UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CIVIL RIGHTS EDUCATION AND ENFORCEMENT CENTER, *et al.*, *Plaintiffs-Petitioners*, v. HOSPITALITY PROPERTIES TRUST, *Defendants-Respondents*.	Case No. 16-80055

MOTION OF IMPACT FUND, *et al.*, FOR LEAVE TO FILE BRIEF OF IMPACT FUND, *et al.*, AS *AMICI CURIAE* SUPPORTING PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL ORDER DENYING CLASS CERTIFICATION UNDER RULE 23(f)

Pursuant to Federal Rule of Appellate Procedure 29, the Impact Fund, Arizona Center for Disability Law, Disability Rights Advocates, Disability Rights California, Disability Rights Education and Defense Fund, Disability Rights Oregon, Legal Aid Association of California, Legal Aid Society – Employment Law Center, National Association of the Deaf, National Federation of the Blind, and Worksafe respectfully move for leave from the Court to file the accompanying brief as *amici curiae*. Proposed *amici* write in support of Plaintiffs' petition under Federal Rule of Civil Procedure 23(f) for permission to appeal the district court's April 15, 2016 class certification order. Plaintiffs-Petitioners Civil Rights

Education and Enforcement Center, *et al.*, consent to a filing from the proposed *amici*. Defendant-Respondent Hospitality Properties Trust does not consent.

In support of the motion and pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, proposed *amici* state their interest in this case and the reasons why the enclosed *amicus curiae* brief is desirable and relevant to its disposition:

1. The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for litigation to achieve economic and social justice. The Impact Fund provides funding for impact litigation, offers innovative training and support, and serves as counsel in impact litigation across the country. The Impact Fund has served as counsel in a number of major civil rights class actions, including cases challenging employment discrimination, wage-and-hour violations, lack of access for those with disabilities, and violations of fair housing laws. Through this work, the Impact Fund seeks to preserve class actions as an effective mechanism to target discrimination and effect structural reform and institutional change.

The **Arizona Center for Disability Law (ACDL)** is the federally designated Protection and Advocacy System for the State of Arizona that is tasked with assuring that the human and civil rights of persons with disabilities are protected. The ACDL advocates for the legal rights of persons with disabilities to be free from abuse, neglect, and discrimination and to have access to those services

necessary to maximize their independence and achieve equality. In this work, the ACDL pursues a range of legal remedies on behalf of persons with disabilities.

Disability Rights Advocates (DRA) is one of the leading non-profit, disability rights legal centers in the nation. Its mission is to advance equal rights and opportunity for people with all types of disabilities nationwide. DRA identifies and dismantles barriers in partnership with a broad spectrum of local and national client organizations, representing people with the full spectrum of disabilities, including mobility, sensory, cognitive and psychiatric disabilities. DRA represents these organizations in complex, systems-change litigation with a focus on class actions.

Disability Rights California (formerly known as Protection and Advocacy, Inc.) is a non-profit agency established under federal law to protect, advocate for, and advance the human, legal, and service rights of Californians with disabilities. Disability Rights California works in partnership with people with disabilities, striving towards a society that values all people and supports their rights to dignity, freedom, choice, and quality of life. Since 1978, Disability Rights California has provided essential legal services to people with disabilities. In the last year, Disability Rights California provided legal assistance on more than 25,000 matters to individuals with disabilities, many of whom were requesting assistance because they were experiencing accessibility barriers at places of public accommodation

and public services within their communities, despite longstanding federal and state accessibility requirements. Disability Rights California has extensive policy and litigation experience securing the rights of people with disabilities to public accommodations, housing, and employment, including the enforcement of rights protected by the Americans with Disabilities Act.

The **Disability Rights Education & Defense Fund (DREDF)** is a national non-profit law and policy organization dedicated to protecting and advancing the civil rights of people with disabilities. Based in Berkeley, California, DREDF has remained board- and staff-led by people with disabilities since its founding in 1979. DREDF pursues its mission through education, advocacy, and law reform efforts, and is nationally recognized for its expertise in the interpretation of federal disability civil rights laws. As part of its mission, DREDF works to ensure that people with disabilities have the legal protections, including effective legal remedies, necessary to vindicate their right to be free from discrimination.

Disability Rights Oregon (DRO) is a federally funded law office charged with protecting the rights of people with disabilities in Oregon. It is part of a network of disability rights offices in all 50 states, the District of Columbia, and federal territories. One of DRO's Goals and Priorities is "removing significant access barriers . . . with an emphasis on barriers affecting many people in education, transportation, and the court system," in order to ensure that Oregonians

with disabilities have full access to their communities. A great deal of the work done by DRO is enforcing the rights of its clients under the Americans with Disabilities Act.

The **Legal Aid Association of California (LAAC)** is a statewide membership association of more than eighty non-profit public interest law organizations, all of which provide free civil legal services to low-income persons and communities throughout California. LAAC's member organizations provide legal assistance on a broad array of substantive issues, including but not limited to general poverty law, disability rights, and fair housing. LAAC and its member organizations also serve a wide range of low-income and vulnerable populations. Low-income litigants, with the help of legal aid, use class action litigation to redress important cases involving discrimination and other harms. LAAC, therefore, has a strong interest in the Court's decision on this issue.

The **Legal Aid Society – Employment Law Center (LAS-ELC)** is a non-profit public interest law firm founded in 1916 whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities. The LAS-ELC has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBT community, and the working poor. The LAS-ELC has represented, and continues to represent, clients faced with discrimination on the

basis of their disabilities, including those with claims brought under the Americans with Disabilities Act and the Fair Employment and Housing Act. The LAS-ELC has also filed *amicus* briefs in cases of importance to persons with disabilities.

The **National Association of the Deaf (NAD)**, founded in 1880, is the oldest civil rights organization in the United States, and is the nation's premier organization of, by and for deaf and hard of hearing individuals. The mission of the NAD is to preserve, protect, and promote the civil, human, and linguistic rights of 48 million deaf and hard of hearing individuals in the country. The NAD endeavors to achieve true equality for its constituents through systemic changes in all aspects of society including but not limited to education, employment, and ensuring full access to programs and services. Serving all parts of the USA, the NAD is based in Silver Spring, MD and more information is available at: www.nad.org.

The **National Federation of the Blind (NFB)** is the largest organization of blind and low-vision people in the United States. Founded in 1940, the NFB has grown to over fifty-thousand members. The organization consists of affiliates and local chapters in every state, the District of Columbia, and Puerto Rico. The NFB devotes significant resources toward advocacy, education, research, and development of programs to integrate the blind into society on terms of equality and independence, and to remove barriers and change social attitudes, stereotypes,

and mistaken beliefs about blindness that result in the denial of opportunity to blind people. The NFB actively engages in litigation and advocacy to protect the civil rights of the blind under our nation's laws.

Worksafe advocates for protective worker health and safety laws and effective remedies for injured workers through the legislature and courts. Worksafe is also a Legal Support Center funded by the State Bar Legal Services Trust Fund Program to provide advocacy, technical and legal assistance, and training to the legal services projects throughout California that directly serve California's most vulnerable low-wage workers. Millions of low-wage workers often toil long hours in harsh and hazardous work environments in California. Many of these workers become injured and disabled as a result of workplace injuries. Worksafe is committed to ensuring that legal remedies are effective, affordable, and accessible for all workers and individuals who face a disability and for whom ADA compliance is important and essential.

2. Plaintiffs' Petition for Permission to Appeal Order Denying Class Certification Under Rule 23(f) presents important issues bearing on class certification generally, and in civil rights cases in particular. The district court's decision below diverges from the plain language of Rule 23(b)(2), which specifically contemplates class actions based on a defendant's "refus[al] 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). It also departs from case law from this Circuit and others, certifying classes challenging defendants' uniform practice of inaction and failure to fulfill affirmative legal duties. *See, e.g.*, *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015); *Parsons v. Ryan*, 754 F.3d 657 (9th Cir. 2014); *DL v. District of Columbia*, 302 F.R.D. 1 (D.D.C. 2013); *Rosas v. Baca*, No. CV 12–00428 DDP (SHx), 2012 WL 2061694 (C.D. Cal. June 7, 2012); *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. 2011). Finally, the district court's order denying class certification 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 public's ability to challenge civil rights violations and seek structural reform through class actions.

3. By reason of their members' significant participation in and support of civil rights litigation, proposed *amici* offer a unique perspective on the important role Rule 23 plays in private enforcement of civil rights statutes, as well as the potential adverse consequences of impairing individuals' ability to pursue class action remedies under these laws. *See Miller-Wohl Co. v. Comm'r of Labor & Indus. State of Mont.*, 694 F.2d 203, 204 (9th Cir. 1982) (noting "the classic role of

amicus curiae" includes "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration").

4. 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).

5. Proposed *amici* are not parties to this action. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), proposed *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.

6. *Amici*'s proposed brief is timely because *amici* are filing the brief within seven days of the April 29, 2016 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 20 pages authorized for Plaintiffs' petition. *See* Fed. R. App. P. 5(c); Fed. R. App. P. 27(d)(2).

Dated: May 6, 2016

Respectfully submitted,

By: *s/ Lindsay Nako*

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CERTIFICATE OF SERVICE

Ninth Circuit Case Number 16-80055

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 May 6, 2016.

I further certify that I mailed the foregoing document by U.S. Mail, postage prepaid, to the following:

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No. 16-80055

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-Petitioners,

v.

HOSPITALITY PROPERTIES TRUST,
Defendant-Respondent.

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

BRIEF OF IMPACT FUND, *et al.*, AS *AMICI CURIAE* SUPPORTING PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL ORDER DENYING CLASS CERTIFICATION UNDER RULE 23(f)

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INTEREST OF *AMICI CURIAE*[1]

Pursuant to Federal Rule of Appellate Procedure 29(a), Impact Fund and ten fellow non-profit organizations respectfully submit this brief in support of Plaintiffs Civil Rights Education and Enforcement Center, *et al.* ("Petitioners"), and urge the Court to grant the pending Petition for Permission to Appeal Order Denying Class Certification Under Rule 23(f). A brief description of each *amicus* organization and its interest is set forth in the attached Motion for Leave to File.

Amici respectfully submit this brief to emphasize the importance of reviewing the district court's ruling. As described in detail below, the district court's denial of class certification diverges 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 Respondent Hospitality Properties Trust ("Respondent" 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 here is whether the district court erred when it found no commonality because of the lack of a uniform, system-wide policy governing hotel transportation services.

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.

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 a 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].").

The value of class actions is particularly acute 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.[2] *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 basis.").

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 Respondent vulnerable to

[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).

incompatible rulings and directives across 128 hotels in as many as 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." Order 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." Order 14 (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 went awry when it focused on whether there was a narrow duty to implement a policy of compliance with the ADA. Finding no such duty in the statute, it concluded that Plaintiffs failed to establish commonality. *Id*. 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 Respondent's duty to ensure compliance with the ADA that is at issue here.

Contrary to the district court's ruling, Plaintiffs are not limited to alleging

either: (1) Respondent had a specific policy that violated the ADA, or (2) Respondent'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 Americans with Disabilities Act requires public accommodations to make reasonable accommodations in 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").

Despite 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 Respondent's refusal to put into place practices or policies to ensure its hotels complied with the ADA and Respondent's acceptance of liability for the conduct of its hotels, *see id.* at 13-14, the district court somehow then concluded 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.

Following *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), courts in the Ninth Circuit and across the country have continued to certify classes that challenge a uniform practice of inaction and failure to fulfill affirmative legal duties. The district court's commonality analysis ignored Respondent's

acknowledged responsibility to ensure its hotels comply with the ADA, instead focusing on whether Respondent's failure to "maintain and enforce a policy regarding accessible transportation at the [real estate investment trust] level" itself violated any governing authority. Order 12. Ignoring Respondent's affirmative duty and instead focusing on whether it implemented a formal policy of compliance misses the forest for the trees, and threatens class actions based on systemic failures to comply with duties imposed by law.

There are many crucially important cases 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.

In *Brown v. Nucor Corp.*, 785 F.3d 895 (4th Cir. 2015), the Fourth Circuit recently found a practice of managerial inaction, in the face of substantial evidence of racial harassment and discrimination in promotions on the basis of race, supported a finding of commonality, *see id.* at 917. In *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30 (D. Mass. 2011), the District of Massachusetts reviewed a previous class certification order in light of *Wal-Mart* and concluded "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 allege[d] 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, the challenge in *Parsons* would be defensible on the basis that the Eighth Amendment does not require specific levels of staffing or nutrition provided to inmates. Conversely, applying the logic of *Parsons*, *Brown*, *Connor B.*, and *DL* here, the district court's analysis should have focused on whether Respondent fulfilled the duty imposed by the ADA to ensure its hotels provide equivalent transportation to hotel guests who use wheelchairs.

In light of evidence of widespread violations of the ADA across more than 125 hotels, *see* Order 14, and Respondent's admitted liability for any violations of the ADA by its hotels, *id.* at 12, Respondent should not be permitted to avoid class liability solely because it did not implement a formal company-wide policy.

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant Plaintiffs' Petition for Permission to Appeal Order Denying Class Certification Under Rule 23(f).

Dated: May 6, 2016

Respectfully submitted,

THE IMPACT FUND

By: *s/ Lindsay Nako*
Lindsay Nako

Attorneys for Amici Curiae Impact Fund et al.

CERTIFICATE OF COMPLIANCE

1. This amicus brief complies with the requirements of Fed. R. App. P. 29(d) because it is no more than half the maximum length of 20 pages authorized by Fed. R. App. P. 5(c) and Fed. R. App. P. 27(d)(2) for the Plaintiffs' petition for permission to appeal.

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 proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: May 6, 2016

s/ Lindsay Nako
Lindsay Nako

Attorneys for Amici Curiae Impact Fund, et al.

CERTIFICATE OF SERVICE

Ninth Circuit Case Number 16-80055

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 May 6, 2016.

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