ADA.[1]

[1] *See, e.g.*, *Armstrong v. Davis*, 275 F.3d 849, 869-70, 879 (9th Cir. 2001) (affirming certification of a class of prisoners and parolees with sight, hearing, learning, developmental, and mobility disabilities); *Lightbourn v. County of El*

The district court, relying almost entirely on one district court decision refusing to certify a class seeking damages involving materially different facts than those in this case, held that this class does not meet the Rule 23(a) requirements of commonality and typicality, as well as the requirements of Rule 23(b)(2). Because this was an abuse of discretion, Named Plaintiffs respectfully request that this Court reverse the district court, find that the class meets the requirements of Rule 23(a) and 23(b)(2), and remand for further proceedings.

STATEMENT OF JURISDICTION

The district court's subject-matter jurisdiction arose under 28 U.S.C. §§ 1331 and 1343, because Named Plaintiffs allege discrimination on the basis of disability by HPT in violation of Title III of the Americans with Disabilities Act, 42 U.S.C. § 12181 *et seq.* ("Title III").

This Court has jurisdiction over this appeal pursuant to Rule 23(f), which permits a court of appeals to grant an interlocutory appeal from an order granting or denying class-action certification. This Court granted the Named Plaintiffs'

Paso, 118 F.3d 421, 426 (5th Cir. 1997) (affirming certification of a class of blind and mobility-impaired individuals challenging accessibility of polling places); *Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 349 (N.D. Cal. 2008) (certifying class of persons with mobility and/or vision disabilities challenging barriers along outdoor designated pedestrian walkways throughout California owned and/or maintained by the California Department of Transportation); *Nat'l Fed'n of the Blind v. Target Corp.*, 582 F. Supp. 2d 1185, 1203 (N.D. Cal. 2007) (certifying class of persons with visual impairments challenging inaccessible online store).

petition to appeal pursuant to Rule 23(f) and Rule 5 of the Federal Rules of Appellate Procedure on July 19, 2016. *See* Excerpts of Record ("ER") 21.

STATEMENT OF ISSUES

1. Whether the district court abused its discretion by resolving a crucial, classwide legal question on the merits, and then refusing to consider the same question for purposes of commonality;
2. Whether the district court abused its discretion by holding that notwithstanding the existence of a number of important, classwide issues, as well as "significant proof" that HPT "operate[s] under a general policy of discrimination,"[2] commonality does not exist unless HPT has a uniform, formal policy governing accessible transportation at HPT hotels, or unless the ADA specifically requires it to implement such a policy;
3. Whether the district court abused its discretion by holding that the Named Plaintiffs' claims were not typical of the class, despite the fact that the Named Plaintiffs sought the same relief, based on violations of the same legal requirement, as a result of the same pattern of conduct, implicating the same legal and factual issues, as members of the class; and
4. Whether the district court abused its discretion by holding that the class does not meet the requirements of Rule 23(b)(2) because the Named Plaintiffs had

[2] *Dukes*, 564 U.S. at 352-53.

proposed only a "follow the law" injunction at the class certification phase, and because no injunction could be entered that would provide relief generally applicable to the class, despite the fact that the Named Plaintiffs suggested several possible injunctive provisions that would provide classwide relief.

STATUTES AND REGULATIONS

Pursuant to Ninth Circuit Rule 28-2.7, pertinent statutes, rules, and regulations are set forth in the Addendum filed simultaneously with this Brief.

STATEMENT OF THE CASE

I. Procedural Background.

This action challenges consistent and widespread violations of Title III provisions governing accessible transportation services at hotels owned by HPT. Named Plaintiffs, on behalf of a class of persons who use wheelchairs or scooters for mobility, filed this lawsuit on January 15, 2015 seeking declaratory and injunctive relief.[3]

On November 12, 2015, the Named Plaintiffs moved for certification pursuant to Rule 23(b)(2) of the following class:[4]

> Individuals who use wheelchairs or scooters for mobility who, since January 15, 2013, have been, or in the future will be, denied the full and equal enjoyment of transportation services offered to guests at hotels owned and/or

[3] ER 4.

[4] The complaint also seeks declaratory and injunctive relief (but no damages) under the Unruh Civil Rights Act, Cal. Civ. Code § 51 *et seq.* Named Plaintiffs did not seek class certification on these claims and they are not at issue here.

> operated by Hospitality Properties Trust because of the lack of equivalent accessible transportation services at those hotels.

ER 4.

On April 15, 2016, the district court denied the motion for class certification, holding that the proposed class did not meet Rule 23(a)'s requirements of commonality and typicality, and the requirements of Rule 23(b)(2). ER 15-16, 19.

II. Legal Background.

"A precise understanding of the nature of the underlying claims" is necessary to determine whether the requirements of Rule 23 are met. *Parsons v. Ryan*, 754 F.3d 657, 676 (9th Cir. 2014).

Title III applies to entities that own, operate, lease, or lease to places of public accommodation, including hotels. 42 U.S.C. §§ 12181(7)(A),12182(a).

Hotel transportation services are covered by ADA regulations applicable to "private entities not primarily engaged in the business of transporting people," which include "[s]huttle systems and other transportation services operated by privately-owned hotels." *See* 49 C.F.R. § 37.37(b). Hotels must purchase accessible vehicles or, at a minimum, must provide accessible transportation services that are equivalent to the inaccessible transportation services they provide, if they meet one of the following prerequisites: (1) they provide fixed route transportation services using vehicles purchased or leased after August 25, 1990;

or (2) they provide demand responsive services.[5] As set forth below, all 142 hotels at issue here meet one or both of these prerequisites. *See infra* at 10.

As a result, all 142 HPT hotels must provide equivalent, accessible transportation services. ADA regulations (the "Equivalent Transportation Requirements") specify the characteristics of the transportation services that must be equivalent. *See* 49 C.F.R. § 37.105. As relevant here, these regulations require hotels that provide transportation services to provide accessible transportation services at no greater cost, and requiring no greater advance notice, than the inaccessible transportation services that they provide. *Id.* Hotels must also provide information about their accessible transportation services that is equivalent to the information they provide about their inaccessible transportation services.[6] Thus, whether a particular hotel complies with these requirements involves a simple,

[5] *See* 49 C.F.R. §§ 37.101 & 37.171; *see also* 42 U.S.C. § 12182(b)(2)(B) & 12182(b)(2)(C). A "fixed route" transportation system is one "on which a vehicle is operated along a prescribed route according to a fixed schedule," and a "demand responsive" system, also colloquially called an "on demand" system, is any transportation system "which is not a fixed route system," 49 C.F.R. § 37.3.

[6] 49 C.F.R. § 37.105. This is the complete list of factors that must be equivalent: (a) schedules/headways (if the system is fixed route), or response time (if the system is demand responsive); (b) fares; (c) geographic area of service; (d) hours and days of service; (e) availability of information; (f) reservations capability (if the system is demand responsive); (g) any constraints on capacity or service availability; (h) restrictions priorities based on trip purpose (if the system is demand responsive). *Id.*

straightforward comparison of the accessible and inaccessible transportation services provided by the hotel to determine whether they are equivalent.

Only injunctive relief is available to private plaintiffs under Title III,[7] and Named Plaintiffs seek a systemic, classwide injunction. The district court held that entry of such an injunction would require the court to conduct 142 "mini-trials" to analyze the circumstances of each of the 142 hotels. ER 12-13 & n.4. This holding was erroneous.

"The scope of injunctive relief is dictated by the extent of the violation established." *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (citation omitted). A systemic injunction is required where there is "symptomatic" evidence of a widespread discriminatory practice, including "individual items of evidence as representative of larger conditions or problems." *Id.* at 871.

This standard does not require a court to analyze each individual instance of discrimination in order to conclude that a defendant has engaged in a widespread practice of discrimination, thereby warranting a systemic injunction. In *Armstrong*, for example, this Court affirmed entry of a systemic injunction covering all parole and parole revocation hearings in California based primarily on evidence concerning the experiences of 17 prisoners and parolees. *Id.* The Court rejected the state's argument that the systemwide injunction was not based on sufficient

[7] 42 U.S.C. § 12188(a)(1).

evidence, holding that evidence concerning the 17 prisoners and parolees, along with other evidence submitted during the trial, was "symptomatic of its treatment of a broad class of inmates with disabilities." *Id.*

Similarly, this Court in *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1122 n.13 (9th Cir. 2003), affirmed entry of an injunction covering jails in 36 counties based only on evidence concerning jails in seven counties. *See also Californians for Disability Rights, Inc. v. Cal. Dept. of Transp.*, 249 F.R.D. 334, 345 (N.D. Cal. 2008) (rejecting argument that proof of a discriminatory practice requires each class member to prove each instance of discrimination they allegedly suffered).

Systemic injunctive relief is also appropriate where civil rights violations are attributable to systemwide policies. *See, e.g.*, *Armstrong*, 275 F.3d at 870 ("System-wide relief is required if the injury is the result of violations of a statute . . . that are attributable to policies or practices pervading the whole system."); *Clement v. Cal. Dep't of Corr.*, 364 F.3d 1148, 1153 (9th Cir. 2004) (affirming entry of injunction covering all California prisons where evidence showed that the policy at issue had been adopted at eight prisons, and others were considering adopting it).

III. Factual Background.

A. Named Plaintiffs.

Named Plaintiffs Julie Reiskin, Ruthee Goldkorn, and Ann Cupolo Freeman all have disabilities that require them to use wheelchairs for mobility, and all require wheelchair accessible vehicles to use transportation services offered by hotels. ER 1. All three Named Plaintiffs travel regularly and stay in hotels. ER 156, 158, 160. They would like to be able to take advantage of hotel transportation. *Id.*

Each Named Plaintiff served as a tester of particular HPT-owned hotels for compliance with the Equivalent Transportation Requirements.[8] In 2014 and 2015, each Named Plaintiff called one or more HPT-owned hotels that provide transportation services to guests, and each was told that the hotels do not provide equivalent, accessible transportation services. *Id.* at 2-3. All of the Named Plaintiffs allege that if these hotels provided equivalent, accessible transportation services, they intend to stay at the hotel and use those services, and that they were deterred from staying at the hotels by the lack of equivalent, accessible transportation services. *Id.* at 3-4.

[8] ER 1. The district court held that the Named Plaintiffs have standing to assert claims under Title III. ER 9.

B. Hospitality Properties Trust.

HPT is a real estate investment trust ("REIT") that owns approximately 300 hotels, of which 142 hotels provide transportation services to guests. ER 2. In its discovery responses, HPT admitted that all of these 142 hotels provide fixed route transportation systems using vehicles purchased or leased after August 25, 1990, and/or provide demand responsive transportation services. ER 30-31, 33-81, 85-101. As a result, all 142 hotels must comply with ADA transportation requirements, including the Equivalent Transportation Requirements. *See supra* at 5-6.

One of the key common questions in this case concerns tax provisions applicable to HPT and other REITs that own hotels (the "REIT tax provisions"). *See* 26 U.S.C. § 856; 26 C.F.R. § 1.856-4. These provisions provide REITs with tax benefits, but, according to HPT, these benefits are only available if the REIT does not operate or manage the hotels that it owns. ER 11. As a result, HPT contracts with independent contractors ("Managers") to manage its hotels. *Id.*

Although HPT acknowledges that it is liable for ADA violations at its hotels, and that it cannot contract away that liability,[9] it admits that has not taken any steps

[9] ER 15. Title III applies to those who "own" places of public accommodation. 42 U.S.C. § 12182(a). This Court has held that that a property owner cannot contract away its liability under the ADA. *Botosan v. Paul McNally Realty*, 216 F.3d 827, 832-34 (9th Cir. 2000).

or implemented any policies to ensure that its hotels provide equivalent, accessible transportation as required by the ADA. *Id.* at 12.

This failure is not the product of neglect. Rather, it is the result of HPT's deliberate decision not to take such steps for fear that doing so would be construed as operating or managing its hotels, thus costing it the tax benefits it receives through the REIT tax provisions. ER 11. This is a centralized decision, it is companywide, and it is uniform.

Further, HPT not only refuses to voluntarily take steps to provide equivalent, accessible transportation for fear of losing the benefits provided by the REIT tax provisions, it also aruges that these provisions preclude the district court from ordering it to take any such measures. ER 26. According to HPT, because the REIT tax provisions "prevent HPT from operating the shuttle service," "any injunction ordering HPT in some way to operate the shuttle services cannot be lawfully made." *Id.*

The import of this defense cannot be overstated. Because the only relief available to private plaintiffs for violations of Title III of the ADA is an injunction, had HPT prevailed in its argument that the REIT tax provisions preclude injunctive relief, the effect would be to make any Title III lawsuits against it essentially meaningless.

The consequences of HPT's affirmative decision to take no steps to ensure that its hotels provide equivalent, accessible transportation services are predictable: Almost none of its hotels provide required accessible transportation. In fact, Dr. Michael Quinn, a professor at Pennsylvania State University with expertise concerning the hotel industry, called 138 of HPT's 142 hotels that provide transportation services to determine what transportation services each hotel provides and what, if any, accessible transportation services it provides.[10] These calls demonstrated that more than 90% of the HPT hotels that provide transportation services do not provide equivalent, accessible transportation services, including more than 100 hotels that do not offer any accessible transportation whatsoever.[11] Although HPT unsuccessfully moved to strike Dr. Quinn's declaration, it did not submit any evidence that any hotel identified by Plaintiffs as noncompliant actually provides equivalent, accessible transportation.

[10] ER 14 n.5. Dr. Quinn did not call the four remaining HPT hotels because HPT identified those hotels in supplemental discovery responses after the deadline for expert reports.

[11] *Id.* at 13-14. Specifically, 101 hotels did not offer any accessible transportation services at all; 8 hotels that provide free, inaccessible transportation required guests who need wheelchair-accessible transportation to pay for those services; 8 hotels required guests who need wheelchair-accessible transportation services to provide more advance notice than guests who can use inaccessible transportation services; and at least 11 hotels were able to give specific details about inaccessible transportation services provided by the hotel, but had no information concerning accessible transportation services. *Id.* at 14 n.5.

C. District Court Order.

The District Court denied Plaintiffs' motion for class certification.

The court first rejected on the merits HPT's argument that the REIT tax provisions precluded the court from entering an injunction to remedy HPT's ADA violations, holding that "[t]he obligation to avoid discrimination would trump the opportunity to receive a tax-related economic benefit." *Id.* at 12.

The district court then held that because it had resolved this issue, and because HPT had conceded that it was liable for violations of the ADA at its hotels, there was "no need" to further address the REIT tax provisions, and that this central liability question could not, therefore, serve as a basis for commonality. *Id.* at 15. The district court did not address other common issues identified by Plaintiffs.

The district court also held that notwithstanding Plaintiffs' evidence that more than 90% of HPT hotels were in violation of the Equivalent Transportation Requirements, in the absence of a uniform, formal policy governing accessible transportation services, or a requirement under the ADA that HPT implement such a policy, it would have to analyze the circumstances of each of the 142 hotels, and that this defeated the commonality, typicality, and Rule 23(b)(2) requirements. ER 10-16 & n.4, 19.

Finally, the district court held that the class did not meet the requirements of Rule 23(b)(2) because the only injunctive relief identified by Plaintiffs was a bare "follow the law" injunction, and because there is no injunction that could provide relief generally applicable to the class. *Id*. at 19.

SUMMARY OF ARGUMENTS

The district court abused its discretion by refusing to consider HPT's REIT tax provision defense – which is common to the class – on the grounds that it had already resolved that question on the merits. In the absence of class certification, the impact of the REIT tax provisions will have to be re-litigated on a case-by-case basis in other lawsuits in other courts, a greatly inefficient process that runs the risk of inconsistent results, contrary to the purposes of Rule 23.

The district court also abused its discretion by holding that class certification was precluded in the absence of a uniform, formal policy governing accessible transportation, or a statute specifically requiring implementation of such a policy, because the court would be required to conduct an individualized analysis of the circumstances of each of the 142 hotels at issue. To the contrary, a systemic injunction is warranted where "symptomatic" evidence – including "individual items of evidence as representative of larger conditions or problems" – exists of a widespread pattern of discrimination. Under this standard, the district court would only need to analyze the circumstances of a portion of the hotels at issue here.

Further, the factual question of whether HPT has engaged in a widespread pattern of discrimination is common to the class, thus supporting commonality, because it demonstrates the need for a classwide, systemic injunction. This conclusion is in harmony with well-established Circuit precedent holding that commonality is established and class certification appropriate when the class is impacted by a common informal policy or practice.

For similar reasons, the district court erred in its analysis of *Dukes*, which held that the commonality requirement is met with "significant proof" that a defendant operated under a general practice or policy of discrimination. 564 U.S. at 353. The district court held that even if the Named Plaintiffs' evidence demonstrated that more than 90% of HPT's hotels are in violation of the Equivalent Transportation Requirements, commonality does not exist because in the absence of a uniform, formal policy, liability would require a hotel-specific analysis. The Supreme Court in *Dukes*, however, specifically identified individual examples of discrimination as one type of evidence that can be used to meet the "significant proof" standard.

Finally, the district court abused its discretion by holding that the requirements of Rule 23(b)(2) were not met because Plaintiffs had only proposed a "follow the law" injunction, and that no injunction could be entered that would provide relief generally applicable to the class. This is not the case. Plaintiffs

proposed a number of specific provisions that would be appropriate in an injunction to remedy HPT's violations on a classwide basis.

ARGUMENT

The district court's determination that the class does not meet the requirements of Rule 23 was based largely on one incorrect premise: In the absence of a uniform, formal policy governing accessible transportation, or a statute specifically requiring implementation of such a policy, the court would have to engage in a "mini-trial" for each of the 142 hotels, thus precluding class certification. ER 12-13 & n.4. Appellants first explain why this was an error of law, and thus an abuse of discretion. Appellants next address the district court's additional erroneous holdings about the commonality and typicality requirements, as well as the district court's flawed analysis with respect to Rule 23(b)(2).

This Court reviews a district court's class certification order for abuse of discretion, which occurs if the district court committed an error of law, or if the court's application of the correct legal rule was based on a factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record. *See Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1162-63 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 2835 (2015); *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1113-14 (9th Cir. 2014).

I. Class Certification Is Not Defeated by the Absence of a Uniform, Formal Policy, or by Having to Engage in an Analysis of Common Facts to Establish a Widespread Pattern of Discrimination.

A plaintiff class is entitled to a systemic injunction if it can show widespread discriminatory practices. *See supra* at 7-8. Crucially, and contrary to the district court's conclusion here, a systemic injunction does not require a court to analyze each individual instance of discrimination to conclude that a defendant has engaged in a widespread pattern of discrimination. Rather, a class can make this showing based on "symptomatic evidence," including "individual items of evidence as representative of larger conditions or problems." *Armstrong*, 275 F.3d at 871.

In *Armstrong*, for example, a systemic injunction covering all California parole and parole revocation hearings was based primarily on evidence concerning the symptomatic experiences of 17 prisoners and parolees. 275 F.3d at 871. In *Oregon Advocacy Center*, a systemic injunction covering jails in 36 counties was based on evidence concerning jails in just seven counties. 322 F.3d at 1122 n.13.

Here, Named Plaintiffs presented evidence that goes far beyond this standard. Their expert surveyed almost every HPT hotel at issue to compare the accessible and inaccessible transportation services offered by these hotels. ER 14 n.5. This evidence, as well as HPT's discovery responses, demonstrated that more than 90% of the 142 hotels at issue are in violation of Equivalent Transportation

Requirements, and the district court accepted that this was the case for purposes of its decision. *Id.* at 13-14 & n.5.

This Court's decisions in *Armstrong* and *Oregon Advocacy Center* demonstrate that the district court will not have to analyze all of this evidence to enter a systemic injunction. Rather, it will simply have to analyze sufficient "individual items of evidence" to conclude that HPT has engaged in widespread violations of the Equivalent Transportation Requirements. While this will almost certainly include evidence of violations at some specific hotels, it will be much fewer than the 142 hotels at issue.

Further, evidence that individual hotels are out of compliance, and other individual items of evidence that the district court analyzes to determine whether HPT has engaged in widespread violations, involve facts common to the class. This is the case because: (1) the class seeks a systemic injunction; (2) a systemic injunction is warranted if HPT has engaged in a widespread pattern of violations of the Equivalent Transportation Requirements; and (3) whether HPT has engaged in a widespread pattern of violations is established based on individual items of evidence symptomatic of that pattern, including violations of these Requirements at individual hotels. [12] Thus the district court erred by finding that the factual

[12] Commonality can be established based on common factual and legal questions relating to the relief sought by the class. Newberg on Class Actions § 3:27 (5th ed.) ("A claim that the opposing party 'has acted or refused to act on grounds that apply

analysis of whether HPT has engaged in widespread violations precludes certification. To the contrary, because this analysis involves factual issues common to the class, it supports class certification.

Indeed, this Court and others have frequently held that the factual question of whether a defendant has engaged in a pattern of misconduct – even when that misconduct is not embodied in a uniform, formal policy – is common to the class and thus establishes commonality.

For example, in *Alcantar v. Hobart Service*, 800 F.3d 1047, 1049 (9th Cir. 2015), the district court refused to certify a class of service technicians alleging that their employer had violated the California Labor Code by not compensating them for time spent driving company vehicles during their commute. The district court held that "absent proof of a company-wide policy [requiring employees to use company vehicles for their commute], the commonality requirement is not met." *Id.* at 1053. This Court reversed, holding that notwithstanding the absence of a companywide policy, commonality was established by the common factual issue as to whether "as a practical matter," service technicians were required to commute in employer vehicles. *Id.* at 1053, 1055. In reaching this conclusion, the Court

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generally to the class' necessarily presents a common question of fact; similarly, a claim that injunctive or declaratory relief is appropriate for the class as a whole presents a common question of law.").

relied on declaration testimony from "numerous" service technicians, Rule 30(b)(6) testimony, and excerpts from a personnel manual. *Id.* at 1055.

Similarly, in *Jimenez*, this Court held that the commonality requirement was met based on the common factual question of whether defendant had a "practice or unofficial policy" of failing to compensate employees for off-the-clock overtime in violation of California law. *Jimenez*, 765 F.3d at 1162-63, 1165; *see also Bell v. PNC Bank, Nat. Ass'n*, 800 F.3d 360, 374-75 (7th Cir. 2015) ("We conclude therefore, that the question 'Did PNC have an unofficial policy or practice that required employees class-wide to work off-the-clock overtime hours?' is indeed a common one that is capable of class-wide resolution.").

Finally, this Court in *Armstrong* held that the commonality and typicality requirements were met by a class challenging, pursuant to the ADA, California's failure to provide reasonable accommodations to prisoners with disabilities during parole and parole revocation hearings. 275 F.3d at 868-69. Many of the alleged violations resulted from practices,[13] not formal policies. The court entered a systemic injunction based in large part on testimony from 17 prisoners and parolees. *Id.* at 871; *see also Parsons*, 754 F.3d at 664, 678 (affirming certification of a class based on common questions that included the defendant's alleged failure

[13] *Armstrong*, 275 F.3d at 863-64 (finding that the defendant's "practice throughout the parole and parole revocation process routinely deprives disabled prisoners and parolees of their rights under the ADA").

to comply with legal requirements concerning provision of medication, treatment, and other medical care to prisoners); *Gray v. Golden Gate Nat'l Recreation Area*, 279 F.R.D. 501, 520-22 (N.D. Cal. 2011) (certifying class alleging violations of the ADA based in part on the defendant's failure to implement policies regarding access for people with mobility or vision disabilities at the Golden Gate National Recreation Area).[14]

The district court's holding that class certification is precluded in cases challenging widespread alleged misconduct unless embodied in a uniform, formal policy would vastly restrict the scope of Rule 23. For example, under that view, the classes in *Alcanter*, *Jimenez*, *Bell*, *Armstrong*, *Parsons*, and *Gray*[15] either should not have been certified at all, or should have been certified only as to those claims challenging a uniform, formal policy. Yet, in each case, the courts held that the

[14] The district court attempted to distinguish *Gray* and *Parsons* as involving centralized decision-makers. ER 13. But here, HPT has made the centralized decision to do nothing to ensure compliance at its properties. In addition, the ADA requires HPT, the hotels' owner, to comply with the Equivalent Transportation Requirements. 42 U.S.C. § 12182(a) (prohibiting discrimination by those who "own" places of public accommodation). This was also the case in *Gray* and *Parsons*, where the decision-makers were obligated by statute to comply with the substantive law. *See Gray*, 279 F.R.D. at 512 (noting that although lawsuit addressed actions by third parties, the defendant was the decision-maker because it was responsible for ensuring third parties' compliance with access obligations); *Parsons*, 754 F.3d at 681 (decision-makers "charged by law with ultimate responsibility for" ensuring compliance).

[15] None of these decisions indicated that the statutes at issue specifically required implementation of a uniform, formal policy.

class satisfied Rule 23, demonstrating that, contrary to the district court's analysis, the question of whether HPT has engaged in widespread violations is common to the class and supports certification, regardless of whether it has in place any formal, uniform policies governing accessible transportation.

II. The District Court Abused Its Discretion by Holding that the Class Lacked Commonality.

Rule 23(a)(2) requires "questions of law or fact common to the class." This requirement is "construed permissively." *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011). Plaintiffs need not show that "'every question in the case, or even a preponderance of questions, is capable of class wide resolution. So long as there is even a single common question, a would-be class can satisfy the commonality requirement of Rule 23(a)(2).'" *Parsons*, 754 F.3d at 675 (citations omitted). The common contention "must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350.

Here, commonality exists because: (1) the class shares the crucial, common legal question of what impact, if any, the REIT tax provisions have on the injunctive relief that can be ordered in this case; (2) the class shares the crucial, common factual question of whether there is sufficient symptomatic evidence of HPT's widespread violations of the Equivalent Transportation Requirements to

warrant entry of a systemic injunction; and (3) the Named Plaintiffs established commonality based on significant and unrebutted proof that HPT operates under a general policy of discrimination.

A. The District Court Abused its Discretion by Resolving a Key, Classwide Legal Issue and then Refusing to Consider that Issue for Commonality.

HPT's argument that the REIT tax provisions preclude the court from entering an injunction ordering HPT to provide compliant accessible transportation at the hotels that it owns is a central, classwide issue.[16] The only relief available for Title III violations is an injunction, and thus if the REIT tax provisions precluded this relief, a court would be powerless to afford any remedy for violations of that statute, and this would be true with respect to every claim by any member of the class in this case – a paradigm common issue. The district court rejected HPT's argument on the merits in a way that applies to every hotel and class member. ER 11-12. Based on this determination, and HPT's admission that it was liable for

[16] A common defense satisfies Rule 23(a)'s commonality requirement. *See, e.g.*, *del Campo v. Am. Corrective Counseling Servs., Inc.*, 254 F.R.D. 585, 592 (N.D. Cal. 2008) (finding commonality satisfied where "[d]efendants are asserting a common defense"); *In re Agent Orange Prod. Liab. Litig. MDL No. 381*, 818 F.2d 145, 166-67 (2d Cir. 1987) (noting that a defense was "common to all of the plaintiffs' cases, and thus satisfies the commonality requirement of Rule 23(a)(2)"); *see also Romero v. Producers Dairy Foods, Inc.*, 235 F.R.D. 474, 490 (E.D. Cal. 2006) (noting in Rule 23(b)(3) analysis that "[w]here a central common defense may bar each of plaintiff's claims, class action treatment is particularly apt").

violations of the ADA at its hotels, *id.* at 12, the court held that "there is no need to answer" questions related to the REIT tax provisions, and thus these issues could not be the basis for commonality. *Id.* at 15. This holding was incorrect as a matter of law and thus an abuse of discretion.

Numerous courts have held that resolved or conceded common issues must be considered in evaluating commonality under Rule 23(a)(2) (or predominance under Rule 23(b)(3)). *See, e.g., In re Nassau County Strip Search Cases*, 461 F.3d 219, 228 (2d Cir. 2006); *Barnes v. United States*, 68 Fed. Cl. 492, 497-98 (2005) ("[A] defendant may not thwart class certification by making tactical concessions designed to pare down the list of common issues held by putative class members."); *Schreiber v. Nat'l Collegiate Athletic Ass'n*, 167 F.R.D. 169, 174-75 (D. Kan. 1996) ("[T]hat this Court has already resolved many of the common questions does not affect [the commonality] analysis."). Doing so is consistent with a primary purpose of Rule 23: obtaining "greater efficiency via collective adjudication and . . . greater uniformity of decision as to similarly situated parties." *In re Nassau County Strip Search Cases*, 461 F.3d at 228. Eliminating resolved or conceded issues from the certification analysis undermines these goals by requiring plaintiffs who share these issues "to pursue separate and potentially numerous actions," which "creat[es] the risk of inconsistent decisions through the repeated litigation of the same question." *Id*. Further, there is no guarantee that a

defendant's concession in one case will be made in another case, or that other courts will find that the requirements of collateral estoppel or res judicata are met. *Id*.; *see also Barnes*, 68 Fed. Cl. at 497 ("[D]efendant has no ability to 'concede' a legal issue that applies to the thousands of individuals that are not yet before this or any other court.").

This is the case here: the district court's decision leaves class members to re-litigate the impact of the REIT regulations on Title III in different lawsuits in different courts, with no guarantee that the result – or HPT's concession of responsibility for Title III compliance – will be the same in each case.

Although the Ninth Circuit has not addressed this specific issue, it has repeatedly held that the point of class certification is "'to select the metho[d] best suited to adjudication of the controversy fairly and efficiently.'" *Alcantar*, 800 F.3d at 1053 (quoting *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1191 (2013)). Thus a court addressing commonality must determine whether a question is "common to the members of the putative class," not whether it is "meritorious or not." *Stockwell*, 749 F.3d at 1113-14.

These principles apply here. The issues of whether HPT is liable for ADA violations at the hotels that it owns and whether the REIT tax provisions preclude entry of an injunction, are issues common to the class, and are most fairly and efficiently resolved on a class basis. Thus these issues must be considered for

purposes of commonality, regardless of whether HPT has conceded that it is covered by the ADA or the district court has already resolved the REIT tax provision issue on the merits. Otherwise, class members seeking to enforce the Equivalent Transportation Requirements against HPT may be required to relitigate this issue in multiple courts, a vastly inefficient process resulting in a risk of inconsistent findings.

B. Commonality Exists Based on the Common Factual Questions Relevant to Whether a Systemic Injunction Is Warranted.

The common factual issue of whether the evidence of HPT's violations warrants entry of a systemic injunction also establishes commonality in this case.

First, the class shares the common factual question of whether HPT has engaged in a widespread pattern of violations of the Equivalent Transportation Requirements, thus warranting systemic relief. *Armstrong*, 275 F.3d at 871; *see also supra* at 7-8. As set forth above, numerous courts have held that the factual question of whether a defendant has engaged in a widespread pattern of discrimination is common to the class and establishes commonality. *See supra* at 19-21.

Second, the class shares the common factual question of whether HPT's violations of the Equivalent Transportation Requirements "are attributable to policies . . . pervading the whole system," also warranting a systemic injunction. *Armstrong*, 275 F.3d at 870; *see also supra* at 8.

This question has largely been answered by HPT's own admissions. It acknowledges that it is subject to, and responsible for violations of, the ADA. ER 15. Nevertheless, motivated by its economic fear of losing the tax benefits provided by the REIT tax provisions, it has implemented a uniform, companywide policy that it will take no action that could be construed as operating or managing its hotels, including taking any steps to ensure compliance with the Equivalent Transportation Requirements.[17] This supports entry of a classwide systemic injunction, as well as a finding of commonality. *See, e.g., DL v. District of Columbia*, 302 F.R.D. 1 (D.D.C. 2013) (holding that the commonality requirement was met because "each subclass allege[d] a uniform practice of failure that harmed every subclass member in the same way").

Relying almost entirely on *Castaneda v. Burger King Corp.*, 264 F.R.D. 557 (N.D. Cal. 2009), the district court held that commonality did not exist based on its erroneous view that, in order to enter an injunction in this case, it would have to conduct 142 "trials within a trial" to evaluate the circumstances of each hotel.[18] As

[17] Thus even assuming a uniform, formal policy is required for class certification, that requirement is met here.

[18] ER 12. A number of courts have rejected the argument that differences in barriers defeat commonality in disability access cases. *See, e.g., Californians for Disability Rights, Inc. v. Cal. Dep't of Transp.*, 249 F.R.D. 334, 345-46 (N.D. Cal. 2008); *Gray*, 279 F.R.D. at 513-14.

set forth above, that is not the case. Rather, a systemic injunction is warranted based on symptomatic evidence.

This is why *Castaneda* is not relevant here. *Castaneda* was a damages class action, in which a class of persons who use wheelchairs or scooters challenged a wide array of architectural barriers at 92 restaurants in California. 264 F.R.D. at 559-60. The plaintiffs sought minimum statutory damages on behalf of the class each time a patron visited a store and encountered an access barrier. *Id.* at 561. In the absence of common architectural plans, the district court determined that it would have to analyze the compliance status of every architectural feature in every one of these 92 restaurants. *Id.* at 567-68. The court held that this defeated commonality. *Id*.[19]

This case is materially different from *Castaneda*. First, Plaintiffs challenge only one feature of the hotels at issue – accessible transportation. Second, Plaintiffs seek only injunctive relief, which, as set forth above, is warranted based on symptomatic evidence of widespread violations of the Equivalent Transportation Requirements. Ultimately, there is no need in this case to conduct the extensive

[19] In *Castaneda*, this Court granted the plaintiffs' petition to appeal the cited order under Rule 23(f). *Castaneda v. Burger King Corp.*, No. 09-80158, Dkt. No. 8 (9th Cir. Feb. 10, 2010) (granting 23(f) petition). The case settled for classwide injunctive and monetary relief before this Court reviewed the merits of the class certification decision. *Castaneda v. Burger King Corp.*, No. C 08-04262 WHA, 2010 WL 2735091 (N.D. Cal. Jul. 12, 2010) (granting final approval of settlement).

analysis of different types of architectural features, for which each violation would give rise to statutory damages, that was the basis for the holding in *Castaneda*.

C. The District Court Abused Its Discretion by Not Finding the Commonality Requirement Met Based on Plaintiffs' Significant Proof of Widespread Violations.[20]

Commonality exists where there is "significant proof" that a defendant operated under a general practice or policy of discrimination.[21] Plaintiffs submitted unrebutted proof – consisting of HPT's discovery responses and Dr. Quinn's report – that more than 90% of the hotels at issue are in violation of the Equivalent Transportation Requirements. Nevertheless, the district court held that this did not establish commonality because "even if Plaintiffs were able to show that 90% of HPT's hotels violated the ADA, Plaintiffs would only be able to do so by putting forward evidence regarding each of HPT's 142 hotels individually." ER 14.

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[20] In this case, the same type of evidence – proof that a number of HPT hotels are in violation of the Equivalent Transportation Requirements – is relevant to both the significant proof and symptomatic evidence standards. These, however, are analytically distinct concepts. The significant proof test in *Dukes* is a class-action principle whose purpose is to bridge the "gap" between an individual's claim that he or she has experienced discrimination, and the existence of a class of persons who have suffered the same injury. *Dukes*, 564 U.S. at 352-53. The symptomatic evidence standard set forth in *Armstrong* is a principle of injunctive relief whose purpose is to demonstrate that a problem is sufficiently widespread to justify systemic relief. *Armstrong*, 275 F.3d at 871.

[21] *Dukes*, 564 U.S. at 353. In *Parsons*, this Court did not resolve whether the "significant proof" standard applied in that case. 754 F.3d at 684 n.29. The Court need not resolve this here either, as Plaintiffs' evidence of widespread violations, and HPT's "near-utter failure to respond to it with evidence of their own" satisfies "significant proof" or any lesser evidentiary standard. *See id.*

This holding is completely at odds with the "significant proof" standard for commonality set forth in *Dukes*. In that case, the plaintiffs sought to certify a nationwide class of women employees, alleging that the defendant had engaged in sex discrimination in violation of Title VII. 564 U.S. at 342. It was undisputed that the defendant did not have any express corporate policy against the advancement of women; rather, plaintiffs' claims were based on the defendant's allegedly discriminatory practices. *Id.* at 344-45. The Court held that to establish commonality, the plaintiffs had to bridge the "gap" between an individual's claim that he or she has experienced discrimination, and the existence of a class of persons who have suffered the same injury, and that this could be accomplished with "significant proof" that the defendant "operated under a general policy of discrimination." *Id.* at 352-53.

The Court cited *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), as an example of the type of evidence satisfying the significant proof standard. *See Dukes*, 564 U.S. at 358. This evidence consisted of statistical and anecdotal proof of approximately 40 specific instances of discrimination to demonstrate that discrimination was widespread. *Id*.

Here, Plaintiffs relied on numerous and widespread examples of violations of the Equivalent Transportation Requirements at HPT hotels to demonstrate that HPT "operate[s] under a general policy of discrimination," but the district court

erroneously rejected this evidence on the grounds that it required a hotel-specific analysis. ER 14. This holding cannot be reconciled with *Dukes*, which explicitly identified evidence of specific instances of discrimination as *supporting* a finding that the defendant operated under a general policy of discrimination. In other words, *Dukes* expressly contemplates that the significant proof standard will be met by evidence of specific instances of discrimination, notwithstanding the fact that this will require a fact-specific analysis of each such instance.

III. The District Court Abused Its Discretion by Holding that the Class Does Not Meet the Typicality Requirement.

Rule 23(a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." The district court, relying on *Castaneda*, held that the class does not meet the typicality requirement for essentially the same reasons that it held commonality not to exist: that, in the absence of a uniform, formal policy, each of the Named Plaintiffs "suffered different injuries than those suffered by purported class members who encountered different [ADA violations] at other [HPT-owned hotels] that the named plaintiffs did not visit." ER 16 (citation omitted). This, too, was an error of law and thus an abuse of discretion.

As an initial matter, the district court erred in finding that the Named Plaintiffs here encountered ADA violations different from those encountered by the putative class, relying on *Castaneda*. The Named Plaintiffs and class members

all allege violations of the Equivalent Transportation Requirements. In contrast, as explained above, the 92 restaurants in *Castaneda* involved numerous different kinds of architectural elements ranging from parking spaces to restroom stalls, and also concerned architectural elements subject to different statutory requirements, as some restaurants were built before the enactment of the ADA and some were built or altered after, so the named plaintiffs in that case may have encountered different architectural barriers subject to different statutory requirements than those encountered by other class members. *See Castaneda*, 264 F.R.D. at 561, 563-64.

The district court's conclusion that the Named Plaintiffs suffered different injuries appears to refer to the different ways that HPT hotels violate the Equivalent Transportation Requirements. Some hotels do not provide any accessible transportation, others provide free inaccessible transportation but require guests with disabilities who require accessible transportation to pay for that transportation, and others require more advanced notice for accessible transportation than they do for inaccessible transportation. *See* ER 13 n.4.

These minor differences do not defeat typicality. This Court has repeatedly stressed that "[t]ypicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (citation omitted). In particular, "[d]iffering factual scenarios resulting in a claim of the same nature as other class members

does not defeat typicality." *Ellis*, 657 F.3d at 985 n.9. The typicality requirement is met where "[t]he plaintiffs all suffer a refusal or failure to afford them accommodations as required by statute, and are objects of discriminatory treatment on account of their disabilities." *Armstrong*, 275 F.3d at 869. Numerous courts have held that the typicality requirement is met by classes of persons with disabilities challenging accessibility barriers. *See, e.g., id.* ; *See, e.g., Californians for Disability Rights, Inc.*, 249 F.R.D. at 346; *Gray*, 279 F.R.D. at 513-14.

The minor differences in the particular form of the inequivalent transportation services encountered by Named Plaintiffs and class members are also significantly less than the differences in cases in which this Court has found the typicality requirement met. For example, in *Rodriguez v. Hayes*, 591 F.3d 1105, 1111 (9th Cir. 2010), a single plaintiff sought to represent a class of noncitizens who were detained for more than six months without a bond hearing while engaged in immigration proceedings. The class members had been detained for different reasons and were at different stages of the admission and removal process, with each stage governed by a different immigration detention statute. *Id.* at 1113-16, 1122. This Court held that typicality requires only that the named plaintiffs' claims be "reasonably co-extensive with those of absent class members; they need not be substantially identical." *Id.* at 1124 (citation omitted). Even though only one named plaintiff sought to represent a class consisting of detainees

at different stages in the process, detained for different reasons and subject to different immigration detention statutes, this Court held that the typicality requirement was met because the named plaintiff and the class raised similar legal arguments and were alleged victims of the same practice of prolonged detention. *Id.*

Here, the typicality requirement is easily met. As in *Armstrong*, the Named Plaintiffs and the class members all suffered from the same type of violation and are objects of discriminatory treatment on account of their disabilities. All were denied equivalent transportation. Further, their claims are all based on the same course of conduct: HPT's widespread failure at hotels it owns to provide equivalent, accessible transportation, attributable to its deliberate decision not to take any measures to ensure provision of such transportation based on its fear of losing tax benefits. The Named Plaintiffs, like members of the class, all must address the same legal standards and arguments, including whether the REIT tax provisions limit or preclude injunctive relief. Finally, the Named Plaintiffs and the class request systemic injunctive relief and thus seek to establish the same evidentiary foundation, *i.e.*, that HPT has a companywide policy resulting in ADA violations, or has engaged in widespread violations of the Equivalent Transportation Requirements.

IV. The District Court Abused Its Discretion by Finding that the Class Does Not Meet the Requirements of Rule 23(b)(2).

This is a paradigmatic Rule 23(b)(2) case. Certification under Rule 23(b)(2) is proper where "the party opposing the class has acted *or refused to act* on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." (Emphasis added.) The Supreme Court in *Dukes* recognized that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." 564 U.S. at 361 (citation omitted); *see also* Newberg on Class Actions § 4:26 (5th ed.) ("The rule makers who re-drafted Rule 23 in 1966 designed Rule 23(b)(2) specifically for cases stemming from the civil rights movement.").

The district court held that the class did not meet the requirements of Rule 23(b)(2) because (1) the injunctive relief suggested by Plaintiffs consisted of a "'bare injunction to follow the law,'" and (2) injunctive relief would only be appropriate to those hotels where there are in fact accessibility violations, and such relief would vary from location to location. ER 19 (citations omitted). Both of these holdings were erroneous.

First, as this Court held in *Parsons*, it is often the case that class certification occurs before legal and factual determinations have been made that impact the contents of any injunction. *Parsons*, 754 F.3d at 689 n.35. As a result, it is

generally sufficient for the plaintiffs to describe the "general contours of injunction that would provide relief to the whole class." *Id.*

In this case, the class certification briefing occurred relatively early in the litigation, before any summary judgment or other motions that would resolve factual and legal issues relevant to the content of an injunction. Most importantly, at that juncture, the district court had not yet addressed HPT's defense that the REIT tax provisions precluded entry of an injunction requiring it to do anything that could be construed as operating or managing its hotels. Had the district court agreed with HPT on this point, this would have had a significant impact on the content of an injunction.

Nevertheless, during the briefing on the motion for class certification, Plaintiffs provided specific proposals concerning the contents of an injunction, including, for example:

- The Court could order HPT "to implement a uniform policy of training and operational changes at its hotels to comply with the ADA's accessible transportation requirements." ER 23.
- If, based on the REIT tax provisions, the court ultimately concluded that it could not issue an injunction requiring HPT to undertake actions that could be construed as operating its hotels, it could still order HPT to purchase accessible vans for use at those hotels. *Id.* at 24.

- In addition, or in the alternative, based on "compliance with law" provisions in HPT's management agreements with the independent contractors that managed its hotels, the Court could order HPT to take all measures permitted by its contract to force management companies to comply with the ADA, or to terminate those contracts. *Id.* at 28.

In light of the district court's rejection on the merits of HPT's REIT tax provision argument, it is now clear that an injunction can require HPT to take measures to ensure compliance with the Equivalent Transportation Requirements. This could include: (1) with input from the Named Plaintiffs, development of accessible transportation policies, with any disputes to be resolved by the district court; (2) ensuring that HPT hotels that own or lease accessible shuttles operate those shuttles in a way that is equivalent to how the hotels operates their inaccessible shuttles; (3) requiring that hotels relying on third parties for accessible transportation services enter contracts with the third parties specifically to ensure provision of equivalent accessible transportation services; (4) requiring that hotel employees who interact with the public receive training on the accessible transportation services provided by the hotels so they can provide accurate information to the public; and (5) monitoring by class counsel to ensure compliance with the injunction.

Second, the district court also erred by holding – again relying only on *Castaneda* – that the class did not meet the requirements of Rule 23(b)(2) because injunctive relief would only be appropriate as to those hotels where there are in fact accessibility violations, and such relief would vary from location to location. ER 19. On this basis, the district court concluded that there can be no generally applicable relief in this case as to patrons of all 142 hotels. *Id.*

To the contrary, Plaintiffs seek an injunction requiring development and implementation of accessible transportation policies, together with employee training on those policies, and monitoring to ensure that they are carried out. There would be no need for the injunction to specifically address the circumstances of each hotel.

Indeed, two district courts recently approved classwide settlement agreements in actions virtually identical to this one, based on alleged violations of the Equivalent Transportation Requirements, and both agreements included comprehensive, classwide injunctive relief without having to specifically address the circumstances of any particular hotel. *See Civil Rights Educ. & Enforcement Ctr. v. Ashford Hospitality Trust*, 2016 WL 1177950, *2 (N.D. Cal. Mar. 22, 2016); *Civil Rights Educ. & Enforcement Ctr. v. RLJ Lodging Trust*, No. 15-CV-0224-YGR (N.D. Cal. May 3, 2016) (Addendum at 32-34).

This approach is in accord with numerous decisions holding that the requirements of Rule 23(b)(2) are met by injunctions requiring development and implementation of policies.

For example, in *Gray*, the court certified – after *Dukes* – a Rule 23(b)(2) class where the plaintiffs alleged the defendant had inadequate or nonexistent systemwide polices regarding access for people with mobility or vision disabilities at the Golden Gate National Recreation Area. *See Gray*, 279 F.R.D. at 520-22. In discussing Rule 23(b)(2), the court noted "a complete absence of a written policy for the accessibility review" and "a pattern of planning, development, and construction" that did not meet accessibility guidelines. *Id.* at 522 (internal quotation marks omitted). The court concluded that "[s]uch deficiencies, if proven at trial, might conceivably be remedied by an injunction that required such a written policy and training on its implementation . . . ." *Id.*; *see also Hernandez v. County of Monterey*, 305 F.R.D. 132, 163-64 (N.D. Cal. 2015) (rejecting argument that each class member needed an individualized remedy, and concluding that the plaintiffs' injuries could be remedied "by uniform changes in [jail] policy and practice." (Citation omitted.)); *Shields v. Walt Disney Parks & Resorts US, Inc.*, 279 F.R.D. 529, 558-59 (C.D. Cal. 2011).

Gray also rejected the defendants' arguments that all of the barriers "would have to be examined and remediated one by one" or that thousands of injunctions would have to be issued. *Id.* at 511, 520-21.

Similarly, in *Californians for Disability Rights, Inc. v. California Department of Transportation*, 249 F.R.D. at 335, the plaintiffs brought a class action suit against the California Department of Transportation ("Caltrans") challenging practices and policies resulting in access barriers at sidewalks and pedestrian walkways throughout the state. The defendant argued that class certification should be denied because the plaintiffs' claims would require a "mini-trial" on every alleged violation of the ADA by Caltrans. *Id.* at 343. The court rejected this argument:

> Stripped of its merits-based premise, the essence of defendants' argument—that in order to prove the existence of the forest the plaintiffs must individually prove the existence of each tree—is anathema to the very notion of a class action. Taken to its logical conclusion, under defendants' reasoning, no civil rights class action would ever be maintainable, because, in order to prove the existence of a discriminatory pattern or practice, each class member would have to individually prove the highly individualized factors relating to each instance of discrimination they allegedly suffered. This would simply obviate the concept of the class action lawsuit.

Id. at 345. Indeed, this is not how class actions work, as "courts regularly order the remediation of discriminatory practices in class actions without presiding over the details of the application of such remediation to each and every affected facility or individual." *Id.*

Fundamentally, this civil rights case challenges HPT's widespread "failure to act" to comply with the law, a failure that has resulted in an injury common to a large number of people. As such, it is the epitome of the type of case for which Rule 23(b)(2) was designed to address. *See Parsons*, 754 F.3d at 688 (holding that Rule 23(b)(2)'s requirements are "unquestionably satisfied when members of a putative class seek uniform injunctive or declaratory relief from policies or practices that are generally applicable to the class as a whole.").

RELIEF SOUGHT

For the reasons above, Named Plaintiffs respectfully request that this Court reverse the district court, hold that the proposed class meets the requirements of Rule 23(a) and 23(b)(2), and remand this case for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellants' counsel believe that the issues raised in this appeal have significant public importance and respectfully request that oral argument be permitted.

STATEMENT OF RELATED CASES

Appellants know of no related cases pending before this Court.

Dated: October 27, 2016

Respectfully submitted,

CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER

By: /s/ Timothy P. Fox
Attorneys for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7), and Ninth Circuit Rule 32-1, I certify that the attached reply brief is proportionately spaced, has a typeface of 14 points or more, and contains 10,809 words.

Dated: October 27, 2016 s/Timothy Fox

CERTIFICATE OF SERVICE

I, Timothy P. Fox, certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF system on October 27, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/Timothy P. Fox