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,
The Honorable Jon S. Tigar, District Judge
Case No. 3:15-cv-00221-JST

BRIEF OF IMPACT FUND, *et al.*, AS AMICI CURIAE IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Impact Fund and eleven fellow non-profit organizations respectfully submit this brief in support of Plaintiffs-Appellants The Civil Rights Education and Enforcement Center, *et al.* ("Plaintiffs-Appellants" or "Plaintiffs"), and urge the Court to reverse the district court's order denying class certification. A brief description of each amicus organization and its interest is set forth in the attached Unopposed Motion for Leave to File.

Amici respectfully submit this brief to emphasize the significance of the district court's divergence from the plain language of Rule 23(b)(2), case law from this Circuit and others, and the policy of efficiency and effective redress that created and sustains the class action system.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Americans with Disabilities Act ("ADA") mandates the elimination of discrimination and expansion of access for individuals with disabilities. 42 U.S.C. § 12101 *et seq.* (2012). In the present case, there is no real dispute that many of the hotels owned by Defendant-Appellee Hospitality Properties Trust ("Appellee" or

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), Amici certify that this 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 the brief.

"HPT") violate the Equivalent Transportation Requirements of the ADA. The question of concern to Amici is whether the district court erred when it concluded Plaintiffs had not shown commonality in the absence of an explicit system-wide policy governing hotel transportation services, despite evidence that at least 128 out of Appellee's 142 hotels violated the ADA by failing to provide equivalent hotel transportation to guests who use wheelchairs.

Rule 23(b)(2) of the Federal Rules of Civil Procedure contemplates and provides for certification of classes challenging both action and *inaction* that violate the law. The drafters of Rule 23 specifically intended for this provision to facilitate civil rights class actions, like the one presently before the Court. The district court's order allows businesses, employers, and the State to escape class liability for civil rights violations simply by not implementing formal policies. The absence of a system-wide policy threatens to become a safe harbor from class liability for defendants who have otherwise violated the law through unlawful practices of inaction.

ARGUMENT

I. Class Actions Provide a Valuable Mechanism for Efficient Resolution of Aggregated Individual Claims.

Class actions provide "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court

at all." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotation marks omitted). The Supreme Court has observed:

> The aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of government. Where it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device.

Deposit Guar. Nat'l Bank, Jackson, Miss. v. Roper, 445 U.S. 326, 339 (1980).

To this end, Rule 23(b)(2) explicitly provides for class certification in situations that involve an established practice of inaction: "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." Fed. R. Civ. P. 23(b)(2) (emphasis added). The drafters of the modern Rule 23 made clear that one purpose of the rule was to facilitate civil rights class actions. The Rules Advisory Committee's Comment to Rule 23(b)(2) explains:

> Action or inaction is directed to a class within the meaning of this subdivision even if it has taken effect or is threatened only as to one or a few members of the class, provided it is based on grounds which have general application to the class. Illustrative are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.

Fed. R. Civ. P. 23, note to subdiv. (b)(2); *see also Amchem*, 521 U.S. at 614 ("Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples [of Rule 23(b)(2) cases].").

Class actions are particularly valuable in the case of putative classes seeking only injunctive relief under Rule 23(b)(2), as they challenge structural injustice and seek institutional reform. The present case is precisely the type of civil rights class action that the Rule 23 drafters contemplated: a defined group of individuals seeking only structural reform to remedy harm caused by the systemic inaction of a single actor in violation of the law.

The structural reform sought by Petitioners is simply not available through individual lawsuits. Single plaintiffs are limited in their ability to challenge equivalent transportation access violations across multiple hotels, while Petitioners submitted evidence that at least 128 out of 142 hotels that HPT owns violated the ADA. Order Denying Motion for Class Certification ("Order") 14, ECF No. 88. Many courts have held that class-wide relief is available only where there is a certified class. *See, e.g.*, *Zepeda v. U.S. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983) ("Without a properly certified class, a court cannot grant relief on a class-wide

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basis.").[2]

It is hard to imagine a scenario in which 128 individual cases addressing the same arguments and defenses, based on one federal statute, is more efficient than a single class action. Such a scenario also leaves Appellee vulnerable to incompatible rulings and directives across 128 hotels in up to 38 states. *See* Order 1, 14.

II. Class Actions Can and Must Continue to Provide Avenues for Challenging Systemic Inaction and Failure to Fulfill Duties Established by Civil Rights Laws.

Here, the district court recognized:

- "HPT acknowledges that each of its hotels must comply with the ADA." *Id.* at 12.
- HPT also acknowledged that it "—as the hotels' owner—is liable if an individual hotel violates that obligation." *Id.*
- "Plaintiffs' alleged injuries are fairly traceable to defendant's challenged conduct and . . . the alleged injury is redressable by the Court." *Id.* at 7.
- "[C]ommonality is satisfied where [a] lawsuit challenges a system-wide *practice* or policy that affects all of the putative class members." *Id.* at 14

[2] There are instances in which systemic relief has been ordered without a certified class. *See, e.g.*, *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1501-02 (9th Cir. 1996) (concluding an injunction is not overbroad because it extends benefits to persons other than the individual plaintiffs "*if such breadth is necessary to give prevailing parties the relief to which they are entitled*"); *Criswell v. W. Airlines, Inc.*, 709 F.2d 544, 558 (9th Cir. 1983), *aff'd*, 472 U.S. 400 (1985) (concluding that system-wide relief was properly granted where the court found the airline's policy violated the Age Discrimination in Employment Act).

(emphasis added) (quoting *Rosas v. Baca*, No. CV 12–00428 DDP (SHx), 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012)).

But the court then focused on whether HPT maintained a uniform policy relevant to the alleged violations, and whether the absence of such a policy violated the ADA. *Id.* at 12-14. Finding no "common offending policy" or violation arising from the absence of a policy, it concluded that Plaintiffs failed to establish commonality, as the only contemplated alternative was "142 trials within a trial." *Id*. at 12. The court's ruling contradicts both the language of Rule 23(b)(2) and governing case law, which allow certification of class actions challenging *practices* (not just policies) that have affected members of the class. It is Appellee's duty to ensure compliance with a substantive provision of the ADA that is at issue here.

Contrary to the district court's ruling, Plaintiffs are not limited to showing commonality through evidence that: (1) HPT enacted a specific policy that violated the ADA, or (2) HPT's failure to implement a policy violated a specific provision of the ADA. The framers of Rule 23 intended to facilitate civil rights class actions through the class action mechanism, *see supra* Section I, and civil rights statutes specifically target unlawful *practices*, *see, e.g.*, 42 U.S.C. § 12182 (2012) (the ADA requires public accommodations to make reasonable modifications of practices, as well as policies and procedures); 42 U.S.C. § 2000e-2 (2012) (Title VII of the Civil Rights Act of 1964 prohibits "unlawful employment practices");

29 U.S.C. § 623 (2012) (the Age Discrimination in Employment Act delineates employment practices that constitute unlawful age discrimination); 42 U.S.C. § 3604 (2012) (the Fair Housing Act prohibits discriminatory housing practices).

In accordance with the plain language and purpose of both Rule 23(b)(2) and civil rights statutes, commonality may be established on the basis of an alleged unlawful practice—including a practice of systemic inaction—that harms the putative class. *See, e.g.*, *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1162-63 (9th Cir. 2014) (affirming grant of class certification to employees who alleged defendant had "a practice or unofficial policy of requiring its claims adjusters to work unpaid off-the-clock overtime"); *Parsons v. Ryan*, 754 F.3d 657, 663 (9th Cir. 2014) (affirming grant of class certification where plaintiffs alleged "nearly a dozen specific . . . policies and practices, including inadequate staffing, outright denials of care, lack of emergency treatment, failure to stock and provide critical medication, grossly substandard dental care, and failure to provide therapy and psychiatric medication to mentally ill inmates"); *Rosas*, 2012 WL 2061694, at *3 (granting class certification when plaintiffs alleged that Los Angeles County Sheriff's Department's supervisors "knew of, and were deliberately indifferent to, a pattern or practice of deputies using or threatening violence against inmates and facilitating inmate-on-inmate violence").

After citing to *Rosas* for the proposition that "commonality is satisfied where [a] lawsuit challenges a system-wide practice or policy that affects all of the putative class members," Order 14 (quoting *Rosas*, 2012 WL 2061694, at *3), and recognizing both HPT's refusal to put into place practices or policies to ensure its hotels complied with the ADA and HPT's acceptance of liability for the conduct of its hotels, *see id.* at 13-14, the district court erred in concluding that there was no basis for a finding of commonality, *id*. at 15.

III. The District Court's Opinion, if Allowed to Stand, Will Undermine Class Actions Challenging Systemic Failures to Fulfill Legal Duties.

Courts in the Ninth Circuit and across the country have certified classes that challenge a uniform practice of inaction and failure to fulfill affirmative legal duties across multiple locations, even following the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). The district court's focus on the existence or absence of a formal policy threatens class actions based on systemic failures to comply with duties imposed by law.

There are many crucially important cases arising from unlawful practices that would become more challenging if the district court's ruling is allowed to stand. For example, in *Parsons v. Ryan*, cited by the district court, Order 12, thirteen state prisoners filed a class action against the Arizona Department of Corrections for failing to provide adequate health services to approximately 33,000 inmates in ten different prison facilities, 754 F.3d at 662. While the Arizona

Department of Corrections promulgated statewide policies governing health care and conditions of confinement, the prisoners alleged that these policies were inadequate and that they continued to face substantial risk of serious harm to which the Department was deliberately indifferent, including widespread practices of inadequate staffing and providing insufficient nutrition to inmates in solitary confinement. *Id.* at 662-64. In finding commonality, this Court focused on whether the Department fulfilled its overall duty to protect inmates from serious harm and identified the following example of a common question: "do ADC staffing policies and practices place inmates at a risk of serious harm?" *Id.* at 681.

Similarly, in *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015), the Fourth Circuit concluded that a practice of managerial inaction, in the face of substantial evidence of racial harassment and discrimination on the basis of race in promotions, supported a finding of commonality, *see id.* at 917. The court was not deterred by the fact that the class of African-American workers spanned six production departments in a steel plant. *Id.* at 898, 910-11. In *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. 2011), the District of Massachusetts upheld an earlier order granting certification of a class of "all children who are now or will be in the foster care custody of the Massachusetts Department of Children and Families as a result of abuse or neglect," *id.* at 31. The court concluded that the plaintiffs' allegations of "specific and overarching systemic

deficiencies within [the Massachusetts Department of Children and Families] that place children at risk of harm" "provide the 'glue' that unites Plaintiffs' claims," *id.* at 34.

In *DL v. District of Columbia*, 302 F.R.D. 1 (D.D.C. 2013), the district court found commonality on behalf of a class of District of Columbia residents and former preschool-age children with disabilities, holding:

> Where there is a statutory obligation to act, there is a significant difference between challenging the inadequacy or complete failure to enact policies and procedures and alleging an erroneous application of a policy to individuals. For this reason, even after *Wal-Mart*, courts have properly certified classes challenging uniform practices of failure or inaction.

Id. at 13. The court concluded that the commonality requirement was met on the basis that "each subclass alleges a uniform practice of failure that harmed every subclass member in the same way." *Id.*

If the district court's approach in this case were adopted, cases like *Parsons*, *Brown*, *Connor B.*, and *DL* may come out differently in the future. For example, class certification in *Parsons* could be opposed on the basis that the Arizona Department of Corrections's failure to maintain a policy of compliance with the Eighth Amendment did not violate any law unto itself. Conversely, applying the logic of *Parsons*, *Brown*, *Connor B.*, and *DL* here, the district court's analysis should have focused on whether Plaintiffs properly alleged and submitted significant proof that HPT maintained a system-wide practice of failing to comply

with the ADA's requirements that it ensure its hotels provide equivalent transportation to hotel guests who use wheelchairs.

In light of evidence of widespread violations of the ADA's Equivalent Transportation Requirements across at least 128 hotels, *see* Order 14, and HPT's admitted liability for any violations of the ADA by its hotels, *id.* at 12, HPT should not be permitted to avoid class liability in the absence of a formal company-wide policy.

CONCLUSION

For the foregoing reasons, Amici urge the Court to reverse the district court order denying class certification.

Dated: November 3, 2016

Respectfully submitted,

IMPACT FUND

By: *s/ Lindsay Nako*
Lindsay Nako

Attorneys for Amici Curiae Impact Fund et al.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Amici Curiae Impact Fund, *et al.*, hereby certifies that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B)(i). As measured by the word processing system used to prepare this brief, there are 2,507 words in this brief.

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a plain, roman-style typeface of at least 14-point or larger (Times New Roman, 14-point) using Word.

Dated: November 3, 2016

s/ Lindsay Nako
Lindsay Nako

Attorneys for Amici Curiae Impact Fund, et al.

CERTIFICATE OF SERVICE

Ninth Circuit Case Number 16-16269

I, Lindsay Nako, hereby 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 November 3, 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/ Lindsay Nako
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