

No. 23-80030

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

STACIA STINER, *et al.*,
Plaintiffs-Petitioners,

v.

BROOKDALE SENIOR LIVING, INC., *et al.*,
Defendants-Respondents.

On Appeal from the United States District Court for the Northern District of California
District Court Case No. 4:17-cv-03962-HSG
The Honorable Haywood S. Gilliam, Jr.

**MOTION OF *AMICI CURIAE* DISABILITY RIGHTS ADVOCATES *et al.*
TO FILE BRIEF IN SUPPORT OF PLAINTIFFS-PETITIONERS'
PETITION FOR PERMISSION TO APPEAL UNDER RULE 23(f)**

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MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(a) the Impact Fund, Disability Rights Education and Defense Fund, Disability Rights Advocates, AIDS Legal Referral Panel, Child Care Law Center, Disability Rights California, Family Violence Appellate Project, Learning Rights Law Center, Legal Aid at Work, Legal Assistance for Seniors, Legal Assistance to the Elderly, Mental Health Advocacy Services, National Housing Law Project, Prison Law Office, the Public Interest Law Project and Senior Legal Services respectfully move for leave from the Court to file the attached brief as *amici curiae* in support of Plaintiffs-Petitioners' Petition for Permission to Appeal Under Rule 23(f). Plaintiffs-Petitioners consent to the filing from the proposed amici. Defendants-Respondents do not consent.

The proposed *amici* are not parties to this action. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that the brief was not authored, in whole or in part, by either party's counsel; no party or party's counsel contributed money to fund the preparation or submission of the brief; and they know of no person who contributed money that was intended to fund preparing or submitting brief.

Amici's proposed brief is timely because *amici* are filing the brief within seven days of the April 13, 2023 filing of Plaintiffs' Rule 23(f) petition. Fed. R.

App. P. 29(e). *Amici*'s proposed brief complies with Federal Rule of Appellate Procedure 29(d) because it is no more than half the maximum length of 5,200 words authorized for Plaintiffs' petition. *See* Fed. R. App. P. 5(c); Fed. R. App. P. 27(d)(2).

**INTEREST OF THE *AMICI CURIAE* AND
BASIS OF MOTION FOR LEAVE TO FILE BRIEF**

Amici are non-profit legal services organizations that represent and advocate for rights of individuals with disabilities in California and nationwide. The constituents and clients of *amici* are disproportionately subject to large institutional systems that have multiple facilities with site-based personnel and system-wide oversight. They include foster children, K-12 students, nursing home residents, people in state hospitals, people in group homes, residents of public housing, and incarcerated people. These constituents and clients are typically low-income and experience barriers to accessing the legal system. It is often infeasible for them to hire private attorneys to bring individual cases to obtain relief, and the free legal services provided to indigent and disabled individuals are inadequate.¹ Oftentimes,

¹ Legal Services Corporation, *The Justice Gap: The Unmet Civil Legal Needs of Low-income Americans* (Apr. 2022), 19 (LSC-funded organizations are unable to provide any or enough legal help for 71% of the civil legal problems brought to them), <https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhwtjlgj0emp3myz1>; State Bar of California, 2019 California Justice Gap Study: Executive Report, <https://www.calbar.ca.gov/Portals/0/documents/accessJustice/Justice-Gap-Study-Executive-Summary.pdf>.

participation in a class action under Federal Rule of Civil Procedure 23 is the primary, if not only way that these client groups can access legal services, obtain relief, and reform large institutions. The district court's order negatively impacts the rights and options of the communities *amici* serve. Review is necessary.

I. Statements of Interest of *Amici Curiae*

The Impact Fund is a non-profit legal foundation that provides funding for impact litigation, offers innovative training and support, and acts as counsel in impact litigation across the country. The Impact Fund has an interest in ensuring that class actions remain a robust vehicle for individuals with disabilities and other underserved communities to vindicate their rights and enable greater access to justice.

Disability Rights Education and Defense Fund (DREDF) is a national nonprofit law and policy center dedicated to advancing and protecting the civil and human rights of people with disabilities. Founded in 1979 by people with disabilities and parents of children with disabilities, DREDF remains board- and staff-led by members of the communities for whom we advocate. DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal civil rights laws protecting persons with disabilities. As part of its mission, DREDF works to ensure

that people with disabilities have the legal protections, including broad legal remedies, necessary to vindicate their rights to be free from discrimination.

Disability Rights Advocates (DRA) is based in Berkeley, California with offices in New York City, New York and Chicago, Illinois. DRA is a national nonprofit public interest center recognized for its expertise on issues affecting people with disabilities. DRA represents clients with disabilities who face discrimination or other violations of civil rights or federal statutory protections in class action and impact litigation. DRA is generally acknowledged to be one of the leading public interest disability rights legal organizations in the country, taking on precedent-setting disability rights class actions in this Circuit and beyond.

AIDS Legal Referral Panel (ALRP) is a non-profit organization helping people living with HIV/AIDS maintain and improve their health by resolving their legal issues. ALRP provides legal assistance and education on virtually any civil matter to persons living with HIV/AIDS. This includes such widely disparate areas as housing, employment, insurance, confidentiality matters, family law, credit, government benefits or public accommodations, and immigration.

The **Child Care Law Center** is a non-profit organization that educates, advocates, and litigates to make child care a civil right. The Law Center focuses on increasing affordable child care for families with low incomes, equitable pay for family child care providers, and rights for children with disabilities, using

legislative advocacy, budget advocacy, community education and outreach, and movement building. With its partners, the Law Center helps people understand the legal underpinnings of child care that are harmful to families and providers — particularly those who are Black and Brown.

Disability Rights California is California’s protection and advocacy agency and the nation’s largest non-profit disability rights law firm, mandated under state and federal law to advocate for the rights of people with disabilities and investigate allegations of abuse and neglect. 42 U.S.C. § 15001 *et seq.*; 29 U.S.C. § 794e *et seq.*; 42 U.S.C. § 10801 *et seq.*; Welf. & Inst. Code, § 4900 *et seq.* Since its founding in 1978, Disability Rights California has represented people with disabilities in numerous individual and class action cases involving their right to be free from discrimination, including segregation in facilities, and has investigated hundreds of cases involving the abuse and neglect of individuals with disabilities living in facilities.

The **Family Violence Appellate Project (FVAP)** is a nonprofit organization in California dedicated to representing domestic violence survivors in civil appeals for free. FVAP’s goal is to empower abuse survivors through the court system and ensure that they and their children can live in safe and healthy environments, free from abuse. This includes a commitment to increasing survivors’ access to accessible, secure and safe housing.

Learning Rights Law Center is a nonprofit legal services organization that fights to achieve education equity for underserved students in Los Angeles and surrounding counties. The Center provides representation, advice, advocacy and training to children and their families, including by filing systemic education litigation against California school districts. The students and families served by Learning Rights Law Center would be disadvantaged and their rights impinged by a limitation on the availability of relief for classes of plaintiffs who encounter disability-based discrimination in large institutions like public school districts.

Legal Aid at Work (formerly known as the Legal Aid Society – Employment Law Center) is a San Francisco-based, non-profit public interest law firm that has for decades advocated on behalf of the rights of members of historically underrepresented communities, including persons of color, women, immigrants, individuals with disabilities, and the working poor. Founded in 1916 as the first legal services organization west of the Mississippi, Legal Aid at Work frequently appears in state and federal courts to promote the interests of people with disabilities. Legal Aid at Work is recognized for its expertise in the interpretation of state and federal disability rights statutes including the Americans with Disabilities Act (“ADA”) and the Unruh Civil Rights Act.

Legal Assistance for Seniors (LAS) is a nonprofit organization that works to ensure the independence and dignity of seniors by protecting their legal rights

through education, counseling, and advocacy. LAS provides free legal services to seniors throughout Alameda County including representation in court and administrative hearings, referrals to other community resources, and community education and training on legal issues. LAS houses the Health Insurance Counseling and Advocacy Program (HICAP), a volunteer-supported program that helps Medicare beneficiaries of any age make informed choices and provides advocacy when their health care benefits and rights are threatened or denied.

Legal Assistance to the Elderly (LAE) is a nonprofit organization that has provided free legal services for over 40 years to seniors and adults with disabilities. LAE's mission is to protect and advance the right of our clients to be housed, healthy, financially stable, and safe. LAE's services include enforcing our clients' right to live free of discrimination and with full access to their housing, whether it is senior housing or in an institutional setting. We represent individual clients and groups of clients. With partners, LAE recently achieved a settlement on behalf of a group of tenants who experienced discriminatory practices by a property-management company that runs multiple single-room occupancy buildings in Chinatown, San Francisco.

Mental Health Advocacy Services (MHAS) is a nonprofit organization with the mission to protect and advance the legal rights of low-income adults and children with mental health disabilities and empower them to assert those rights in

order to maximize their autonomy, achieve equity, and secure the resources they need to thrive. MHAS is concerned about the District Court's decision in this case, as it significantly limits class actions in systems with multiple facilities. Under the Court's standard, individuals whose rights are violated by mental health systems (which are often composed of multiple facilities) would not have the ability to join a class action to assert their rights. Individuals with mental health disabilities not only often find themselves in such mental health systems, but they also have limited access to individual forms of relief. Denying class certification in this case would likely prevent our clients from accessing the justice system to assert their rights under the ADA.

The **National Housing Law Project (NHLP)** is a nonprofit organization that advances housing justice for poor people and communities, predominantly through technical assistance and training to legal aid attorneys and through co-counseling on important litigation. Founded in 1968, NHLP works with organizers and other advocacy and service organizations to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. NHLP also coordinates the Housing Justice Network (HJN), a collection of approximately 2,000 legal services attorneys, advocates, and organizers from around the country that for over 40 years has shared resources and collaborated on significant housing

law issues affecting low-income persons. Since 1981 NHLP has published HUD Housing Programs: Tenants' Rights, the seminal authority on the laws and policies affecting tenants and program participants in the major HUD-subsidized housing programs. Having access to effective and efficient procedures by which subsidized housing tenants and participants in other federal housing programs may enforce their rights and protections, including against public housing agencies or other housing administrators with multiple buildings or residential communities, is an issue of high importance to subsidized housing tenants and their advocates in the HJN.

The **Prison Law Office (PLO)** is a non-profit public interest law firm founded in 1978 that engages in class action and other impact litigation to improve the conditions in prisons and jails for adults and children, represents individual incarcerated persons, educates the public about prison conditions, and provides technical assistance to attorneys throughout the country. The PLO has litigated numerous large-scale prison and parole class actions for the last 30 years, including successfully arguing before the U.S. Supreme Court in *Brown v. Plata*, 563 U.S. 493 (2011) (holding the court-mandated population limit for California prisons was necessary to remedy violations of incarcerated persons' constitutional rights to adequate medical and mental health care) and *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998) (unanimously holding the ADA applies

to people in state prison). The PLO has appeared before this Court in numerous cases involving rights of incarcerated people, both as direct counsel and as amicus curiae. The PLO's interest in the matter relates to the organization's advocacy on behalf of all incarcerated persons in prisons, jails, and immigration detention centers.

The Public Interest Law Project (PILP) is a California non-profit corporation certified as a state support center to local legal services programs by the State Bar. PILP provides advocacy support, technical assistance and training to local legal services offices throughout California on issues related to affordable housing and fair housing, public benefits and civil rights. Our practice includes representation of persons with mobility impairments who are denied access to critical programs and benefits as have been the class members in this action.

Senior Legal Services (SLS) is a nonprofit organization that provides free legal services to senior residents of Santa Cruz and San Benito Counties. SLS opened its first office in 1972 because these senior residents were unable to obtain legal aid services that addressed their unique problems. Our clients face problems relating to disability discrimination, elder abuse, age discrimination, health insurance, health care, patients' rights, Social Security and SSI, debt collection, and the rights of tenants and mobile home residents. Many of our clients live in

nursing homes and other residential care facilities, including in facilities that are owned and operated by entities that run multiple facilities.

II. The Court Should Allow *Amici* to File Their Brief in Support of Plaintiffs' Rule 23(f) Petition

Courts routinely permit *amici* to file briefs in support of petitions for permission to appeal class certification orders pursuant to Federal Rule of Civil Procedure 23(f). *See, e.g., Reyes v. NetDeposit, LLC*, No. 13-8086 (3d Cir. Nov. 1, 2013) (granting opposed motions to file amicus briefs in support of Rule 23(f) petition); *In re ComScore, Inc.*, No. 13-8007 (7th Cir. May 28, 2013) (also granting leave to file amicus brief in support of Rule 23(f) petition despite opposition); *see also In re High-Tech Emp. Antitrust Litig.*, No. 13-80223 (9th Cir. Jan. 14, 2014) (granting leave to file Rule 23(f) amicus brief to which all parties consented). *Amici's* proposed brief will advance the Court's understanding of the importance of maintaining the ability to challenge the failure of defendants to comply with the ADA and other civil rights laws at multiple non-identical facilities. It will also highlight how the people represented by the *amici* are disproportionately subject to large institutional systems with multiple facilities, thus requiring class certification to challenge systemic policies and practices that infringe upon their rights. Finally, the brief explains how ensuring physical accessibility is a central purpose of the ADA.

The proposed *amici* are familiar with the issues in this case. Some *amici* are, or have been, counsel for parties in some of the cases cited in the brief of *amici*. The clients and constituents of *amici* include people who are harmed by systemic policies and practices that violate the ADA and other civil rights laws. These violations often occur in large institutional systems with multiple facilities. Class actions under Rule 23 are a primary means for these clients and constituents to secure compliance with the laws and improve their lives. As such, this appeal raises particular concern for all *amici*.

Specifically, plaintiffs' Petition pursuant to Rule 23(f) presents important issues bearing on class certification generally, and in disability rights law and other civil rights laws in particular. The district court's decision below diverges from the plain language of Rule 23 and departs from the case law of this Circuit and others. It also conflicts with the policy of efficiency and effective redress that created and sustains the class action system. Single plaintiffs lack the same ability to pursue broad injunctive relief. If interlocutory appeal of the order denying class certification is not granted, the district court's order threatens to limit the ability of the clients and constituents of *amici* to challenge civil rights violations and seek structural reform through class actions.

CONCLUSION

Based on the foregoing, the Impact Fund, Disability Rights Education and Defense Fund, Disability Rights Advocates, AIDS Legal Referral Panel, Child Care Law Center, Disability Rights California, Family Violence Appellate Project, Learning Rights Law Center, Legal Aid at Work, Legal Assistance for Seniors, Legal Assistance to the Elderly, Mental Health Advocacy Services, National Housing Law Project, Prison Law Office, the Public Interest Law Project, and Senior Legal Services respectfully request permission to file their brief *amici curiae* and the Court's consideration of the issues raised in the accompanying brief.

Respectfully submitted,

Dated: April 20, 2023

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), the undersigned counsel states that Impact Fund, Disability Rights Education and Defense Fund, Disability Rights Advocates, AIDS Legal Referral Panel, Child Care Law Center, Disability Rights California, Family Violence Appellate Project, Learning Rights Law Center, Legal Aid at Work, Legal Assistance for Seniors, Legal Assistance to the Elderly, Mental Health Advocacy Services, National Housing Law Project, Prison Law Office, the Public Interest Law Project, and Senior Legal Services are all 501(c)(3) organizations and are not publicly held corporations; none have any parent corporation; and none have shares owned by any publicly held corporation.

Dated: April 20, 2023

By: /s/ Thomas Zito
Thomas Zito
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DISABILITY RIGHTS ADVOCATES

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INTEREST OF AMICI CURIAE²

Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* nonprofit legal services organizations urge the Court to grant Petitioners’ Petition for Permission to Appeal Under Rule 23(f).³ The district court’s order denying class certification departs from the case law of this Circuit and from courts across the country that have certified classes challenging decisions made across multi-facility systems that implicate rights guaranteed by the Americans with Disabilities Act (“ADA”). The order impacts communities with limited access to individual legal representation who are frequently overrepresented in institutional settings, from foster shelters and schools to group homes, jails, and prisons.

INTRODUCTION AND SUMMARY OF ARGUMENT

The ADA mandates the elimination of discrimination and expansion of access for individuals with disabilities. 42 U.S.C. § 12101 *et seq.* The alleged failures to follow the ADA Accessibility Guidelines in new construction or alteration and to remove barriers when readily achievable in the present case violate the ADA. 42 U.S.C. §§ 12182 (b)(2)(A)(iv), 1218; 28 C.F.R. §§ 36.304,

² *Amici* certify that no party or party counsel authored the brief in whole or in part or contributed money to fund preparing or submitting the brief. *Amici* know of no person who contributed money intended to fund preparing or submitting the brief. Fed. R. App. Proc. 29(a)(4)(E).

³ The Motion for Leave to File contains brief descriptions of the individual interests of *amici* organizations.

36.401 *et seq.* When failures occur across multiple facilities under the control of a single entity, as happened here, class actions are the most effective—and often the only—way to obtain a system-wide remedy.

The district court’s order identifies two scenarios where ADA accessibility class actions are appropriate against entities operating multiple facilities: (1) where the facilities share “a common blueprint or design characteristics,” or (2) where the proposed class is “challeng[ing] a common offending policy or centralized decision-making.” *Stiner v. Brookdale Senior Living, Inc.*, No. 17-cv-03962, 2023 WL 2722294, at *23–24 (N.D. Cal. March 30, 2023). But as detailed in Section I below, multiple courts in the Ninth Circuit have rejected the need for a common blueprint. And as detailed in Section II, courts across the country have certified classes challenging systemic failures to act and other deficiencies across multiple facilities that violate the ADA through both central and localized decision-making. The district court below erred in rejecting Plaintiffs’ evidence of “a policy and practice of disregarding the existence of access barriers and of failing to remove them,” *id.* at *24, and its order should be reviewed.

ARGUMENT

I. Previous Courts Rejected the “Blueprint Defense.”

The Ninth Circuit has long permitted Rule 23 class actions challenging defendants’ failure to comply with the ADA at multiple non-identical facilities.

Rule 23(a)'s commonality requirement requires only that there be at least one common legal or factual question capable of class-wide resolution. *Wal-Mart Stores, Inc., v. Dukes*, 564 U.S. 338, 349–50 (2011). In multi-facility ADA cases, a common practice of non-compliance with affirmative obligations provides one such common question. Here, plaintiffs allege that defendants had a systemic policy of ignoring barriers until affected individuals requested removal. Dkts. 238-4 at 31; 276-7.⁴ Courts in this Circuit have certified similar classes, rejecting arguments that variations among architectural barriers defeat commonality when there is such a systemic policy.

For example, in *Californians for Disability Rights, Inc. v. California Department of Transportation*, plaintiffs alleged that Caltrans had a systematic practice of discrimination against people with mobility and vision disabilities that created state-wide barriers along pedestrian walkways. 249 F.R.D. 334, 336, 342–43 (N.D. Cal. 2008). Defendants argued commonality did not exist because “almost infinite variations in design” of the various pathways would require “mini-trials” on “every single alleged violation of the ADA by Caltrans.” *Id.* at 343–44. The court rejected this argument and certified the class. *Id.* at 345–46.

⁴ Citations to “Dkt.” are to the docket in N.D. Cal. Case No. 4:17-cv-03962.

Three years later, the Northern District of California certified a class of disabled persons challenging barriers at multiple park sites. *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501 (N.D. Cal. 2011). The court rejected defendants' argument that the class could not be certified because variations in park attributes across different locations would require the court to examine "thousands of different types of barriers." *Id.* at 510. Because plaintiffs challenged "uniform policies and practices of failing to ensure that [the park system's] features and programs are accessible to mobility and vision impaired individuals," any "differences in the types of barriers alleged [were] insufficient to defeat commonality." *Id.* at 512–14. A uniform design plan for all facilities was not necessary to certification; rather, a uniform policy of improper design and failure to ensure compliance was sufficient. *Id.* at 512–13 (collecting cases).

Courts have also certified classes challenging access issues across multiple buildings in a wide variety of settings:

Educational Institutions: In *Cherry v. City College of San Francisco*, students with disabilities alleged that the college failed to remedy myriad barriers across nine campuses, including noncompliant restrooms, steep or broken walkways, heavy doors, and broken or inaccessible elevators. 2005 WL 6769124, at *1, *3 (N.D. Cal. June 15, 2005). The court rejected defendants' argument that differences in experiences among class members, including facing different

barriers at different buildings, prohibited class treatment. Common issues included “[w]hether [the defendant] had a systemic policy of leaving architectural barriers in place and relying solely on ‘accommodations upon request[.]’” *Id.* at *5.

Jails: In *Pierce v. County of Orange*, the Central District of California certified a class of pretrial detainees, finding a common question in whether defendants “deny disabled inmates necessary accommodations and equal access to services or activities.”⁵ 2003 WL 27387077, at *1–2 (C.D. Cal. Oct. 15, 2003). The court rejected defendants’ argument that commonality was not satisfied because class members raised “different incidents” in “different branches of the jails.” *Id.* at *2. “Plaintiffs intend to prove systemic violations,” and “[e]ach incident contributes to the common question of whether Defendants have a common practice.” *Id.* at *1–2.

Commercial Businesses: In *Moeller v. Taco Bell Corporation*, defendants opposed certification in a case challenging barriers in more than 200 restaurants, arguing that the restaurants encompassed “a multitude of architectural designs, based on approximately 30 different prototypes with different interior layouts and features.” 220 F.R.D. 604, 609 (N.D. Cal. 2004). The court found that the ““unique

⁵ The court later decertified the class under Rule 23(b)(3) but maintained the Rule 23(b)(2) class. *Pierce v. County of Orange*, 2004 WL 7340112, at *8 (C.D. Cal. March 1, 2004).

architecture’ argument has been rejected by a number of courts in disability cases.” *Id.* at 609. Similarly, in *Park v. Ralph’s Grocery Co.*, defendants argued that commonality was not met because each Ralph’s store “possesse[d] a unique architectural style” and plaintiffs challenged “numerous different types of alleged barriers,” necessitating individual assessment of each location. 254 F.R.D. 112, 120–21 (C.D. Cal. 2008). Rejecting this argument, the court found that common questions included “whether defendant created a policy to ignore accessibility for the mobility impaired in its restrooms and parking lots unless It was sued.” *Id.* at 120.

Multiple courts have explicitly rejected the position adopted by the district court below, warranting review.

II. *Amici*’s Constituents Are Disproportionately Subject to Large Institutional Systems with Multiple Facilities and a Combination of Central and Local Oversight.

The communities that *amici* serve are disproportionately subject to large institutional systems with multiple facilities, site-based personnel, and system-wide oversight. These constituents include foster children, K-12 students, nursing home residents, people in state hospitals, people in group homes, residents of public housing, and incarcerated people. They are frequently low-income with little access to the legal system, making individual claims for relief infeasible.

Participation in class actions is one significant way these constituents access legal services, obtain relief, and reform large institutions.

Class certification is particularly appropriate in the context of disability rights laws and other legal frameworks that require institutional systems to not only avoid discrimination but to take affirmative steps to achieve the laws' remedial purposes. *Cf. D.L. v. District of Columbia*, 860 F.3d 713, 725 (D.C. Cir. 2017) (distinguishing *Wal-Mart* analysis in context of class case alleging failure to comply with obligations of disability laws). When an institution does not satisfy their affirmative obligations, they have violated the rights of the entire class.

For example, foster children, particularly those with disabilities or other circumstances that cause physical and programmatic barriers to placement, often have system-wide claims against state agencies. These claims are certified as class actions, even when the barriers at issue involve countless disparate local entities and personnel. *See, e.g., B.K. v. Snyder*, 922 F.3d 957 (9th Cir. 2019) (affirming certification of state-wide class and sub-classes of foster children regarding medical care and inappropriate placements), *subsequent proceeding, Tinsley v. Faust*, 411 F. Supp. 3d 462 (D. Ariz. Oct. 11, 2019); *Wyatt B. v. Brown*, 2022 WL 3445767, at *24–29 (D. Or. Aug. 17, 2022) (certifying state-wide class including foster children with disabilities alleging systemic deficiencies including understaffing and inappropriate placements).

The same is true for public school children with disabilities. While public education involves a large degree of local control, with each school having its own principal and decision-makers, systemic claims of schoolchildren are nevertheless certified as class actions. *See, e.g., J.R. v. Oxnard Sch. Dist.*, 2019 WL 4438243, at *25 (C.D. Cal. July 30, 2019) (certifying class of students alleging the district’s inadequate policies and procedures caused a failure to evaluate and provide services and accommodations in violation of disability laws); *P.V. ex rel. Valentin v. School Dist. of Philadelphia*, 289 F.R.D. 227, 233–34, 236 (E.D. Pa. 2013) (certifying class of K-8 autistic students across the school district alleging systemic failures to comply with disability rights laws).

Certified classes of nursing home residents further demonstrate the viability of systemic claims against the administrations that oversee their care, even when residents typically interact with the management of the facility where they live. In *Brown v. District of Columbia*, plaintiffs who lived in nineteen separate nursing facilities alleged a system-wide failure of the District to provide transition assistance to facilitate their access to community-based care, as required by the ADA. 928 F.3d 1070 (D.C. Cir. 2019). The appellate court affirmed class certification, noting that “‘civil rights cases against parties charged with unlawful, class-based discrimination’ like this one, [are] ‘prime examples of what (b)(2) is meant to capture.’” *Id.* at 1083 (quoting *Wal-Mart*, 564 U.S. at 361); *see also*

Steward v. Janek, 315 F.R.D. 472, 476, 482 (W.D. Tex. 2016) (certifying class of disabled nursing home residents and rejecting argument that deficiencies would manifest differently for each individual).

Courts also certify class claims for individuals with disabilities who are or may be institutionalized in state facilities and group homes, even when the claims implicate multiple facilities and community agencies. *See, e.g., Murphy v. Piper*, 2017 WL 43555970, at *1 (D. Minn. Sep. 29, 2017) (certifying class of disabled adults living in hundreds of “adult foster care” facilities across the state); *Kenneth R. v. Hassan*, 293 F.R.D. 254 (D. N.H. 2013) (certifying class of people with serious mental illness unnecessarily institutionalized or at serious risk of unnecessary institutionalization at two state facilities); *Lane v. Kitzhaber*, 283 F.R.D. 587 (D. Or. 2012) (certifying state-wide class of people with disabilities in sheltered workshops who are qualified for supported employment).

Residents of subsidized housing also need systemic solutions to resolve multi-facility barriers. In *McMillon v. Hawaii*, the district court certified a class of public housing residents with disabilities challenging a systemic failure to remove architectural barriers and to remediate hazardous conditions across hundreds of housing units in two public housing projects. 261 F.R.D. 536 (D. Haw. 2009). Similarly, in *Baez v. New York City Housing Authority*, the district court certified a settlement class of public housing residents with asthma who alleged a systemic

failure to ensure remediation of mold and moisture in violation of state and federal disability rights laws across hundreds of housing developments containing thousands of units. *See* 2015 WL 9809872, at *1 (S.D.N.Y. Dec. 15, 2015) (summarizing procedural history, including the court’s certification the settlement class).

Finally, adults and children with disabilities who are incarcerated often encounter systemic barriers and discrimination in large multi-facility correctional systems. This Court and others regularly affirm certification or certify classes of incarcerated or detained individuals facing access barriers and other civil rights violations in multi-facility systems. *See, e.g., Lacy v. Cook County*, 897 F.3d 847, 865–867 (7th Cir. 2018) (affirming certification of class of detainees with mobility disabilities challenging barriers at multiple facilities); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014) (affirming state-wide classes of incarcerated people challenging isolation policies and inadequate healthcare) *on remand sub nom, Jensen v. Shinn*, 2023 WL 431819 (D. Ariz. Jan. 9, 2023) (ordering systemwide injunction) and *Jensen v. Thornell*, 2023 WL 2838040 (D. Ariz. Apr. 7, 2023 (detailing state-wide remedial plan for all facilities); *Armstrong v. Davis*, 275 F.3d 849, 867–70 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005) (affirming state-wide class of incarcerated disabled people challenging systemic access barriers and lack of accommodations); *Holmes v.*

Godinez, 311 F.R.D. 177, 211–24 (N.D. Ill. 2015) (certifying class of deaf and hard of hearing incarcerated individuals in facilities across the state for systemic failure to provide accommodations).

These cases all involved multiple facilities with both system-wide and local decision-makers. Without class procedures, many—if not all—of these people would have been denied the opportunity to assert their rights under the ADA.

III. Ensuring Physical Accessibility is a Central Purpose of the ADA.

Congress enacted the ADA understanding that discrimination against people with disabilities is “most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect.” *Cohen v. City of Culver City*, 754 F.3d 690, 694 (9th Cir. 2014) (citation omitted). Accordingly, the ADA aims to address “more subtle forms of discrimination—such as difficult-to-navigate restrooms and hard-to-open doors—that interfere with disabled individuals’ full and equal enjoyment” of public places. *Id.* at 694 (quoting *Chapman v. Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 945 (9th Cir. 2011)).

The ADA Accessibility Guidelines at issue in the underlying case set out the *minimum requirements*—both scoping and technical—to ensure the accessibility of newly designed and constructed or altered facilities covered by Title III of the ADA. 28 C.F.R. Part 36, App. A. The requirements “are as precise as they are thorough, and the difference between compliance and noncompliance with the

standard of full and equal enjoyment established by the ADA is often a matter of inches.” *Chapman*, 631 F.3d at 945–46. Ensuring accessibility through enforcement of the ADAAG is essential to effectuating the ADA’s remedial purpose, and Plaintiffs’ enforcement of the ADAAG fulfills the promise of the ADA.

IV. Conclusion

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

Dated: April 20, 2023

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**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number: 23-80030

I am an attorney for plaintiffs-Appellees.

This brief contains 2,484 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature: /s/ Thomas P. Zito **Date:** April 20, 2023

CERTIFICATE OF SERVICE

I certify that on April 20, 2023, I electronically filed the foregoing motion and brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that on the same day, I caused the motion and brief to be served by email (per agreement pursuant to FRAP 25(c)(2)) on the following:

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