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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

LORI GRAY, et al.

No. C-08-00722 -EDL

Plaintiffs,

**ORDER GRANTING MOTION FOR
CLASS CERTIFICATION**

v.

GOLDEN GATE NATIONAL
RECREATIONAL AREA, et al.

Defendants.

I. Introduction

By way of this Motion for Class Certification, individual plaintiffs Lori Gray, Peter Mendoza, Ann Seick, and Marc Sutton and institutional plaintiff California Council of the Blind seek to certify a class defined as: “All persons with mobility and/or vision disabilities who are being denied programmatic access under the Rehabilitation Act of 1973 due to barriers at park sites owned and/or maintained by Golden Gate National Recreation Area. For the purpose of class certification, persons with mobility disabilities are those who use wheelchairs, scooters, crutches, walkers, canes, or similar devices to assist their navigation. For the purpose of class certification, persons with vision disabilities are those who due to a vision impairment use canes or service animals for navigation.”¹

Plaintiffs seek injunctive relief only under Federal Rule of Civil Procedure 23(b)(2). Defendants Golden Gate National Recreation Area (“GGNRA”) and the National Park Service (“NPS”) do not dispute that Plaintiffs have satisfied the numerosity and adequacy requirements for

¹ The parties stipulated to this revised class definition after the hearing, except that the Court substituted “For the purpose of” in the third sentence in lieu of “For purposes of” to make it consistent with the second sentence.

1 class certification. Instead, they contend that no class may be certified because individualized
2 attributes of different park assets, differences in disabilities across the proposed class, and
3 differences in the efficacy and reasonableness of any remedial accommodations all preclude a
4 finding of commonality or typicality. Defendants further argue that no class should be certified
5 because class wide injunctive relief is unavailable and no injunction complying with both Federal
6 Rules of Civil Procedure 23 and 65 could be fashioned. For the following reasons, the Motion for
7 Class Certification is GRANTED.

8 **II. Factual Background**

9 **A. The Rehabilitation Act of 1973**

10 Plaintiffs' sole claim alleges a violation of Section 504 of the Rehabilitation Act of 1973
11 ("Section 504"), 29 U.S.C. § 794. This statute provides in pertinent part that "No . . . individual
12 with a disability . . . shall, solely by reason of her or his disability, be excluded from the
13 participation in, be denied the benefits of, or be subjected to discrimination . . . under any program
14 or activity conducted by any Executive agency." To prove a violation of section 504, Plaintiffs must
15 show that: (1) they are disabled within the meaning of the Rehabilitation Act; (2) they are otherwise
16 qualified; (3) they were excluded from, denied the benefit of, or subject to discrimination under a
17 program or activity; and (4) the program or activity is carried out by a federal executive agency or
18 with federal funds. American Council of the Blind v. Paulson, 525 F.3d 1256, 1266 (D.C. Cir.
19 2008).

20 It is undisputed that the GGNRA and the NPS are subject to Section 504. It is also
21 undisputed that Plaintiffs and the proposed class are persons with disabilities who are qualified to
22 participate in the programs and activities at issue. Therefore, the primary issue in this case is
23 whether they were excluded from, denied the benefit of, or subject to discrimination under a
24 program or activity. Further, Defendants may assert an affirmative defense that accommodating the
25 plaintiffs' disabilities would constitute an undue burden. In class actions claiming systemic
26 violations of Section 504, in some cases Courts have ordered system-wide injunctive relief under
27 Section 504. See, e.g., Armstrong v. Davis, 275 F.3d 849, 870-72 (9th Cir. 2001), abrogated on
28 other grounds as recognized by Harris v. Alvarado, No. 08-16860, 2010 WL 4296636, at *1 (9th Cir.
Oct. 28, 2010).

B. Plaintiffs

1 **B. Plaintiffs**
2 Organizational Plaintiff California Council of the Blind (“CCB”) is a non-profit
3 organization composed of Californians who are blind or have low vision. The mission of CCB is to
4 gain full independence and equality of opportunity for all blind and visually disabled Californians.
5 Appendix of Plaintiffs’ and Class Members’ Declarations (“Appx.”), Ex. I (Lozano Decl.) ¶ 4; Third
6 Amended Complaint (“TAC”) ¶ 16. Several CCB members have experienced access barriers at
7 GGNRA parks. See Appx. Ex. A (Buchmann-Garcia Decl.); Lozano Decl. ¶¶ 11-13; Appx. Ex. C
8 (Donovan Decl.); Appx. Ex. G (Knudson Decl.); Appx. Ex. K (Moses Decl.) Decl. ¶¶ 1, 3.

9 The individual named Plaintiffs all have visual and/or mobility disabilities and have
10 experienced access barriers at GGNRA parks in approximately the last ten years. Lori Gray has both
11 visual and mobility disabilities and has encountered numerous access barriers at multiple GGNRA
12 parks. Appx. Ex. E (Gray Decl.) ¶¶ 1, 4-26; TAC ¶ 12. Peter Mendoza has mobility disabilities and
13 uses a wheelchair, and has experienced multiple access barriers at multiple GGNRA parks. Appx.
14 Ex. J (Mendoza Decl.); TAC ¶ 13. Ann Sieck has a mobility disability and uses a wheelchair and has
15 encountered multiple access barriers at multiple GGNRA parks. Sieck Decl. ¶¶ 1, 3; TAC ¶ 14.
16 Marc Sutton is blind and has encountered multiple access barriers at multiple GGNRA parks. Appx.
17 Ex. P (Sutton Decl.) ¶¶ 1, 6-13; TAC ¶ 15. Mr. Sutton has also experienced barriers trying to access
18 the GGNRA website using his screen access software. Sutton Decl. ¶ 13.

19 In their TAC, Plaintiffs allege that Defendants have systematically discriminated against
20 them on the basis of their vision and/or mobility disabilities by failing to provide adequate
21 accommodations. None of the named Plaintiffs claim to have encountered all of the alleged barriers
22 at all of the GGNRA parks at issue in this litigation, and instead each has only encountered a subset
23 of the barriers at some of the parks within the GGNRA. See Appx. Exs. E, I, J, O. Many of the
24 barriers that Plaintiff’s seek to have remedied have not been encountered by any named Plaintiff,
25 and the named class Plaintiffs do not claim to have yet been injured by them. Id. Plaintiffs’ TAC
26 seeks “an order enjoining Defendants from violating Section 504(a) of the Rehabilitation Act,” and a
27 declaration that GGNRA is being operated in a discriminatory manner and fails to provide required
28 access, as well as costs and fees. TAC at pages 16-17. Their motion for class certification refers to
“thousands” of barriers that they seek to have remediated. See Motion at 1, 10.

1 **C. Golden Gate National Recreation Area**

2 Among the world’s largest urban national parks, GGNRA consists of a number of
3 park areas encompassing more than 75,000 acres bordering the California coastline for nearly sixty
4 miles in and around the San Francisco Bay Area. TAC ¶ 2. GGNRA has been described as the
5 “backyard” of Bay Area residents, but also attracts approximately 20 million visitors from around
6 the United States and the world. Pl.’s Request for Judicial Notice (“Pl.’s RJN”) Exs. A, B. GGNRA
7 is comprised of at least 36 separate park units, and boasts “a huge variety of natural and cultural
8 resources and different ecological zones that will interest almost anyone.” *Id.* Ex. E, F.

9 **D. GGNRA’s Accessibility Compliance**

10 Section 504 of the Department of Interior (“DOI”) regulations required that by March 1988,
11 all entities within the DOI prepare self-evaluation and transition plans covering their policies,
12 practices, and facilities. 43 C.F.R. §§ 17.510 & 17.550(d). The plans were required to: (1) identify
13 physical obstacles in the agency’s facilities that limit the accessibility of its programs or activities to
14 disabled persons; (2) describe in detail the methods that will be used to make the
15 facilities accessible; and (3) specify the schedule for taking the steps necessary to achieve
16 compliance and, if the time period of the transition plan is longer than one year, identify steps
17 that will be taken during each year of the transition period. *Id.* § 17.550(d). GGNRA developed a
18 plan that purported to identify accessibility barriers and solutions for making the facilities and
19 programs at issue accessible.²

20 In 2000, an individual named Mr. De La O was designated to perform the duties of
21 Accessibility Coordinator for GGNRA. Elsberry Decl. Ex. A (De La O Depo.) 9:16-13:6. Mr. De
22 La O discovered that some of the information in the 1988 transition plan was obsolete and/or
23 inaccurate. *Id.* at 27:9-27:12; 34:10-34:25 (plan excluded issue of access to trails or beaches); 35:2-
24 36:1 (as of 2000, too many inaccessible GGNRA facilities to mention). He prepared a December

25
26 ²Plaintiff’s expert opines that the 1988 plan was inadequate because it failed to meaningfully
27 address how to make many of GGNRA’s programs, facilities, and activities programmatically
28 accessible, did not address various barriers, was impermissibly vague, and contemplated work that was
never completed. See Declaration of Peter Margen (“Margen Report”) at 4; see also Elsberry Decl. Ex.
B (Dean Depo.) 98:25-99:22; Ex. A (De La O Depo.) 77:6-78:13 (GGNRA officials do not know if
recommended work was ever completed or if there is funding for the work).

1 2000 update to the 1988 transition plan. The updated plan did not address trails and
2 beaches, and focused on certain features such as entrances, restrooms, and parking. De La O
3 Dep. 35:2-35:12; Margen Report 4. The updated plan also did not fully assess GGNRA's "park
4 partners." De La O Depo. 112:4-112:7. Plaintiffs define these as outside entities that operate and/or
5 provide facilities, programs, or services at GGNRA parks, and Defendants have not disputed this
6 definition.

7 In 2006, NPS began discussions with the National Center on Accessibility ("NCA") to
8 conduct physical and programmatic assessment of its programs, policies, and facilities. De La O
9 Dep. 51:10-52:13, 83:17-84:5. However, NCA assessment work did not begin until 2007 in part
10 because of funding issues, communication with Washington D.C., and because Mr. De La O was not
11 certified to oversee cooperative and task agreements such as the one with NCA. *Id.* 52:14-52:23. In
12 early 2007, as part of an agreement between the parties to facilitate settlement of this action, NPS
13 and NCA entered into an arrangement pursuant to which NCA would conduct an evaluation and
14 prepare a transition plan for all GGNRA policies, facilities, and programs. *Id.* 51:10-52:13; Dkt. No.
15 33 (MOU) at 2-3.³ NCA was not provided with the 1988 transition plan or the 2000 updated plan so
16 that NCA would start from scratch. De la O Depo. 83:17-84:5. On January 31, 2008, Plaintiffs filed
17 this action, following over a year of pre-litigation negotiations. By 2008, less than half of the
18 barriers identified in the updated plan had been remedied. De La O Dep. 78:14-78:21.

19 In November 2008, the parties to this action executed a Memorandum of Understanding
20 ("MOU"). *See* Dkt. No. 33. The MOU divided GGNRA into six "phases," and called for an
21 assessment by NCA of GGNRA's facilities and policies to identify those barriers and conditions that
22 needed to be remedied to meet the requirements for program access under Section 504, and propose
23 remedies to such barriers. MOU 2-3. The assessments for Phases I and II were completed in June
24

25 ³Defendants challenge Plaintiff's label of NCA as "Defendants' expert" and do not concede the
26 reliability of NCA's methods or the accuracy of these opinions. However, Plaintiffs point out that NCA
27 was hired before this litigation began and has had an agreement with NPS since 1992. *See* Elsberry
28 Reply Decl Ex. B at 35. One of the two employees assigned to NPS' Accessibility Management
Program works on-site at NCA. Ellis Depo. at 107-108. Further, NPS engaged NCA to work on the
GGNRA project and jointly prepared the draft transition plans for Phases I and II. Elsberry Reply Decl.
Ex. B at 19-20. Thus, Plaintiffs have some basis for that characterization. In any case, as discussed
elsewhere, several of the reports prepared by NCA are relevant and have been considered in connection
with this motion as discussed below.

1 2009, and NCA prepared written reports of these assessments prioritizing barriers according to a
2 three-level system (“minor,” “serious,” or “critical”) developed by NPS. Elsberry Decl. Ex. C; De
3 La O Depo. 119:8-119:22. The assessment identified numerous access barriers, many of which were
4 found to be serious or critical, and recommended solutions for most of the barriers and a proposed
5 remediation timetable. Elsberry Decl. Ex. C. Based on these assessments, Defendants prepared a
6 draft transition plan for Phases I and II. Elsberry Decl. Ex. D. Thereafter, NCA conducted an
7 assessment of facilities included in Phase III and prepared a report in February 2010 identifying
8 numerous serious and critical access barriers and recommended solutions for most of the barriers
9 and a proposed remediation timetable. Elsberry Decl. Ex. E.

10 In July 2010, NCA also prepared a draft self-evaluation of GGNRA’s park-wide policies and
11 procedures and recommended necessary changes in such policies and procedures. *Id.* Ex. F. This
12 assessment found approximately thirty system-wide deficiencies in policies and procedures relating
13 to, among others: unavailability of public information on accessibility features and services, park
14 partners and permitted groups’ lack of understanding and commitment to accessibility and lack of
15 assessment of their compliance with accessibility requirements, lack of training on procedures for
16 accommodating the disabled during emergency situations, failure to consider needs of disabled in
17 new and existing programs, lack of oversight, lack of accessible orientation and exhibit information,
18 failure to apply accessibility standards in new construction, and inconsistent maintenance and
19 inspection of accessible trails. *Id.* The individual in charge of NCA’s assessment and planning for
20 GGNRA, Sherril York, has testified that, though not final, the substance of the findings in the July
21 2010 report will not change. Elsberry Decl. Ex. G (York Depo.) 148:12-149:3.3.

22 After completion of the Phase III assessments, NCA conducted a Phase IV assessment of
23 barriers at trails in different park areas within GGNRA, and prepared a draft report that identified
24 programmatic barriers and recommended solutions. Elsberry Decl. Ex. H; York Dep. 74:6-74:20.
25 Thereafter, settlement discussions between the parties ceased, and Plaintiffs therefore do not know
26 whether NCA will perform assessments of Phases V and VI.⁴ Plaintiff’s expert has conducted

27
28 ⁴Under the MOU, Phase VI does not identify particular park areas but includes facilities not assessed in prior phases. Plaintiffs state that they are not aware of anything that would be included in Phase VI, so the areas to be assessed in Phase V are the only areas have not yet been the subject of written transition planning by NCA.

1 “sample inspections” of Phase V locations and found barriers at every sampled location. Margen
2 Report 5-6, 10-18. Mr. Margen has concluded that virtually no trails in GGNRA meet the standards
3 for disability access, and all but a very few are entirely unusable by people with significant mobility
4 disabilities. See Elsberry Decl. Ex. H; Margen Report 7-8. He further concludes that GGNRA
5 beaches lack a “beach access route” needed by people with mobility disabilities. See Margen Report
6 8. Similarly, he believes that the exhibits contained in the various GGNRA park units are largely
7 inaccessible to people with vision disabilities. Id. Further, Plaintiff’s technology expert contends
8 that the park’s website and that of its partner that oversees park programs, the Golden Gate National
9 Parks Conservancy, contain insufficient information regarding the accessibility of GGNRA
10 numerous programs and activities and are inaccessible to the vision disabled. See Belser Decl.

11 Based on the NCA assessments and the sample inspections by Plaintiff’s expert, Plaintiffs
12 contend that there are thousands of access barriers requiring remediation. See De La O. Depo.
13 143:3-143:9 (acknowledging that Phases I and II alone will require thousands of barrier removal
14 projects); Elsberry Decl. Ex. F (York Depo.) 49:15-55:6, 60:10-60:15 (implementing a solution to
15 eliminate or provide alternative means of access for *all* barriers identified by NCA in Phases I
16 through III that are publicly accessible is necessary to ensure program access); Margen Report 5-6,
17 Ellis Depo. 152 (barriers categorized as “serious” or “critical” must be remediated); De La O Dep.
18 120:3-120:7 (barriers categorized as “critical” must be remediated). They further contend that
19 GGNRA’s failure to initiate a plan until 2007 or ever complete self-evaluation and transition
20 planning, an obligation which they acknowledge is *not* privately enforceable, is further evidence of
21 Defendants’ systemic failure to comply with accessibility obligations. See *Cherry v. City College of*
22 San Francisco, 2005 WL 2620560, at *4 (N.D. Cal. Oct. 14, 2005) (failure to comply with self-
23 evaluation and transition-plan regulations may be evidence of discrimination even if the regulations
24 are not privately enforceable).

25 According to Plaintiffs, most of the previously-identified access barriers have not been
26 remedied and there is no clear plan for remediation. With respect to Phases I and II, approximately
27 fifty percent of the “critical” barriers have been remedied but substantial work remains to be done.
28 De La O Depo. 153:24-154:3, 162:23-164:23.). Plaintiffs believe that no work has been done with
respect to the subsequent phases. Defendants are unable to identify which GGNRA facilities and

1 programs are currently accessible. Paradis Decl. ¶ 8 (relating to GGNRA discovery response on this
 2 point). There is no firm plan for implementing the required work and funding for such work is
 3 uncertain. De La O Depo. 140:1-143:2, 141:9-142:16; Dean Depo.20:24- 26:14, 39:7-40:12, 94:3-
 4 95:19, 98:21-99:15; Ellis Depo. 96, 205; Shaeffer Depo. 86-89. Plaintiffs also contend that GGNRA
 5 fails to properly maintain existing access features for visitors with mobility and vision disabilities.
 6 Margen Report 8; Elsberry Decl. Ex. F at 12-13. There are declarations from named Plaintiffs and
 7 other disabled members of the proposed class describing instances where access barriers interfered
 8 with and denied them opportunities to experience GGNRA programs and facilities, including
 9 restrooms, parking, trails, beaches, walkways, information and exhibits, and natural and cultural
 10 structures and features. See generally Gray Decl.; Mendoza Decl.; Sheldon Decl.; Sieck Decl.;
 11 Williams Decl.; Church Decl.; Donovan Decl.; Elliot Decl.; Buchmann-Garcia Decl.;
 12 Hall Decl.; Largent Decl.; Sutton Decl.; Theriault Decl.; Moses Decl.; Mueller Decl. Decl.; Van
 13 Allen Decl.; Knudson Decl.; Lozano Decl.; Rubke Decl. (all contained in Plaintiff's Appendix of
 14 Declarations).

15 In their Reply, Plaintiffs point to additional evidence that, while not specifically addressing
 16 the GGNRA, Plaintiffs contend shows a general policy or practice of failure of the NPS to comply
 17 with the Rehabilitation Act, including a 2000 Report entitled "Improving Access to Outdoor
 18 Recreational Activities on Federal Lands" prepared by a third party which found systemic
 19 deficiencies in a number of entities including NPS. Elsberry Reply Decl. Ex. C at I, 31-37.
 20 Plaintiffs also refer to a memo from the Director of NPS in 2006, in which he admitted that NPS was
 21 falling short in meeting the minimum amount of access required by law and stated that there needed
 22 to be more accountability. Elsberry Reply Decl. Ex. D at 1.

23 **III. Legal Standard**

24 Plaintiffs seeking to represent a class must satisfy the threshold requirements of Rule 23(a) as
 25 well as the requirements for certification under one of the subsections of Rule 23(b). Rule 23(a)
 26 provides that a case is appropriate for certification as a class action if:

- 27 (1) the class is so numerous that joinder of all members is impracticable;
- 28 (2) there are questions of law or fact common to the class;
- (3) the claims or defenses of the representative parties are typical of the claims or
 defenses of the class; and
- (4) the representative parties will fairly and adequately protect the interests of the

1 class.

2 Fed. R. Civ. P. 23(a). Plaintiffs seek class certification under Rule 23(b)(2), which provides that a
3 case may be certified as a class action if “the party opposing the class has acted or refused to act on
4 grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory
5 relief is appropriate respecting the class as a whole.”

6 A plaintiff seeking class certification bears the burden of demonstrating that each element of
7 Rule 23 is satisfied, and a district court may certify a class only if it determines that the plaintiff has
8 met its burden. See General Tel. Co. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw.
9 Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). While the primary focus is not on the merits of the
10 plaintiff’s claims, the Supreme Court has recently recognized that:

11 sometimes it may be necessary for the court to probe behind the pleadings before
12 coming to rest on the certification question,” 457 U.S., at 160, 102 S.Ct. 2364,
13 and that certification is proper only if “the trial court is satisfied, after a rigorous
14 analysis, that the prerequisites of Rule 23(a) have been satisfied,” *id.*, at 161, 102
15 S.Ct. 2364; see *id.*, at 160, 102 S.Ct. 2364 (“[A]ctual, not presumed, conformance
16 with Rule 23(a) remains ... indispensable”). Frequently that “rigorous analysis”
17 will entail some overlap with the merits of the plaintiff’s underlying claim. That
18 cannot be helped. “[T]he class determination generally involves considerations
19 that are enmeshed in the factual and legal issues comprising the plaintiff’s cause
20 of action.” Falcon, supra, at 160, 102 S.Ct. 2364 (quoting Coopers & Lybrand v.
21 Livesay, 437 U.S. 463, 469, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978); some internal
22 quotation marks omitted). Nor is there anything unusual about that consequence:
23 The necessity of touching aspects of the merits in order to resolve preliminary
24 matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation. See Szabo
25 v. Bridgeport Machines, Inc., 249 F.3d 672, 676–677 (C.A.7 2001) (Easterbrook,
26 J.).

27 Wal-Mart Stores, Inc. v. Dukes, 121 S.Ct. 2541, 2551-52 (2011). To satisfy itself that class
28 certification is proper, the Court may consider material beyond the pleadings and require
supplemental evidentiary submissions by the parties. Blackie v. Barrack, 524 F.2d 891, 901 n. 17
(9th Cir.1975). Ultimately, it is in the district court’s discretion whether a class should be certified.
See Molski v. Gleich, 318 F.3d 937, 946 (9th Cir. 2003).

25 IV. Analysis

26 A. Class definition

27 As a threshold matter, before reaching the requirements of Rule 23, the party seeking class
28 certification must demonstrate that an identifiable and ascertainable class exists. See Mazur v. eBay,
Inc., 257 F.R.D. 563, 567 (N.D. Cal. 2009). “An implied prerequisite to certification is that the class

1 must be sufficiently definite.” Whiteway v. FedEx Kinko’s Office & Print Servs., Inc., 2006 WL
 2 2642528, at *3 (N.D. Cal.2006). “A class definition should be precise, objective, and presently
 3 ascertainable,” though “the class need not be so ascertainable that every potential member can be
 4 identified at the commencement of the action.” O’Connor v. Boeing N. Am., Inc., 184 F.R.D. 311,
 5 319 (C.D. Cal.1998) (internal quotations omitted).

6 Plaintiffs propose a class consisting of : “All persons with mobility and/or vision disabilities
 7 who are being denied programmatic access under the Rehabilitation Act of 1973 due to barriers at
 8 park sites owned and/or maintained by Golden Gate National Recreation Area. For the purpose of
 9 class certification, persons with mobility disabilities are those who use wheelchairs, scooters,
 10 crutches, walkers, canes, or similar devices to assist their navigation. For the purpose of class
 11 certification, persons with vision disabilities are those who due to a vision impairment use canes or
 12 service animals for navigation.” There is no dispute between the parties that this definition states an
 13 identifiable and ascertainable class of vision and mobility impaired individuals who are being denied
 14 access to various portions of the GGNRA.

15 **B. Rule 23(a)**

16 **1. Numerosity**

17 For a class to be certified, it must be so numerous that joinder of all members individually is
 18 “impracticable.” See Fed. R. Civ. P. 23(a)(1). When evaluating numerosity, courts should consider
 19 the number of class members, whether their identities are known, the geographical diversity of class
 20 members, the ability of individual claimants to institute separate suits, and whether injunctive relief
 21 is sought. See William W. Schwarzer, et al., Federal Civil Procedure Before Trial, §§
 22 10:260-10:264 (Rutter Group 2009). Here, Plaintiffs have presented undisputed evidence from
 23 which it can reasonably be deducted that thousands of people from all over the country with mobility
 24 and/or vision disabilities visit GGNRA each year, or are deterred from visiting due to the alleged
 25 barriers. See Pl.’s RJN Ex. H (approximately 4.4% of the population is vision or mobility impaired);
 26 Ex. A (more than 20 million people visit GGNRA annually). Defendants do not dispute that
 27 Plaintiffs have satisfied the numerosity requirement.

28 **2. Commonality and Typicality**

Rule 23(a)(2) requires the existence of “questions of law or fact common to the class.” This

1 standard is not strictly construed:

2 Rule 23(a)(2) has been construed permissively. All questions of fact and law need
3 not be common to satisfy the rule. The existence of shared legal issues with
4 divergent factual predicates is sufficient, as is a common core of salient facts coupled
5 with disparate legal remedies within the class.

6 Hanlon v. Chrysler, 150 F.3d 1011, 1019 (9th Cir. 1998), see also Staton v. Boeing, 327 F.3d 938,
7 953 (9th Cir. 2003). The Supreme Court has recently clarified the commonality requirement, at least
8 in employment discrimination cases, by stating that: “Commonality requires the plaintiff to
9 demonstrate that the class members ‘have suffered the same injury.’” Wal-Mart, 131 S.Ct. at 2551
10 (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)). “This does not mean merely that
11 they have all suffered a violation of the same provision of law,” but instead that their claims “depend
12 upon a common contention . . . of such a nature that is capable of classwide resolution—which
13 means that determination of its truth or falsity will resolve an issue that is central to the validity of
14 each one of the claims in one stroke.” Id. Although “for purposes of Rule 23(a)(2) even a single
15 common question will do,” id. at 2556 (internal citation and quotation marks omitted), “[w]hat
16 matters to class certification is not the raising of common ‘questions’—even in droves—but, rather
17 the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the
18 litigation.” Id. at 2551 (emphasis in original).

19 Prior to Wal-Mart, commonality in disability discrimination suits has generally been deemed
20 satisfied “where the lawsuit challenges a system-wide practice or policy that affects all of the
21 putative class members.” Armstrong v. Davis, 275 F.3d 489 (9th Cir. 2001) (finding commonality
22 requirement met for putative class of individuals with different types of disabilities “all of whom
23 suffer from the Board’s failure to accommodate their disabilities”), citing LaDuke v. Nelson, 762
24 F.2d 1318, 1332 (9th Cir. 1985) (holding that commonality is satisfied where the lawsuit challenges
25 a system-wide practice or policy that affects all of the putative class members), and Baby Neal ex rel
26 Kanter v. Casey, 43 F.3d 48, 56 (3d Cir. 1994) (holding that individual factual differences among the
27 individual litigants or groups of litigants will not preclude a finding of commonality). See also
28 Californians for Disability Rights, Inc. v. California Dept. of Transp., 249 F.R.D. 334, 346 (N.D.
Cal. 2008) (certifying class of mobility and vision impaired individuals in light of the issue common
to all plaintiffs, namely whether and to what extent Caltrans had violated the ADA on a “systematic

1 basis for many years through the use of improper design guidelines and the failure to ensure
2 compliance with even those deficient guidelines”); L.H v. Schwarzenegger, 2007 WL 662463, at
3 *12 (E.D. Cal. Feb. 28, 2007) (holding that system wide deficiencies in the California juvenile
4 parole system affect all of the putative class members with disabilities, regardless of the specific
5 nature of their disability.)

6 Rule 23(a)(3) further requires that “the claims or defenses of the representative parties are
7 typical of the claims or defenses of the class.” “Typicality and commonality requirements are
8 similar and tend to merge.” Californians for Disability Rights, Inc. at 346 (N.D. Cal. 2008); see also
9 Wal-Mart, 131 S.Ct. 2551, n.5. “Under the rule’s permissive standards, representative claims are
10 ‘typical’ if they are reasonably coextensive with those of absent class members; they need not be
11 substantially identical.” Hanlon, 150 F.3d at 1020; see also L.H v. Schwarzenegger, 2007 WL
12 662463, at *12-13 (holding that “minor differences among the class are inconsequential,” and
13 rejecting the defendants’ assertion that plaintiffs had not shown sufficient evidence that each
14 plaintiff was disabled since the deprivations complained of by plaintiffs affected the entire class).
15 Although the claims of the purported class representative need not be identical to the claims of other
16 class members, the class representative “must be part of the class and possess the same interest and
17 suffer the same injury as the class members.” General Tel. Co. of Southwest v. Falcon, 457 U.S.
18 147, 156 (1982). That injuries may differ in amount does not defeat typicality. See William W.
19 Schwarzer, et al., Federal Civil Procedure Before Trial, § 10:293 (Rutter Group 2009) (a plaintiff’s
20 claims may be typical although other members of the class suffered less or more injury).

21 Plaintiffs contend that this case is a quintessential civil rights action appropriate for class
22 certification because it concerns Defendants’ “illegal system-wide policies and practices, and their
23 system-wide failures to take necessary action” which damage class members in the same way by
24 creating access barriers at GGNRA. Motion at 18. Plaintiffs concede that not every class member
25 has been exposed to the same set of access barriers, but argue that the claims stem from the same
26 system-wide, decades-long practices and policies of failing to assess and eliminate accessibility
27 barriers, and require a common determination of whether the policies or practices were sufficient to
28 satisfy Defendants’ legal obligations. Plaintiffs list a number of questions of law and fact that they
contend are common to the class as a whole. They argue that the evidence that will resolve these

1 common questions is the same for all class members, and injunctive relief requiring barrier removal
2 and changes to Defendants' policies and practices regarding accessibility would apply to the class as
3 a whole.

4 Plaintiffs further argue that they are typical of the class they seek to represent because they
5 have suffered the same type and manner of injury (inability or difficulty accessing GGNRA facilities
6 and programs) stemming from the same discriminatory practice (systemic failure to remedy access
7 barriers or implement accessibility features) as unnamed class members. Plaintiffs rely on Arnold v.
8 United Artists Theatre Circuit, Inc., 158 F.R.D. 439, 450 (N.D.Cal. 1994), which certified a class of
9 semi-ambulatory and wheelchair bound individuals who experienced access barriers at many of the
10 defendant's movie theaters. There, the court held that, "in a public accommodations suit such as this
11 one where disabled persons challenge the legal permissibility of architectural design features, the
12 interests, injuries, and claims of the class members are, in truth, identical such that *any* class member
13 could satisfy the typicality requirement for class representation." Id. at 450 (emphasis in original).

14 Defendants counter that there are not common questions of law and fact and the named
15 Plaintiffs are not typical, and instead the case will necessitate numerous fact-intensive,
16 individualized inquiries in light of the inclusion of thousands of barriers allegedly experienced by
17 putative class members but not by any named Plaintiff. They contend that, while Plaintiffs' motion
18 attempts to characterize the suit as one based on "policies" and "practices," Plaintiffs have not
19 actually pointed to any specific policy or practice that connects all of the alleged barriers. Instead,
20 Defendants contend that the Court will have to examine each of the thousands of different types of
21 barriers and their unique impact on the class members, all of whom have different types of
22 disabilities and require different types of reasonable accommodation.⁵

23
24 ⁵Defendants generally rely on Mark H. v. Hamamoto, 620 F.3d 1090, 1098 (9th Cir. 2010) for
25 the position that each barrier at issue in this case requires its own individualized inquiry and that this
26 precludes certification. However, Hamamoto was a not a class action and the Ninth Circuit's decision
27 did not touch on class certification or its commonality or typicality requirements. Instead, it held that
28 autism-specific educational services for reasonable accommodation of two students required an
individualized inquiry, and the Court then performed that inquiry and found triable issues of fact as to
whether reasonable accommodations had been made for the students. Hamamoto is factually
distinguishable from this case in part because it involved the necessity of individually tailored education
plans, and does not preclude certification of a class seeking the removal of access barriers allegedly
affecting the class as a whole. Many other cases cited by Defendants are also not on point for similar
reasons. See also Crowder v. Kitagawa, 81 F.3d 1480, 1486 (9th Cir. 1996) (triable issue of whether
modification of law relating to service dogs was reasonable; not a class action); Vinson v. Thomas, 288

1 Defendants break their opposition into three primary arguments: that (1) differences in
2 challenged park attributes, (2) differences in plaintiffs' disabilities, and (3) differences in reasonable
3 accommodations all defeat commonality and typicality. As discussed below, Plaintiffs persuasively
4 counter that classes of disabled individuals seeking reasonable accommodation have been certified
5 without the need for individualized assessments of each alleged barrier, each class member's
6 disability or the type of accommodation needed. While this class is certainly larger and broader than
7 some of the cases on which Plaintiffs rely, on balance the Court finds that Plaintiffs have met their
8 burden of satisfying commonality and typicality for purposes of class certification.

9 **a. Differences in Alleged Access Barriers**

10 Defendants first argue that differences in the thousands of challenged park attributes require
11 denial of class certification. They contend that evidence of the barriers actually experienced by the
12 named Plaintiffs, which does not encompass all of the park areas in question or all of the alleged
13 barriers within in any given park area, is insufficient to bring in all of the challenged barriers, and
14 remediation of all barriers would require a fact-intensive analysis of each barrier. Defendants rely
15 primarily on Castaneda v. Burger King Corp., 264 F.R.D. 557 (N.D. Cal. 2009), in which the court
16 denied certification of a class of mobility-impaired patrons challenging multiple alleged ADA
17 violations at 92 Burger King stores owned and operated by franchisees of Burger King Corporation,
18 where the stores were designed and updated without a common blueprint but with a directive to
19 comply with disability laws. The court found that commonality was not satisfied because there was
20 no common core of salient facts (e.g., that Burger King Corporation created common barriers across
21 the 92 stores by way of a common blueprint) or a shared legal issue (e.g., whether the same
22 violations existed at each of the stores in question). Id. at 567. Instead, the court found that it would
23 require "bone-crushing feature-by-feature and store-by-store analyses" to establish whether and to
24 what extent violations existed at each store. Id. at 564. The court rejected the plaintiffs' argument
25 that, even though there was no common blueprint for the stores, Burger King Corporation's "failure
26 of oversight" to ensure compliance with disability laws was sufficient for commonality. Id. at 568.
27 The court held that the argument ignored the initial question of whether there were violations at each
28

F.3d 1145 (9th Cir. 2002) (triable issue of fact as to whether individual plaintiff was disabled).

1 of the 92 stores, and that this determination would require 92 trials within a trial without any
2 common method of proof. Id. The court also found that typicality was not satisfied where the
3 named plaintiffs, who had not individually or cumulatively visited all of the 92 stores in question,
4 suffered different injuries than other class members who encountered barriers at stores that the
5 named plaintiffs did not even visit. Id. at 572. Instead, the court certified ten classes for the ten
6 stores that the named plaintiffs had actually visited, finding that commonality was satisfied for these
7 classes because “[a]ll mobility-impaired patrons of a particular restaurant who use wheelchairs face
8 identical facilities and identical access barriers” and that the named plaintiff for each class directed
9 to a particular store would be typical of a class of mobility-impaired individuals who encountered
10 the same barriers at the same store. Id. at 572.

11 Defendants contend that, as in Burger King, Plaintiffs are asking the court to certify a class
12 that will require a detailed analysis of each of the thousands of challenged features in a number of
13 park areas, some of which no named Plaintiff has even visited or experienced, without any common
14 method of proof. Defendants point out that a named Plaintiff’s experience with one barrier
15 admittedly does not necessarily translate to other barriers across the GGNRA. See Def.’s Appendix,
16 Ex. B (Sutton Depo.) at 155-57 (plaintiff testifying that, to know if there is an access barrier, one
17 would have to go facility-by- facility). Further, there is evidence that not all of the named Plaintiffs
18 consider all of the alleged barriers to be barriers to them. For example, Mr. Sutton has not
19 experienced access problems with bathrooms, while others have. See id. at 154. Dr. York of NCA
20 has also testified that, to assess access barriers within GGNRA, it would be necessary to go facility-
21 by -facility, trail-by-trail, bathroom-by-bathroom, beach-by-beach and no generalizations could be
22 made about the accessibility of a feature based on information about other similar features within
23 GGNRA. Id. Ex. C (York Depo. at 199-200).

24 Plaintiffs counter that courts regularly certify classes alleging discriminatory practices
25 without making individual determinations about each individual barrier, and that Defendants’
26 response to Plaintiffs’ First Set of Interrogatories admits that “they are not able to
27 identify individual facilities, if any, that do not provide meaningful access because (1)
28 Defendants have not yet completed assessments of all public areas within GGNRA, and (2)
meaningful access cannot be evaluated by considering individual facilities in a vacuum, but

1 rather key programs and experiences must be viewed as a whole.” Elsberry Reply Decl. Ex. B at 11.

2
3 Plaintiffs persuasively point out that Burger King was based only in part on lack of
4 commonality and typicality, and another factor weighing against certification of a Rule 23(b)(2)
5 class was that damages claims predominated. Plaintiffs also distinguish Burger King because it
6 involved 92 different restaurant franchises supervised by different entities that obtained their own
7 blueprints and did not share common architecture, plans, remodels, policies or barriers. In contrast,
8 Defendants do not seriously dispute that all of the challenged facilities and barriers are controlled by
9 GGNRA as a centralized decision-maker. See Elsberry Decl. Ex. G (Dean Depo.) at 92 (whether
10 funding allocated to GGNRA will be used to implement NCA’s transition plan is made by the
11 GGNRA Park Superintendent). Plaintiffs acknowledge that their lawsuit implicates the policies and
12 practices of third-party “park partners” who operate programs and facilities within the GGNRA, but
13 it is undisputed that GGNRA is also responsible for ensuring their compliance with access
14 obligations.

15 Plaintiffs rely on Californians for Disability Rights v. California Department of
16 Transportation, 249 F.R.D. 334 (N.D. Cal. 2008) (hereinafter “Caltrans”), where a judge in this
17 district certified a class of mobility and vision impaired individuals who claimed to have been
18 denied access under the ADA and the Rehabilitation Act “due to barriers along sidewalks, cross-
19 walks, pedestrian underpasses, pedestrian overpasses and any other outdoor designated pedestrian
20 walkways throughout the state of California.” Id. at 336. The thousands of barriers at issue were
21 not identical and involved different physical conditions, and no named plaintiff claimed to have
22 encountered every alleged barrier, but the court certified the class because requiring class members
23 to individually prove each instance of discrimination would obviate the concept of a class action and
24 preclude certification of any class. Id. at 345. The defendants in Caltrans appear to have relied on
25 the same arguments being made by Defendants here – that the court would be required to
26 individually examine each alleged barrier and Caltrans’ remedial obligation with respect to each
27 barrier. Id. at 343. They contended that there was no commonality because there was no centralized
28 policy of discrimination, and twelve different local offices made design and construction decisions.
Id. The court rejected this “merits-based” argument, finding that Plaintiffs were “not seeking that

1 the Court directly order and oversee the remediation of every non-compliant pedestrian feature
2 throughout the state. Rather, they are seeking injunctive relief remedying Caltrans ‘use of improper
3 design guidelines and the failure to ensure compliance with even those deficient guidelines.’” *Id.* at
4 345. The court held that Caltrans’ alleged centralized policy of discrimination was an issue common
5 to all class members, and Caltrans could not defeat class certification by simply arguing that there
6 was no such policy. The court stated that “courts regularly order the remediation of discriminatory
7 practices in class actions without presiding over the details of the application of such remediation to
8 each and every affected facility or individual,” and held that the case was a “garden variety class
9 action of the type routinely certified under Rule 23(b)(2).” *Id.* at 345-46.

10 Defendants attempt to distinguish Caltrans on the basis that it focused on a “common design
11 feature for a physical asset of a specified type [that] allowed for an adjudication of the accessibility
12 of all the Caltrans facilities that had been constructed according to that design.” *Opp.* at 22-23.
13 However, it does not appear that the Caltrans court found that there was one uniform design plan for
14 all of the challenged barriers, but instead that allegations of a uniform policy of improper design
15 guidelines and failure to ensure compliance with those guidelines were sufficient. 249 F.R.D. at
16 345. The proposed class definition approved by the Court specifically included “sidewalks, cross-
17 walks, pedestrian underpasses, pedestrian overpasses, and any other out-door designated pedestrian
18 walkways.” The complaint alleged violations ranging from systemic failure to maintain pedestrian
19 rights of way to failure to provide alternative routes in construction areas to failure to remedy
20 dangerous slopes and uneven pavement. *Id.* at 334. Similarly here, Plaintiffs do not allege any
21 uniform design plan, but instead uniform policies and practices of failing to ensure that GGNRA and
22 various of its features and programs are accessible to mobility and vision impaired individuals as
23 required by law. Therefore, Caltrans lends support to certification here .

24 Additionally, in Arnold v. United Artists Theatre Circuit, Inc., 158 F.R.D. 439 (N.D. Cal.
25 1994), the court certified a class of mobility impaired individuals challenging the access features of
26 70 movie theaters built or re-modeled at various times throughout the relevant time period. The
27 court noted that it was likely that members of the class would each have only attended some (or one)
28 of the theaters in question, and therefore “in a sense, the proposed class is divided into more than
seventy subclasses,” one for each of the theaters. *Id.* at 449. However, the court found that

1 subclasses were not necessary and commonality was satisfied for a class including all of the theaters
2 because the design features were ones “some or all of which, they allege exist or have existed in
3 many if not all of defendant’s theaters during the relevant period” and the legality of those features
4 was a common question. The court also found it important that the sites were owned by a single
5 corporate defendant so the adequacy of the accommodation for ADA purposes would hinge on
6 corporate-wide factors such as the availability of resources. *Id.* Regarding typicality, the court held
7 that the mobility impaired named plaintiffs suffered the same injury as class members (all were
8 subjected to legally inadequate accommodation and deterred from attending the theaters in the
9 future) and that “in a public accommodations suit such as this one where disabled persons challenge
10 the legal permissibility of architectural design features, the interests, injuries, and claims of the class
11 members are, in truth, identical such that *any* class member could satisfy the typicality requirement
12 for class representation.” *Id.* at 450.

13 Similarly, in Moeller v. Taco Bell Corp., 220 F.R.D. 604 (N.D. Cal. 2004), the court certified
14 a class of mobility-impaired individuals (defined as those using wheelchairs or scooters) seeking to
15 remedy various categories of architectural barriers (lines, entrances, dining rooms, rest rooms,
16 parking lots, drink dispensers) at Taco Bell’s corporate-owned and/or operated stores in California
17 and requesting an “injunction ordering Defendant to adopt policies to ensure access for customers
18 who use wheelchairs and scooters, and to bring all of its facilities into compliance” with applicable
19 laws. *Id.* at 605. Relying on Arnold, the court rejected the defendants’ “unique architecture”
20 argument and found commonality and typicality met in part because the stores were built in
21 accordance with corporate prototypes involving centralized decision-making, as well as a common
22 question of corporate resources. See also Access Now v. Ambulatory Surgery Center Group, 197
23 F.R.D. 522 (S.D. Fla. 2000) (certifying ADA class of mobility, hearing and sight impaired people
24 against operators of hundreds of medical facilities party to a service agreement with a common
25 program for ADA compliance, finding that allegation of common discriminatory practice and denial
26 of access to same facilities was sufficient).

27 Plaintiffs’ proposed class falls somewhere in between Burger King, on the one hand, and the
28 cases cited by Plaintiffs, on the other. Unlike in Burger King, Defendants have centralized control
over decision-making with respect to accessibility within the GGNRA. However, unlike in Arnold

1 and Taco Bell, there is no uniform design plan with respect to GGNRA as a whole, or even common
2 types of features within the GGNRA. The case most on point is Caltrans, where the plaintiffs
3 alleged thousands of various barriers but relied on a common Caltrans policy of non-ADA compliant
4 guidelines and failure to ensure compliance with those faulty guidelines. Similarly here, Plaintiffs
5 point to the thousands of access barriers but argue that the common question for all plaintiffs and
6 class members is whether GGNRA's policies and practices of failing to comply with the
7 Rehabilitation Act, the specifics of which are set forth in NCA's July 2010 report, denied them
8 access to the GGNRA. See Ex. F (assessment finding approximately 30 system-wide deficiencies
9 in policies and procedures relating to unavailability of public information on accessibility features
10 and services, park partners and permitted groups' lack of understanding and commitment to
11 accessibility and lack of assessment of their compliance with accessibility requirements, lack of
12 training on procedures for accommodating the disabled during emergency situations, failure to
13 consider needs of disabled in new and existing programs, lack of oversight, lack of accessible
14 orientation and exhibit information, failure to apply accessibility standards in new construction, and
15 inconsistent maintenance and inspection of accessible trails). They are typical of class members
16 because they have all been denied access to the GGNRA on the basis of this common failure of
17 policies and practices. Based on all of the foregoing, the Court concludes that differences in the
18 types of barriers alleged are insufficient to defeat commonality or typicality.

19 **b. Differences in Alleged Disabilities**

20 Defendants argue that differences in the type and degree of the alleged mobility and vision
21 impairments of the proposed class members also defeat commonality and typicality. For an access
22 barrier to be actionable under the Rehabilitation Act, a plaintiff must show that he was denied
23 benefits of the program "by reason of his disability." See Weinreich v. Los Angeles County
24 Metropolitan Transportation Authority, 114 F.3d 976 (9th Cir. 1997) (finding no discrimination on
25 basis of disability in requiring individual to submit updated medical information every three years to
26 obtain reduced fare). Defendants rely on this snippet from a non-class action case unrelated to
27 multiple types of disabilities or barriers to conclude that evidence of a park feature's traits is
28 insufficient to show how it limits access to a particular individual on the basis of disability because
what might be a barrier to one is not necessarily a barrier to all. However, this case does not truly

1 support Defendants' position.

2 For example, Defendants point out that, while NCA's guidelines require specific
3 measurements for bathroom grab bars, a technical deficiency in measurement of a particular grab bar
4 does not necessarily prevent any disabled person's use and whether there is a Rehabilitation Act
5 violation requires individualized assessment of who is seeking access, the nature of that individual's
6 disability, and how that person is affected by the alleged barrier. Def.'s Appx. Ex. C (York Depo.)
7 at 192-93, 195-96. Similarly, a steep slope could constitute a barrier to some mobility-impaired
8 individuals, but perhaps not those in motorized wheelchairs, and certainly not the vision-disabled.
9 Id.; see also Mendoza Depo. at 130-31; Sieck Depo. at 35-36. Likewise, gradations in blindness
10 would create different barriers for different levels of vision impairment (i.e., Braille would help
11 some but not others who require audio or large print). Def.'s Appx. Ex. D at 71-72. Defendants also
12 argue that the disparities between the disabled class members in this case is further compounded
13 because Plaintiffs seek to certify a class of both mobility *and* vision impaired individuals. These
14 individuals would obviously be affected differently by different types of barriers. See Def.'s Appx.
15 Ex. D at 74-75. Further, there is some limited indication that the groups' interests could already be
16 or become adverse to each other if more attention or accommodation is given to one group over the
17 other. See Def.'s Appx. Ex. E.⁶

18 For their position, Defendants rely on Chandler v. City of Dallas, 2 F.3d 1385 (5th Cir.
19 1993), where the Fifth Circuit reversed and remanded judgment in favor of a class of city employees
20 who claimed disability discrimination based on physical standards imposed on employees who drove
21 as part of their job. With very little analysis, the court reversed certification of the sub-classes of
22 vision-impaired and insulin-dependent diabetic employees because determination of whether the
23 purported class members were handicapped or "otherwise qualified" would require individual
24 determinations about the effect of a claimed impairment on the individual's ability to perform tasks.
25 Id. at 1396. Defendants also quote Sokol v. New United Motor Mfg., Inc., 1999 U.S. Dist. LEXIS
26 20215, *11 (N.D. Cal. 1999) for the position that "Courts have been cautious to certify disability

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28 ⁶ Neither party focused on the issue of whether two subclasses, one of mobility-impaired individuals and the other of vision-impaired individuals, would be appropriate in their class certification briefs, so the Court makes no ruling on this issue. However, the Court would consider an appropriate motion or stipulation on the issue of vision and mobility subclasses.

1 discrimination claims as class actions due to the individualized determinations required by such
2 claims.” However, Sokol, also an employment discrimination case, acknowledged that “[t]he need
3 for individualized determinations, however, has not precluded class actions based on claims of
4 disability discrimination. Courts have certified class actions in the ADA/Rehab Act context where
5 the challenged conduct is a specific policy that allegedly discriminates in a broad-based manner
6 against class members.” The Sokol court denied certification because the challenged conduct was
7 not a discrete policy with broad application, but instead would require individualized determinations
8 about the reasonable accommodation process for each employee. Sokol’s implication that an
9 employer can escape class liability simply by failing to adopt a “specific” or “easily-identifiable”
10 policy has been rejected by later courts. See Bates v. UPS, 204 F.R.D. 440, 448 (N.D. Cal. 2001).
11 Defendants also quote Daggett v. Blind Enterprises of Oregon, 1996 U.S. Dist. LEXIS 22465, *42-
12 44 (D. Or. 1996), another employment discrimination case addressing reasonable accommodation in
13 the workplace, where the court refused to certify a class of blind individuals who claimed failure to
14 accommodate because “failing to reasonably accommodate a person’s disability necessarily requires
15 an individualized inquiry into the essential functions of the job the individual seeks to perform and
16 the extent of the impairment suffered by the person seeking a particular accommodation.”

17 While these employment discrimination cases do focus to some extent on the individualized
18 determination required to assess differing types and levels of disabilities, none of them preclude
19 certification of a class of individuals with differing types and levels of disabilities in the context of
20 access to public spaces, and all focus on reasonable accommodation in the employment context.
21 Also, Defendants ignore Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001), abrogated on other
22 grounds as recognized by Harris v. Alvarado, 2010 WL 4296636 (9th Cir. 2010). There, the Ninth
23 Circuit affirmed certification of a class of life-with-parole prisoners with several different categories
24 of disabilities – mobility, hearing, visual, learning, and developmental – who claimed that the Board
25 of Prison’s policies and practices for parole hearings violated the ADA and Rehabilitation Act. The
26 Ninth Circuit rejected the defendants’ argument that the “wide variation in the nature of the
27 particular class members’ disabilities precludes a finding of commonality” and separate lawsuits
28 should have been filed by each group. Id. at 868. In no uncertain terms, the Ninth Circuit
“reject[ed] this approach to class action litigation” and held that commonality in civil rights suits is

1 satisfied where the suit challenges a system-wide pattern or practice that affects all of the class
2 members. Id. The Ninth Circuit stated that “the differences that exist here do not justify requiring
3 groups of persons with different disabilities, all of whom suffer harm from the board’s failure to
4 accommodate their disabilities, to prosecute separate actions.” Id. The court also found typicality
5 satisfied because the injury of all plaintiffs was identical – namely a refusal or failure to afford them
6 accommodations as required by law – and minor differences did not defeat typicality. Id. at 869.
7 Other cases have similarly certified classes including members with different types of disabilities.
8 See, e.g., Caltrans (vision and mobility impaired), Access Now (mobility, hearing and sight). Based
9 on the Ninth Circuit’s decision in Armstrong, and because the individualized assessments of
10 reasonable accommodation in the workplace in the employment discrimination cases relied on by
11 Defendants are distinguishable, the class of vision and mobility impaired individuals proposed by
12 Plaintiffs satisfies the commonality and typicality requirements.

13 **c. Differences in Reasonableness of Accommodation Needed To**
14 **Remediate Access Barriers**

15 Defendants argue that an individualized inquiry into the reasonableness and efficacy of the
16 proposed accommodation for each barrier also precludes certification. Defendants rely on Fortyune
17 v. Am. Multi-Cinema, Inc., 364 F.3d 1075, 1083 (9th Cir. 2004), which held that “the determination
18 of whether a particular modification is ‘reasonable’ involves a fact-specific, case-by-case inquiry
19 that considers, among other factors, the effectiveness of the modification in light of the nature of the
20 disability in question and the cost to the organization that would implement it.” Fortyune was a
21 non-class action case brought by a mobility-impaired individual against a movie theater who refused
22 to evict a non-disabled-companion individual from a companion seat so that his companion could sit
23 next to him. The court held that the requested modification (requiring eviction of non-disabled-
24 companions from disabled-companion seats) was reasonable because the law already required the
25 modification, it did not impose an undue financial or administrative burden and even the potential
26 that the defendant would be forced to call the police to enforce the policy was not unreasonable.
27 Fortyune is not analogous to this case.

28 Defendants further argue that Plaintiffs here seek remediation of thousands of different
access barriers across the GGNRA. As just one example, the point to a claimed 1.5% slope

1 deficiency in a path running from a certain parking space to a certain restroom in Fort Barry.
2 Elsberry Decl. Ex. C. at 8:1. They contend that a claim relating to remediation of this barrier
3 necessarily requires analysis of both whether the slope is actually excessively steep, whether any
4 class member was denied access to Fort Barry on the basis of this alleged barrier, whether a given
5 proposed solution would remedy the barrier for the individual in question, and whether the proposed
6 solution is reasonable. They contend that this fact-intensive analysis would be required for each of
7 the thousands of alleged barriers of varying types within GGNRA, and that this type of case-by-case
8 adjudication defeats commonality and typicality.

9 However, as discussed above, the Court disagrees that it will necessarily need to undertake a
10 barrier-by-barrier, accommodation-by-accommodation evaluation, and instead finds that a common
11 question of whether GGNRA has taken reasonable steps to comply with the Rehabilitation Act and
12 accommodate the disabled by remedying access barriers allows for certification. This conclusion
13 holds equally true for a remediation evaluation.

14 **d. Are Plaintiffs' Claims Of Deficient Policies or Practices Sufficient?**

15 Defendants argue that, while Plaintiffs claim to rely on a deficient "policy" or "practice,"
16 they have not actually pointed to any specific GGNRA policy or practice in their TAC. The TAC
17 does not cite any specific policy or practice, and instead generally alleges an ongoing failure to
18 provide program access to facilities, programs, services and activities. However, the evidence
19 presented in connection with the class certification motion shows various seemingly inadequate
20 policies or practices that Defendants themselves have recognized as pervasive and indeed system-
21 wide.. See Ex. F (self-assessment finding approximately 30 system-wide deficiencies in policies and
22 procedures).

23 Defendants argue that the cases discussed above certifying classes challenging a variety of
24 access barriers have done so only in the face of a uniform design policy that allows for a common
25 method of assessing the barriers. To the contrary, Arnold certified a class involving design elements
26 in over 70 movie theaters built and updated at various times "some or all of which" existed in "many
27 if not all of defendant's theaters." Arnold, 158 F.R.D. at 449. There was no mention of a uniform
28 building plan or blueprint, and the court's qualifying language indicates that one did not exist.
Armstrong certified a class impacting a number of parole hearing facilities across the state and

1 various types of barriers on the basis of a common policy and practice of failure to accommodate,
2 without requiring any common design blueprint. Armstrong, 275 F.3d 489 (9th Cir. 2001).
3 Californians for Disability Rights certified a class involving thousands of different types of barriers
4 throughout California based on the “use of improper design guidelines and the failure to ensure
5 compliance with even those deficient guidelines,” not based on the use of one particular set of plans.
6 Californians for Disability Rights, 249 F.R.D. at 345. Though the TAC itself does not identify
7 specific policies or practices being challenged, the evidence presented in connection with this
8 motion does show some systemwide policies that appear to be seriously deficient. See generally
9 Elsberry Decl. Ex. F.

10 Defendants also argue that Plaintiffs cannot satisfy commonality by circularly arguing that
11 all of the alleged barriers share a common element of being an access barrier and thus indicate some
12 sort of policy or practice. See Opp. at 18. Defendants rely on General Telephone Co. v. Falcon, 457
13 U.S. 147 (1982), where the Supreme Court reversed certification of a class of Mexican-American
14 applicants for employment. The Fifth Circuit had affirmed class certification based on its prior
15 decision allowing victims of racial discrimination in employment to maintain an across-the-board
16 attack on all unequal employment practices alleged to have been committed by the employer
17 pursuant to a policy of racial discrimination. The Supreme Court held that, despite the Fifth
18 Circuit’s across-the-board rule that racial discrimination is by its nature class discrimination, the
19 requirements of Rule 23 still must be met. Id. at 157. In the case before it, the Court found that the
20 plaintiff had not bridged the gap between demonstrating the validity of his own claim and the
21 existence of a class of people who had suffered the same injury because allegations that he was not
22 promoted due to his ethnicity were insufficient to show that the employer’s treatment of the plaintiff
23 was typical of its promotion practices, that the promotion practices were motivated by a policy of
24 ethnic discrimination, or that the policy of ethnic discrimination was reflected in other employment
25 practices such as hiring. Id. at 158. The Court concluded that, “If one allegation of specific
26 discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case
27 would be a potential companywide class action.” Id. at 159. Here, by contrast, Plaintiffs have gone
28 well beyond merely alleging one specific incident of discrimination as in Falcon, or even an array of
unrelated incidents. Instead, there is evidence of multiple people suffering the same injury (lack of

1 access) and evidence that the injuries were caused by systemwide policies and practices of failing to
2 comply with access requirements as identified by the Defendants themselves, as opposed to the Fifth
3 Circuit’s across-the-board assumption that any racial discrimination constitutes class discrimination.

4 In their Opposition, Defendants also relied on the Ninth Circuit’s decision in Dukes v. Wal-
5 Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010), where the Ninth Circuit largely affirmed the district
6 court’s decision to certify a class of over a million female workers challenging Wal-Mart’s pay and
7 promotion practices. Id. at 578. However, following briefing and oral argument on this motion, the
8 Supreme Court reversed the Ninth Circuit’s decision, holding that the plaintiffs in Wal-Mart had not
9 established the requisite commonality for certification of the class. Wal-Mart Stores, Inc. v. Dukes,
10 131 S.Ct. 2541 (2011). In Wal-Mart, “the basic theory of [the plaintiff’s] case [wa]s that a strong
11 and uniform “‘corporate culture’ permits bias against women to infect, perhaps subconsciously, the
12 discretionary decisionmaking of each one of Wal-Mart’s thousands of managers – thereby making
13 every woman at the company the victim of one common discriminatory practice.” Id. at 2548. The
14 Court reasoned that this “pattern or practice” theory required the plaintiffs to show that
15 “discrimination was the company’s standard operating procedure[,] the regular rather than the
16 unusual practice.” Id. at 2552, n.7. Wal-Mart concerned the hiring and promotion of over 1.5
17 million women in multiple job classifications across approximately 3500 Wal-Mart stores in 50
18 states. The Court ultimately concluded that the plaintiffs had not come forward with “significant
19 proof that [Wal-Mart] operated under a general policy of discrimination” that would provide “some
20 glue holding together the alleged reasons for [its employment decisions]” and thus there could be no
21 common answer to the question of whether Wal-Mart had violated Title VII with respect to its
22 female employees. Wal-Mart, 131 S.Ct. at 2551-52. Following the Supreme Court’s Wal-Mart
23 decision, the parties provided additional briefing on the impact of the decision on the class
24 certification issues before this Court.

25 Plaintiffs contend that the discussion of commonality in Wal-Mart has little or no impact on
26 this case. Plaintiffs point out that Wal-Mart was an employment discrimination case brought under
27 Title VII in which the alleged discrimination was based on a policy of discretionary decision-making
28 that Plaintiffs contended allowed bias to affect the hiring and promotion of women across all of the
thousands of Wal-Mart stores nationwide. Plaintiff argues that the Supreme Court’s analysis

1 depended heavily on the nature of the class claims asserted in that case and on the type of proof
 2 required to prevail on such claims. Specifically, plaintiffs in a Title VII suit must generally prove
 3 the reasons behind the challenged employment decisions, Wal-Mart at 2552 (“crux of the inquiry [in
 4 resolving individual’s Title VII claim] is ‘the reason for a particular employment decision’”), so the
 5 Court’s opinion turned on the plaintiffs’ failure to show a common factor uniting the reasons behind
 6 the million-plus challenged employment decisions. Plaintiffs argue that “the analysis of
 7 commonality in Dukes was limited to the type of proof required in Title VII cases and the type of
 8 evidence the plaintiffs needed to establish liability under Title VII.” Pl.’s Supp. Brief at 6. In
 9 contrast, in Rehabilitation Act suits such as this one, intent is not at issue and Plaintiffs need not
 10 show the reasons (or any common reason) why each of the barriers was erected or removed to prove
 11 their claim.⁷ Plaintiffs point out that, even under Wal-Mart, one common contention capable of
 12 classwide resolution in this case is that barriers exist and deprive class members of access, because
 13 the truth or falsity of this will “resolve an issue that is central to the validity of the claims in one
 14 stroke.” Pl.’s Supp. Brief at 6 (quoting Wal-Mart at *7).

15 Though the Supreme Court did not expressly limit its holding in Wal-Mart to Title VII
 16 employment discrimination cases, Plaintiffs’ arguments are generally persuasive. A reading of the
 17 Wal-Mart opinion as the whole shows that the Court found the evidence presented to support
 18 commonality insufficient because it did not show a common reason for the alleged disparate
 19 treatment of female employees. For example, the plaintiff’s expert admitted that he could not
 20 determine whether less than one percent or 95 percent of Wal-Mart’s employment decisions were
 21 motivated by stereotypical thinking. Wal-Mart, 131 S.Ct. at 2553. Since Rehabilitation Act claims
 22 do not require proof of the intent behind the alleged barriers, but instead rely on evidence that they
 23 exist across GGNRA and that they deny plaintiffs the benefit of GGNRA programs or activities, the
 24 Title VII analysis in Wal-Mart is not closely on point. Additionally, in Wal-Mart there was evidence

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⁷ Plaintiffs rely on Ramos v. SimplexGrinnell LP, 2011 WL 2471584, *5 (E.D.N.Y. June 21, 2011), a recent case that found commonality present the day after the Wal-Mart decision. However, Ramos was not a Rehabilitation Act case, and distinguished Wal-Mart on the basis that plaintiffs had come forward with “significant proof” that the defendant routinely failed to pay prevailing wages for covered work, there was little discretion or subjective judgment present in the challenged pay decisions, and there was no express policy of non-discrimination (as there was in Wal-Mart and as there is in this case), while there was admissible classwide data reflecting the improper payments.

1 of significant localized discretionary decision-making among the approximately 3500 stores across
2 50 states potentially impacting a class of approximately 1.5 million women, whereas here there is
3 evidence of shows common policies and practices across the GGNRA that result in barriers to access
4 which impact a more closely aligned class. See Ex. F. At the same time, Plaintiffs still need to
5 show that the class was harmed by one or more across-the-board discriminatory practices or policies
6 to establish commonality. While this does not require a showing of *intent*, the cause of the barriers
7 (i.e., that they were created or not removed in conformance with one or more systemic
8 discriminatory practices or policies, as opposed to miscellaneous, localized, ad hoc decisions) is still
9 important. Therefore, Wal-Mart has some bearing on this case.

10 Plaintiffs also argue that Wal-Mart should not be interpreted as always requiring an “express,
11 centralized policy” in discrimination cases, and that any mention in the opinion of an express policy
12 was simply one way that the Court believed the plaintiffs in Wal-Mart could have (but were unable
13 to) shown commonality. Plaintiffs contend that, because they do not have to prove the reasons for
14 any decisions resulting in discrimination, evidence of an express centralized policy is unnecessary.
15 However, even in Rehabilitation Act cases, there must be evidence of some common policy or
16 practice (albeit not an express written policy of discrimination) to certify a class.

17 More persuasively, Plaintiffs argue that they have shown common policies and practices. As
18 discussed elsewhere, NCA’s 2010 draft self-evaluation of GGNRA’s park-wide policies and
19 procedures identified approximately thirty system-wide deficiencies in policies and procedures that
20 undergirded the failure to remove multiple barriers and supports commonality and typicality. See
21 Ex. F. Plaintiffs also point out that decisions within GGNRA are centrally made, unlike in Wal-
22 Mart where they were discretionary and delegated to thousands of local managers across stores
23 nationwide. See Wal-Mart 131 S.Ct. at 2555 (“In a company of Wal-mart’s size and geographical
24 scope, it is quite unbelievable that all managers would exercise their discretion in a common way
25 without some common direction.”). During oral argument, the Court questioned the parties
26 regarding the centralization of decision-making within the GGNRA. Defendants acknowledged that
27 GGNRA’s park superintendent “retains total authority over what’s going on in the park,” although
28 his authority is “subject to the chain of command up to National Park Service and beyond.”
Transcript at 10. Plaintiffs also pointed out that funding decisions go from the GGNRA to NPS. Id.

1 at 11. There is no dispute that overall governance of the GGNRA, including decisions affecting
2 accessibility, is centrally controlled by the Park Superintendent. This is a very different situation
3 than the nationwide, store-by-store, localized discretionary decision-making at issue in Wal-Mart.

4 Not surprisingly, Defendants interpret Wal-Mart very differently, and argue that it precludes
5 certification of the class based on both commonality and Rule 23(b)(2). With respect to
6 commonality, they argue that the decision reaffirms the existing rule that commonality is not
7 satisfied where individual inquiries would be required into each class member's claims. Defendants
8 contend that the permissibility of the thousands of challenged barriers experienced in different ways
9 by individuals with different and varying levels of disability is not an issue that can be resolved "in
10 one stroke," as required by Wal-Mart. However, Defendants' brief quotes a portion of Wal-Mart
11 that states that the "crucial" question of commonality is "why was I disfavored." 131 S.Ct. at 2552.
12 This portion of the opinion appears to be specific to claims under Title VII and other similar statutes
13 under which the motive for the discriminatory action is important, unlike the claims at issue here.

14 Defendants also argue that Wal-Mart requires a common discriminatory practice or policy.
15 They contend that the class was not certified because there was no policy acting as the glue holding
16 the reasons for the million-plus alleged discriminatory decisions together, and that similarly here
17 Plaintiff has not shown that the cause of the challenged barriers was a discriminatory policy or
18 practice. The Court agrees that, following Wal-Mart, commonality certainly requires more than an
19 allegation that "they have all suffered a violation of the same provision of law." Instead, the "claims
20 must depend upon a common contention – for example, the assertion of a discriminatory bias on the
21 part of the same supervisor. That common contention, moreover, must be of such a nature that it is
22 capable of classwide resolution – which means that determination of its truth or falsity will resolve
23 an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart, 131 S.Ct.
24 at 2551. Thus, the fact that an *individual* Rehabilitation Act claim does not require proof of the
25 reason behind the alleged barrier does not necessarily mean that a *class* need not show some
26 unifying factor uniting the claims for purposes of commonality. However, as discussed above, here
27 Exhibit F is evidence of systemic policies and procedures resulting in the alleged violations of the
28 Rehabilitation Act.

Defendants also attempt to equate the Court's rejection of the Wal-Mart plaintiffs' anecdotal

1 evidence regarding various instances of discrimination to the multiple declarations submitted in this
2 case relating individual plaintiff's experiences with various alleged barriers within GGNRA. In
3 Wal-Mart, the Court held that the anecdotal evidence presented was insufficient to support a theory
4 that the entire company operated under a policy of discrimination, and even if the plaintiffs had
5 presented anecdotal evidence from every store they still would "not demonstrate that commonality
6 of issue exists." Id. at 2556. However, the Court's conclusion was based on the fact that the
7 anecdotal evidence did not and could not show a common reason behind the challenged employment
8 decisions, which was a crucial issue in Wal-Mart. In contrast here, Exhibit F, Plaintiffs'
9 declarations, and the NCA survey reports show general policies and practices of failing to address
10 access barriers resulting in the alleged violations of the Rehabilitation Act.

11 3. Adequacy

12 Rule 23(a)(4) permits the certification of a class action only if "the representative parties will
13 fairly and adequately protect the interests of the class." Representation is adequate if: (1) the class
14 representative and counsel do not have any conflicts of interest with other class members; and (2)
15 the representative plaintiff and counsel will prosecute the action vigorously on behalf of the class.
16 See Staton, 327 F.3d at 957. Plaintiffs have presented undisputed evidence that the named
17 individual and organizational plaintiffs are willing and able to be effective advocates for the class.
18 See Gray Decl. ¶ 32; Mendoza Decl. ¶ 14; Sieck Decl. ¶ 10; Sutton Decl. ¶ 16; Lozano Decl. ¶ 15.
19 Further, class counsel Disability Rights Advocates and the individual attorneys handling this case
20 are highly experienced disability rights attorneys who have handled large class actions such as this
21 previously. See Paradis Decl. ¶¶ 2-7. Defendants do not contest the adequacy of the named
22 plaintiffs or their counsel.

23 C. Rule 23(b)(2)

24 Plaintiffs seek class certification under Rule 23(b)(2), which provides that a case may be
25 certified as a class action if "the party opposing the class has acted or refused to act on grounds that
26 apply generally to the class, so that final injunctive relief or corresponding declaratory relief is
27 appropriate respecting the class as a whole." The commonality analysis performed above overlaps
28 somewhat with this requirement. See Californians for Disability Rights v. Caltrans, 249 F.R.D. 334,
349 (N.D. Cal. 2008). In overturning a district court's decision to deny class certification, the Third

1 Circuit stated that the Rule 23(b)(2) requirements are “almost automatically satisfied in actions
2 primarily seeking injunctive relief.” Baby Neal for and by Kanter v. Casey, 43 F.3d 48, 58 (3rd Cir.
3 1994). The Baby Neal court noted the “role of (b)(2) class actions in remedying systemic violations
4 of basic rights of large and often amorphous classes” and held that “[t]he writers of Rule 23 intended
5 that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights
6 violations of people who are individually unable to vindicate their own rights. Id. at 64 -65 (citing
7 Rules Advisory Committee Notes to 1966 Amendments to Rule 23, 39 F.R.D. 102 (1966); 1
8 Newberg & Conte, § 4.11 at 4-39).

9 Defendants oppose certification of a Rule 23(b)(2) class because they contend that the broad
10 injunction sought in the TAC (“order enjoining Defendants from violating Section 504(a) of the
11 Rehabilitation Act”) cannot be issued under Rule 65. Specifically, Rule 65(d) requires that: “Every
12 order granting an injunction and every restraining order must: (A) state the reasons why it issued;
13 (B) state its terms specifically; and (C) describe in reasonable detail – and not by referring to the
14 complaint or other document – the act or acts restrained or required.” One court has held that “Rule
15 23(b)(2)’s bottom line, therefore, demands at the class certification stage plaintiffs describe in
16 reasonably particular detail the injunctive relief they seek ‘such that the district court can at least
17 ‘conceive of an injunction that would satisfy [Rule 65(d)’s] requirements,’ as well as the
18 requirements of Rule 23(b)(2).” DG ex rel. Stricklin v. Devaughn, 594 F.3d 1188, 1200 (10th Cir.
19 2010) (internal citations omitted). Defendants argue that no injunction in this case could satisfy Rule
20 65's standard of specificity and yet encompass all of the class claims as required by Rule 23(b).

21 Defendants correctly point out that cases interpreting Rule 65 generally preclude the issuance
22 of a broad injunction to “obey the law,” which is what Plaintiffs’ TAC appears to seek. See, e.g.,
23 Cuviello v. City of Oakland, 2009 U.S. Dist. LEXIS 26067, *9-11 (N.D. Cal. 2009) (stipulated
24 protective order essentially requiring defendants to obey the law too vague to be enforceable).
25 Plaintiffs counter that they will present evidence supporting an injunction providing specific
26 directions to Defendants to meet their access obligations. See Elsberry Decl Ex. I at 5-6. To date,
27 Plaintiffs have not proposed any specific language for an injunction that would meet Rule 65.
28 However, the Court believes that it would be possible to fashion an appropriate injunction covering
Plaintiffs’ class claims. See, e.g., Caltrans, 249 F.R.D. 334; Arnold, 158 F.R.D. 439; Taco Bell, 220

1 F.R.D. 604.

2 Defendants also argue that, to the extent that Plaintiffs seek a series of injunctions
3 remediating the thousands of alleged barriers, these injunctions would not resolve class claims as a
4 whole as required by Rule 23. They contend that not all of the named plaintiffs have experienced all
5 of the alleged barriers and they would have to be examined and remediated one by one. This is
6 repetitive of Defendants' commonality/typicality arguments, and for the reasons discussed above the
7 Court does not agree that Plaintiffs are seeking a series of thousands of injunctions covering each
8 individual barrier. See Rules Advisory Committee Notes to 1966 Amendments to Rule 23, reprinted
9 at 39 F.R.D. 69, 102 (1966) ("Action or inaction is directed to a class within the meaning of [Rule
10 23(b)(2)] even if it has taken effect or is threatened only as to one or a few members of the class,
11 provided it is based on grounds which have general application to the class."). The fact that not
12 every plaintiff has experienced every alleged barrier does not necessarily require that the barriers be
13 remedied in thousands of separate injunctions.

14 Defendants also cite a Tenth Circuit case, Shook v. Bd. of County Commissioners, 543 F.3d
15 597, 608 (10th Cir. 2008), which affirmed denial of certification of a class of current and future
16 mentally-ill inmates partially on the basis that the court could not conceive of an injunction that
17 would satisfy Rule 23(b)(2) for all of the claims. The plaintiffs' claims there were based on a
18 variety of alleged violations of their rights, including denial of medication, lack of supervision, and
19 excessive force, among others, and the district court concluded that "many of the matters plaintiffs
20 sought to have addressed, such as the use of tasers or restraints, could not be dealt with prospectively
21 on a class-wide basis because the propriety of using such methods depended on the circumstances in
22 which they were used, and those circumstances necessarily varied among class members." Id. at
23 602-603; see also Vallario v. Vandehey, 554 F.3d 1259, 1268 (10th Cir. 2009) (reversing
24 certification of Rule 23(b)(2) because district court did not hold plaintiffs to burden of showing that
25 appropriate injunctive relief could be fashioned). However, cases within the Ninth Circuit have
26 taken a more liberal view of Rule 23(b)(2) requirements. See Caltrans, 249 F.R.D. at 349 (finding
27 that the case was "precisely the sort of civil rights case contemplated by Rule 23(b)(2)" despite the
28 wide ranging alleged barriers and differing types of disabilities of the class members); Arnold, 158
F.R.D. at 454 (finding Rule 23(b)(2) satisfied in part because differences among the alleged access

1 violations at the various theaters were irrelevant because violations would generally affect disabled
2 class members in the same way).

3 Defendants again rely on the Supreme Court's recent Wal-Mart decision, which reversed the
4 Ninth Circuit's affirmation of a Rule 23(b)(2) class because the backpay sought was not incidental to
5 the requested injunctive relief and Wal-Mart was entitled to individualized determinations of each
6 employee's eligibility for backpay. 131 S.Ct. at 2557-61. However, here Plaintiffs seek only
7 injunctive relief and do not request monetary relief of any kind. Defendants further rely on Wal-
8 Mart's holding that a 23(b)(2) class should not be certified where the defendant is entitled to
9 individualized statutory defenses to individual backpay claims (i.e., that it took a challenged
10 employment action for a reason other than discrimination). Id. at 2560-61. Defendants contend that
11 they are similarly entitled to present individualized defenses as to the characteristics of each
12 challenged barrier and its effect on various types of disabled individuals. Defendants also argue that
13 Plaintiffs cannot rely on the policies identified in the NCA Report to support an injunction because
14 they are entitled to individual defenses as to the impact of those policies on various members of the
15 class. The Court disagrees that Wal-Mart's statutory defense to each Title VII backpay claim can be
16 equated to Defendants' potential defenses here. The individual defenses in Wal-Mart related to
17 whether Wal-Mart would be required to pay monetary penalties to each of millions of individuals,
18 whereas Defendants "individual defenses" here include whether and how the overall injunction will
19 benefit class members, but do not impact what Defendants would be required to do.

20 Defendants also argue that, under Wal-Mart, Rule 23(b)(2) only applies when "a single
21 injunction or declaratory judgment would provide relief to each member of the class," and precludes
22 certification where individual class members would be entitled to different relief. Id. at 2557. In
23 Wal-Mart, the Court stated that the key to a Rule 23(b)(2) class is the "indivisible nature of the
24 injunctive or declaratory remedy warranted – the notion that the conduct is such that it can be
25 enjoined or declared unlawful only as to all of the class members or as to none of them." Id. Here,
26 reform of the deficient policies identified in Exhibit F could constitute such a remedy. For example,
27 that review identified, among others, a complete absence of "a written policy for the accessibility
28 review of new construction, alterations or renovation of structures, developed landscapes or physical
environments," as well as "a pattern of planning, development and construction by concessioners or


1 park partners where the new construction or alteration does not meet the minimum accessibility
 2 guidelines.” Ex. F at 5, 7. Such deficiencies, if proven at trial, might conceivably be remedied by
 3 an injunction that required such a written policy and training on its implementation for new
 4 construction and alterations by both Defendants and their partners. Thus, it appears that an
 5 injunction could be formulated that would be sufficiently specific and would resolve the class
 6 claims, and that the defenses that may be asserted by Defendants do not preclude certification.

7 **D. Necessity**

8 Defendants finally argue that a class action is unnecessary to achieve Plaintiffs’ requested
 9 relief, which at its heart seeks modification of barriers throughout GGNRA. They contend that any
 10 modifications ordered by the Court for the benefit of Plaintiffs would necessarily inure to the benefit
 11 of the proposed class without the expense of a class action. See James v. Ball, 613 F.2d 180, 186
 12 (9th Cir. 1979) (upholding denial of class certification without discussion of Rule 23 requirements
 13 because the relief sought would produce the same result as class-wide relief); see also Sokol, 1999
 14 U.S. Dist. LEXIS 20215, *17 (denying class certification in part because “all putative class members
 15 would benefit from an injunction issued on behalf of a single plaintiff” so “class vehicle is not
 16 necessary to obtain the relief sought”). At the same time, however, Defendants argue inconsistently
 17 that any relief should be limited to the barriers specifically experienced by the named Plaintiffs. In
 18 any event, necessity is not a factor under Rule 23, but at most goes to the exercise of discretion. See
 19 Caltrans, 249 F.R.D. at 349 (“there is no requirement that class certification must be ‘necessary’”).
 20 The Court is not persuaded that it should deny certification on this basis.

21
 22 **IT IS SO ORDERED.**

23
 24 Dated: August 30, 2011



25 ELIZABETH D. LAPORTE
 26 United States Magistrate Judge
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 28