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NOT FOR PUBLICATION
United States Court of Appeals, Ninth Circuit.

Ivana KIROLA, On Behalf of Herself and
The Certified Class of Similarly Situated Persons,
Plaintiff-Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO; et al.,
Defendants-Appellees.

No. 21-15621
|
Argued and Submitted February 15, 2023
San Francisco, California
|
FILED APRIL 10, 2023

Appeal from the United States District Court for the Northern District of California, Saundra B. Armstrong, District Judge, Presiding, D.C. No. 4:07-cv-03685-SBA

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Rights Education and Defense Fund, Inc., and 19 Other Organizations.

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Before: WARDLAW, NGUYEN, and KOH, Circuit Judges.

MEMORANDUM*

Ivana Kirola ("Kirola"), on behalf of herself and a certified class of mobility-impaired individuals (collectively, "plaintiffs"), appeals from the district court's grant of judgment to the City and County of San Francisco ("the City") on remand from this court. *See Kirola v. City & County of San Francisco*, 860 F.3d 1164 (9th Cir. 2017). We affirm in part, reverse in part, and remand for further proceedings.

1. The district court found that the plaintiffs proved multiple Americans with Disabilities Act ("ADA") violations. Specifically, the district court found multiple ADA Accessibility Guidelines for Buildings and Facilities ("ADAAG") violations at the Main Library, the lack of an ADAAG-compliant route at St. Mary's Playground,[1] and a missing grab bar in a

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

[1] The plaintiffs' contention that the district court failed to address other purported ADAAG violations at St. Mary's Playground lacks merit. Contrary to the plaintiffs' contention, the

restroom in Golden Gate Park.[2] We remand for the district court to determine injunctive relief tailored to these violations.

The district court's reasoning does not support denying relief entirely. Although the district court was concerned that Kirola, the sole class representative, had not personally encountered any of the ADAAG violations that the plaintiffs ultimately proved at trial, that takes too narrow a view of injunctive relief under the ADA. *See Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) (holding that an ADA plaintiff "need not necessarily have personally encountered all the barriers that [] bar his access to [a facility] in order to seek an injunction to remove those barriers"); *see also Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 944 (9th Cir. 2011) (en banc) ("[W]e hold that an ADA plaintiff who establishes standing as to encountered barriers may also sue for injunctive

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district court did address the bridgeway barriers. Moreover, the district court's finding that St. Mary's Playground "lacks an accessible route" appears to encompass the expert testimony about the lip to the entrance to the play equipment, which the expert testified would "render th[e] path of travel inaccessible." The plaintiffs do not develop an argument to the contrary.

[2] The plaintiffs argued at oral argument that the district court also found ADAAG violations in its prior findings of fact and conclusions of law, *Kirola v. City & County of San Francisco*, 74 F. Supp. 3d 1187 (N.D. Cal. 2014). Although the district court acknowledged there that lipped curb ramps do not conform to ADAAG requirements and noted that "some legacy curb ramp lips still exist," *id.* at 1206 n.4, this does not amount to a finding that the plaintiffs proved ADAAG violations because it does not account for whether these existing lip ramps were built after January 26, 1992, such that the ADAAG applied.

relief as to unencountered barriers related to his disability."). Moreover, we previously held that the plaintiff class here "has standing for claims related to all facilities challenged at trial," "whether Kirola personally visited that facility or not." *Kirola*, 860 F.3d at 1176. "[A]lthough in a class-action lawsuit, as in any other suit, 'the remedy must . . . be limited to the inadequacy that produced the injury in fact that the plaintiff has established,' the 'plaintiff' has been broadened to include the class as a whole, and no longer simply those named in the complaint." *Armstrong v. Davis*, 275 F.3d 849, 871 (9th Cir. 2001) (quoting *Lewis v. Casey*, 518 U.S. 343, 357 (1996)), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005).

Although the district court appropriately found that the plaintiffs' evidence did not warrant the sweeping class-wide relief that the plaintiffs sought, the district court abused its discretion in denying relief for the ADAAG violations found.

2. On remand, the district court should also consider whether the evidence at trial established ADAAG violations at the facilities listed in the plaintiffs' opposition to the motion for judgment that the district court did not address—specifically, the Bernal Heights Recreation Center, Eureka Valley Recreation Center, St. Mary's Recreation Center, Upper Noe Recreation Center, Tenderloin Recreation Center, Woh Hei Yuen Recreation Center, Minnie and Lovie Ward Recreation Center, Gene Friend Recreation Center, Joseph Lee Recreation Center, Richmond Recreation Center, and the Botanical Gardens. *See Kirola*, 860 F.3d at 1185.

3. The plaintiffs also challenge the district court's findings as to the facilities and purported ADAAG violations the district court addressed. We review the district court's findings of fact following a bench trial for clear error, *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1068 (9th Cir. 2015), and we affirm the district court as to all but one such finding.

The district court permissibly found that the plaintiffs failed to prove ADAAG violations in the City's curb ramps because the plaintiffs did not show that any curb ramps with an ADAAG-noncompliant lip or slope were subject to the ADAAG.[3] The plaintiffs argue that the district court overlooked their expert's data analysis showing ADAAG-noncompliant curb ramps on streets resurfaced after January 26, 1992. The plaintiffs' argument that this set of ramps was necessarily subject to the ADAAG fails. The plaintiffs' evidence did not account for whether the resurfacing affected the crosswalk and, therefore, the usability of the street to pedestrians. *See* 28 C.F.R. § 35.151(b), (i). The district court did not err in its determination that resurfacings that do not affect the crosswalk do not trigger the obligation in 28 C.F.R. § 35.151(i) to provide ADAAG-compliant crosswalks. *Kirola*, 74 F. Supp. 3d at 1207.[4]

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[3] These requirements apply only to facilities constructed or altered after January 26, 1992. 28 C.F.R. § 35.151(a)(1), (b)(1).

[4] Because we uphold the district court's evidentiary finding regarding curb ramps, we need not reach the plaintiffs' statute-of-limitations argument.

The plaintiffs also raise three specific challenges related to the district court's library-related findings, all of which fail.[5] First, the district court found that the plaintiffs did not prove ADAAG violations based on step stools left in—and obstructing an accessible path of travel in—library aisles. The plaintiffs have not shown clear error in the district court's factual finding that step stools are removed from library aisles within a reasonable period of time. Although *Chapman v. Pier 1 Imports (U.S.) Inc.* instructs that obstructions "must be viewed systemically," the district court found that the plaintiffs' evidence did not establish "repeated and persistent" access barriers because it was not clear how many times the plaintiffs encountered obstructed aisles. 779 F.3d 1001, 1006–09 (9th Cir. 2015). Second, the district court did not err in finding that, as the Richmond Branch Library had at least one ADAAG-compliant entrance, newly constructed ramps to other entrances did not have to comply with the ADAAG's requirements for accessible entrances. The ADAAG do not require that every public entrance be accessible, *see*, *e.g.*, 28 C.F.R. pt. 36, app. A, § 4.1.3(8), and they contemplate that an entrance may be altered without being made accessible, *see id.* § 4.1.6(1)(h). Third, the district court permissibly found the plaintiffs' expert testimony about the Richmond Branch security gate insufficient to meet the plaintiffs' burden of proof, as the expert's testimony did not offer any basis for his

[5] To the extent the plaintiffs challenged additional findings in their reply brief, they forfeited those arguments by failing to raise them in their opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

conclusion that the gates exceeded the depth for "pinch points." *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013) (noting that a plaintiff who "proffer[s] evidence of precise measurements" "no doubt present[s] a more powerful case at trial").

The plaintiffs also challenge multiple district court findings related to purported ADAAG violations in City parks, playgrounds, and recreational facilities. Contrary to the plaintiffs' contentions, the district court did not run afoul of *Kohler*, 782 F.3d at 1068–69, and *Strong*, 724 F.3d at 1045–47, when it found that the plaintiffs' evidence was not specific enough to establish ADAAG violations. Although it is well established that neither expert testimony nor precise measurements are required to prove an ADAAG violation, the district court understood as much but fairly concluded that the plaintiffs had not met their burden of proof as to the purported violations at the Golden Gate Park Children's Playground, Stow Lake, Alamo Square Park, Holly Park, and the Conservatory of Flowers. *See Strong*, 724 F.3d at 1046 (noting that testimony may be insufficiently probative of an ADA violation where it does not exclude other possibilities). As to the purported violations in the Japanese Tea Garden, the district court's conclusion rested on its finding that the plaintiffs' expert testimony was not credible. The plaintiffs have not shown clear error in that finding or argued that the evidence established ADAAG violations in the Japanese Tea Garden without the expert testimony.

Next, the plaintiffs raise two challenges to the district court's pool-related findings. Given the inconsistency in the record regarding the uninsulated sink pipes, the district court did not reversibly err in finding no violation at Coffman Pool. As to the MLK Pool restroom stall door latch, the district court should reconsider on remand whether the plaintiffs proved an ADAAG violation in light of ADAAG § 4.13.9. *See* 28 C.F.R. pt. 36, app. A, § 4.13.9 (providing that a door latch must "not require tight grasping [or] pinching").

4. Finally, we disagree with the plaintiffs that the district court erred in failing to consider current conditions. Similarly, the district court has no obligation to consider new evidence of new violations on remand.[6]

To clarify what should occur on remand, the district court should first issue injunctive relief as to the ADAAG violations it found in its 2021 order. The district court should then evaluate the evidence of alleged violations in the facilities listed above in paragraph 2 and the evidence regarding the MLK Pool restroom stall door latch. If the district court finds any further ADAAG violations, the district court should revisit the

[6] The plaintiffs again request that the case be reassigned on remand. Because the "rare and extraordinary circumstances" meriting reassignment are not present here, we decline to reassign this case. *Krechman v. County of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013).

question of injunctive relief that is systemwide or tailored to any additional violations found.[7]

AFFIRMED in part, REVERSED in part, and REMANDED.[8]

[7] The request for judicial notice, Dkt. 12, is **denied**.

[8] The parties shall bear their own costs on appeal.

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Only the Westlaw citation is currently available.
United States District Court,
N.D. California, Oakland Division.

Ivana KIROLA, on behalf of herself
and others similarly situated, Plaintiff,
v.
The CITY AND COUNTY OF SAN
FRANCISCO, et al. Defendants.

Case No: C 07-3685 SBA
|
Signed 03/12/2021

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ORDER GRANTING DEFENDANTS' MOTION FOR JUDGMENT

Dkt. 751

SAUNDRA BROWN ARMSTRONG, Senior United States District Judge

Plaintiff Ivana Kirola ("Plaintiff"), a disabled individual residing in San Francisco, filed the instant

class action, claiming that Defendants City and County of San Francisco and related parties (collectively "the City") discriminate against mobility-impaired persons by failing to eliminate access barriers at the City's libraries, swimming pools, parks, and public right-of-way (i.e., the City's network of sidewalks, curb ramps, crosswalks, and other outdoor pedestrian walkways). The First Amended Complaint ("FAC"), the operative pleading, alleges violations of: Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42. U.S.C. § 12132; section 504 of the Rehabilitation Act of 1973, § 29 U.S.C. § 794; and state civil rights statutes.

Following a bench trial, the Court issued Findings of Fact and Conclusions of Law ("Findings") in favor of the City on all claims and entered judgment accordingly. *Kirola v. City and Cty. of San Francisco*, 74 F. Supp. 3d 1187 (N.D. Cal. 2014) ("*Kirola I*"), *aff'd in part and rev. in part,*860 F.3d 1164 (9th Cir. 2017) ("*Kirola II*"). The Ninth Circuit Court of Appeals affirmed the judgment in part and reversed it in part and remanded the action only as to Plaintiff's claims under 28 C.F.R. § 35.151, which applies to facilities constructed or altered after January 26, 1992—the effective date of Title II of the ADA.

The parties are now before the Court on the City's Motion for Judgment. Dkt. 754. In particular, the City contends that the trial record supports entry of judgment in its favor on the remanded new construction and alterations claim. Having read and considered the papers filed in connection with this matter and being fully informed, the Court hereby GRANTS the City's

motion for the reasons set forth below. The Court, in its discretion, finds this matter suitable for resolution without oral argument. *See* Fed. R. Civ. P. 78(b); N.D. Cal. Civ. L.R. 7-1(b).

I. BACKGROUND

A. OVERVIEW OF THE ADA

"Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674 (2001). Title II of the ADA, which applies to public entities and became effective January 26, 1992, prohibits discrimination on the basis of a disability in the programs, services or activities of a public entity. 28 U.S.C. § 12132; *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1273 (9th Cir. 1998) (citing §§ 108, 205, Pub.L. No. 101-336). Federal regulations require a public entity to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7). "To prove a public program or service violates Title II of the ADA, a plaintiff must show: (1) he is a 'qualified individual with a disability'; (2) he was either excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits,

or discrimination was by reason of his disability." *Weinreich v. L.A. Cty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997) (citing 42 U.S.C. § 12132).[1]

The standard for accessibility of public facilities depends on when the facility was built. "In defining accessibility, Title II's implementing regulations distinguish between newly constructed or altered facilities, which are covered by 28 C.F.R. § 35.151, and existing facilities, which are covered by 28 C.F.R. § 35.150." *Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 985 (9th Cir. 2014). Newly constructed or altered facilities are those in which the construction or alteration commenced *after* January 26, 1992. *See* 28 C.F.R. § 35.151(a)(1) (new construction); *id.* § 35.151(b)(1) (alterations). For newly constructed facilities, "[e]ach facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is *readily accessible* to and usable by individuals with disabilities. . . ." 35.151(a)(1) (emphasis added). The provisions for the alteration of existing facilities are much to the same effect, except that each part of the facility that is modified must "be altered in such manner that *the altered portion of the facility is*

[1] Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in any program or activity receiving federal financial assistance. 29 U.S.C. § 794. "There is no significant difference in the analysis of the rights and obligations created by the ADA and Rehabilitation Act." *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n.11 (9th Cir. 1999).

readily accessible to and usable by individuals with disabilities. . . ." 35 C.F.R. § 35.151(b)(1).

"To be 'readily accessible,' any part of a newly constructed or altered facility must be constructed in conformance with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG),28 C.F.R. Pt. 36, App. A, or with the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. Pt. 101-19.6, App. A."[2] *Daubert*, 760 F.3d at 985-86 (citing 28 C.F.R. § 35.151(c)(1)-(3)); *e.g.*, *Kohler v. Bed Bath & Beyond of California, LLC*, 778 F.3d 827, 830 (9th Cir. 2015) ("'Readily accessible,' in turn, is achieved where the stadium complies with the relevant ADAAG."). The ADAAG guidelines "lay out the technical structural requirements of places of public accommodation." *Chapman v. Pier 1 Imps. (U.S.) Inc.*, 631 F.3d 939, 945 (9th Cir. 2011) (citing *Fortyune v. Am. Multi-Cinema, Inc.*, 364 F.3d 1075, 1080-81 (9th Cir. 2004)).

In contrast to newly constructed or altered facilities, *existing facilities*—i.e., facilities constructed *prior*

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[2] ADAAG was developed by the Architectural and Transportation Barriers Compliance Board (the "Access Board"), an independent federal agency. 29 U.S.C. § 792(a)(1). The Department of Justice ("DOJ") is required to promulgate regulations consistent with the Access Board's guidelines, although the regulations need not be identical to the guidelines. The Access Board published a final draft of its first proposed ADAAG in July 1991, which was then adopted by the DOJ. *See* 28 C.F.R. Part 36 App. D. In 2004, the Access Board completed a comprehensive update of the 1991 ADAAG, which the DOJ adopted in 2010. *See* 28 C.F.R. Pt. 36, App. B. All references in this Order to ADAAG are to the 1991 version, unless noted otherwise.

to January 26, 1992—"need not be 'accessible to and usable by individuals with disabilities.'" *Daubert*, 760 F.3d at 986. Rather, a public entity need only provide "program access," by "operat[ing] each service, program, or activity so that the service, program, or activity, *when viewed in its entirety*, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (emphasis added); *See Cohen v. City of Culver*, 754 F.3d 690, 694-95 & n.4 (9th Cir. 2014). Program access may be accomplished through "any . . . methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities." *Id.* § 35.150(b)(1); *Daubert*, 760 F.3d at 986. "Title II's emphasis on 'program accessibility' rather than 'facilities accessibility' was intended to ensure broad access to public services, while at the same time, providing public entities with the flexibility to choose how best to make access available." *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 6 (1st Cir. 2000).

The plaintiff in an ADA case "bears the burden of showing a violation of [ADAAG], the substantive standard of ADA compliance." *Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1048 (9th Cir. 2008). The violation must be shown by a preponderance of the evidence. *See In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir. 2001) ("The standard of proof generally applied in federal civil cases is preponderance of evidence."). Expert testimony is not required to prove an ADA violation. *Kohler v. Presidio Int'l, Inc.*, 782 F.3d 1064, 1068-69 (9th Cir. 2015) (affirming that it is "clear that an ADA plaintiff

is not required to provide 'specialized or technical knowledge' through an expert witness to prove a violation") (quoting in part *Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046 (9th Cir. 2013)). Rather, a lay witness "may estimate size, weight, distance, speed and time even when those qualities could be measured precisely." *Strong*, 724 F.3d at 1046. As such, a disabled person is "qualified to opine on the accessibility of facilities they visit." *Id.* However, "vague" testimony regarding accessibility barriers will not suffice to demonstrate an ADAAG violation. *See Kohler*, 782 F.3d at 1070 & n.3 (finding testimony by the plaintiff that he encountered blocked store aisles, standing alone, was insufficient to substantiate an ADA violation); *see also Doran*, 524 F.3d at 1048 ("That [the plaintiff] scraped his knuckles, unsupported by any measurements, is insufficient to demonstrate that 7-Eleven's aisles do not comply with the thirty-six-inch clearance that the Accessibility Guidelines [i.e., ADAAG] mandate.").

B. SUMMARY OF PRIOR PROCEEDINGS

Plaintiff filed the instant class action on behalf of herself and similarly situated mobility-impaired persons, alleging that the City has failed to eliminate access barriers to City libraries, swimming pools, parks, and public right-of-way. Plaintiff brought new construction and alteration claims governed by 28 C.F.R. § 35.151, as well as "program access" claims under 28 C.F.R. § 35.150 with respect to existing facilities. In addition, Plaintiff challenged the adequacy of the City's:

grievance procedure for handling public complaints regarding disabled access to its facilities, programs and services; maintenance policies and procedures; self-evaluation and transition plan; and purported lack of any written policy or procedure for handling safety hazards.

During the course of the litigation, the Court granted Plaintiff's motion for class certification, and certified the following class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2):

> All persons with mobility disabilities who are allegedly being denied access under Title II of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, California Government Code Section 11135, et seq., California Civil Code § 51 et seq., and California Civil Code § 54 et seq. due to disability access barriers to the following programs, services, activities and facilities owned, operated and/or maintained by the City and County of San Francisco: parks, libraries, swimming pools, and curb ramps, sidewalks, crosswalks, and any other outdoor designated pedestrian walkways in the City and County of San Francisco.

Order Granting Pl.'s Mot. for Class Cert., Dkt. 285. Kirola was appointed class representative. *Id.*

The Court presided over a three-week bench trial on Plaintiff's claims, during which the parties presented evidence and testimony from thirty-six witnesses. Plaintiff testified that she encountered the

following access barriers: (1) three stretches of sidewalk containing "bumps," (2) a sidewalk where her wheelchair became stuck in a tree well; (3)one street corner that lacked curb ramps, (4) one street corner that provided only a single curb ramp, (5) errant step stools at three of the City's libraries, (6) three inaccessible pools, and (7) steep paths in one park. 7 RT 1382, 1384-388. Class members Timothy Grant, Margie Cherry, Jill Kimbrough, Elizabeth O'Neill, Audrey DeChanades, and Erica Monasterio testified as to their encounters with physical barriers at various public facilities in San Francisco. In terms of expert testimony, Plaintiff offered testimony from Peter Margen, Dr. Edward Steinfeld, Jeffrey Scott Mastin, Gary Waters and David Seamon. The City presented testimony from various witnesses, including experts William Hecker and Larry Wood.

Following the conclusion of trial, the parties submitted extensive post-trial briefing and Proposed Findings of Fact and Conclusions of Law. Dkt. 614, 616, 617, 618, 632, 634, 635, 636, 646, 662, 681, 683. After considering the entirety of the evidence and testimony submitted, the Court issued its 113-page Findings pursuant to Federal Rule of Civil Procedure 52(a)(1). Dkt. 686. The Court found, inter alia, that Plaintiff failed to carry her burden of demonstrating Article III standing, and, alternatively, that she otherwise failed to sufficiently substantiate any of her claims by a preponderance of the evidence. In accordance with its ruling, the Court entered judgment in favor of the City. Plaintiff appealed certain of the Court's rulings.

C. APPEAL

On appeal, Plaintiff challenged the Court's determination that she lacked standing as well as its rulings on her new construction and alterations claims under 28 C.F.R. § 35.151 (as to the pedestrian right-of-way, parks and recreational facilities, swimming pools and libraries), existing facilities (i.e., program access) claims under 28 C.F.R. § 35.150 (as to the pedestrian right-of-way and parks and recreational facilities). She did not appeal the adverse rulings on her claims regarding the City's grievance procedure, maintenance policies, repair procedures or the self-evaluation and transition plans.

With regard to the threshold question of standing, the Court of Appeals for the Ninth Circuit Court held that because Plaintiff encountered a barrier connected to each of the challenged programs, she had standing to pursue claims on behalf of the certified class. *Kirola II*, 860 F.3d at 1174-76. Turning to the merits, the appellate court disagreed with this Court's analysis of Plaintiff's claims under 28 C.F.R. § 35.151 relating to newly constructed or altered facilities. In its Findings, this Court discounted the opinions of Plaintiff's experts for a number of reasons, including their inconsistent methodologies and measuring protocols in conducting site inspections, their erroneous measurements and their reliance on ADAAG standards. On appeal, the Ninth Circuit held that "ADAAG applies to [the City's] public right-of-way, parks, and playgrounds, and that this Court therefore erred in

concluding that Kirola's experts' application of ADAAG to those facilities made them less credible." *Id.* at 1181.

The above notwithstanding, the Ninth Circuit agreed that certain of this Court's criticisms of Plaintiff's experts' opinions on new construction and alterations were justified. For example, the panel agreed that ADAAG only applies to new construction and alterations that are post-January 26, 1992. As such, this Court "properly faulted Kirola's experts for applying ADAAG to all curb ramps without first identifying whether those ramps were constructed or altered after January 26, 1992, thereby bringing them within ADAAG's purview." *Kirola II*, 860 F.3d at 1182. The Court also "correctly criticized Kirola's experts for not taking into account dimensional tolerances, for which ADAAG specifically provides." *Id.* (citing ADAAG § 3.2 ("All dimensions are subject to conventional building industry tolerances for field conditions.")).

Finally, the Ninth Circuit affirmed this Court's rejection of Plaintiff's program access claims predicated on 28 C.F.R. § 35.150, which applies to existing facilities. The Ninth Circuit agreed with this Court in holding that Plaintiff and other class members had failed to demonstrate "inaccessibility at a programmatic level." *Id.* at 1183-84 ("In sum, we conclude that Kirola has not shown that the City operates its public right-of-way in a deficient manner so that the program, when viewed in its entirety, is not readily accessible to and usable by individuals with disabilities. . . . [¶] We

reach the same conclusion regarding San Francisco's RecPark program").

The Ninth Circuit remanded this case with two interdependent instructions. First, "[this Court] shall apply the ADAAG as we [the Ninth Circuit] have interpreted it, and reevaluate the extent of ADAAG noncompliance." *Kirola II*, 860 F.3d at 1185. In doing so, the Court is to reevaluate the credibility of the expert testimony presented, taking into account that ADAAG does apply to public right-of-way, parks and playgrounds. *Id.* Second, "[o]nce the scope of any ADAAG violations at facilities used by [Plaintiff] and all other class members has been determined, [this Court] shall revisit the question of whether injunctive relief should be granted." *Id.*

The City has now filed a Motion for Judgment as a Matter of Law. In its motion, the City contends that, notwithstanding a reassessment of Plaintiff's experts' testimony, Plaintiff still has not proven any ADAAG violations by a preponderance of the evidence. Alternatively, even if she has, the City argues that Plaintiff has failed to demonstrate that any violations are pervasive or attributable to any policy or practice affecting the facilities at issue. Subsequent to the filing of the motion, the parties engaged in extensive and protracted settlement discussions with the assistance of a Magistrate Judge, but were unable to resolve their

differences. As a result, the parties completed briefing on the City's motion, which the Court resolves below.[3]

II. DISCUSSION

A district court, on remand, has a duty to follow the appellate court's instructions as to how the case is to proceed. *See Vizcaino v. U.S. Dist. Court for W. Dist. of Wash.*, 173 F.3d 713, 719 (9th Cir. 1999). In accordance with the Ninth Circuit's mandate, the Court, in addressing the City's motion for judgment, first considers the extent of ADAAG non-compliance, if any, with respect to the City's right-of-way, parks and playgrounds, libraries and swimming pools (constructed or altered after January 26, 1992). After making that determination, the Court will address whether and to what extent class-wide injunctive relief is appropriate.

A. PUBLIC RIGHT-OF-WAY

1. Background

As set forth above, 28 C.F.R. § 35.151 provides that the alteration of facilities commenced after January 26, 1992, "that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that

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[3] In accordance with Federal Rule of Civil Procedure 52(a), the analysis below shall constitute the Court's supplemental findings of fact and conclusions of law regarding Plaintiff's claims under 28 C.F.R. § 35.151 based on newly constructed or altered facilities. The Court adopts its prior findings and conclusions to the extent that they do not conflict with the Ninth Circuit's opinion.

the altered portion of the facility is readily accessible and usable by individuals with disabilities." *Id.* § 35.151(b); *see also id.* § 35.151(c) (alterations should meet accessibility standards). As for altered streets and pedestrian walkways, they must contain curb ramps. *Id.* § 35.151(e).

In enacting the ADA, Congress directed the Attorney General to "promulgate regulations . . . that implement" Title II. 42 U.S.C. § 12134(a). Self-evaluation plan and transition plan requirements are among such regulations. The self-evaluation regulation states: A public entity shall, within one year of the effective date of this part, evaluate its current services, policies, and practices, and the effects thereof. . . ." 28 C.F.R. § 35.105(a). The transition plan regulation mandates that any public entity obliged to undertake "structural changes to facilities" to meet ADA standards "shall develop a transition plan setting forth the steps necessary to complete such changes." *Id.* § 35.150(d)(1). Where the public entity has authority over streets or walkways, "its transition plan was required to include a schedule for installing disabled access curb ramps at intersections, giving priority to intersections located near important public services." *Cohen v. City of Culver City*, 754 F.3d 690, 696 (9th Cir. 2014) (citing 28 C.F.R. § 35.150(d)(2)).

Consistent with its regulatory obligations, the City's Department of Public Works ("DPW") prepared its first curb ramp transition plan in FY 1992/1993, which estimated that 52,000 curb ramps were needed citywide. 10 RT 1950; Ex. DTX H20. DPW updated its

transition plan in 1998, *see* Ex. DTX H20, and again in FY 2007/2008 with the issuance of a Transition Plan for Curb Ramps and Sidewalks ("Transition Plan"), RT 1951-52; Ex. PTX 22.[4] Ken Spielman, the City's Project Manager of the DPW Curb Ramp Program, was involved in implementing the Transition Plan. *See Kirola I*, 74 F. Supp. 3d 1204-206.

As part of its Transition Plan, DPW implemented a scoring system to evaluate whether an existing curb ramp should be repaired or replaced and to prioritize installations and upgrades. *Id.* Under the curb ramp grading system, existing curb ramps were assigned a "condition score" based on a 100- point scale. *Id.* Each curb ramp began with a score of 100 points, from which a specific number of points were to be deducted, depending on the type of disability access barrier presented. *Id.* For example, 5 points were deducted for curb ramp lips greater than a half-inch; 12 points for a running slope between 8.33 percent and 10 percent; 25 points for a running slope greater than 10 percent; and 13 points for lack of a level bottom landing. *Id.* The City considers a curb ramp "good" and "usable" if it has a condition score of greater than 75. 8 RT 1615.

The City tracks curb ramp condition scores, curb ramp attributes and citizen requests relating to curb ramps through a Curb Ramp Information System

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[4] In her FAC, Plaintiff challenged the sufficiency of the City's Transition Plan. Dkt. 294 ¶¶ 15, 52, 54, 60, 77. The Court rejected this claim in its Findings, *See Kirola I*, 74 F. Supp. 3d at 1245, and Plaintiff did not challenge that ruling on appeal.

("CRIS") database.[5] *Id.* at 1208. For each of the approximate 50,000 potential curb ramp locations in the City, the CRIS database contains information about various attributes, such as whether a curb ramp exists and if so, the condition score assigned to that curb ramp based on characteristics such as the slope of the curb ramp. 12 RT 2388-89.

The City also uses a geographic information service ("GIS") to map citywide curb ramp locations by grade based on the data contained within the CRIS database. *Id.* To prioritize future curb ramp construction, the City evaluates information in the GIS along with public requests to install or repair curb ramps and planned paving projects. 8 RT1627-633. Under its Transition Plan, the City installs approximately 1,200 new curb ramps each year with the ultimate goal of achieving "curb ramp saturation"—that is, to construct a curb ramp compliant with its current design standards at the end of every pedestrian crossing or at least one curb ramp per corner. 6 RT 1206, 1208. The City anticipates achieving curb ramp saturation by 2026/2027. 6 RT 1208.

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[5] Requests for curb ramp installation and repairs may be submitted to the City through its citywide grievance procedure for handling public complaints regarding disabled access to its facilities, programs and services. *Kirola I*, 74 F. Supp. 3d at 1203-204.

2. Curb Ramp Lips

ADAAG applies to curb ramps constructed or altered after January 26, 1992. *See Kirola II*, 860 F.3d at 1182. Although Plaintiff did not testify that she personally encountered any curb ramp lips, she alleges that, in violation of ADAAG, a large number of curb ramps in the City still contain a half-inch lip at the base of the ramp where the ramp meets the crosswalk. *See* Pl.'s Opp'n to Mot. for Judgment, Dkt. 758 at 29. As explained more fully in the Court's Findings, the California Building Code ("CBC") previously required a half-inch detectable lip at the base of the curb ramp to facilitate the ability of blind or low-vision individuals to locate the edge of the ramp. *Kirola I*, 74 F. Supp. at 1206 & n.3, 4. Federal law, by contrast, specified flush or smooth transitions. *Id.*; *see* ADAAG § 4.7.2 ("Transitions from ramps to walks, gutters, or streets shall be flush and free of abrupt changes.").

To address the then conflicting federal and state requirements, the City constructed non-federally-funded curb ramps with a lip, and federally-funded curb ramps without a lip. *Kirola I*, 74 F. Supp. at 1206. The practice of installing lips on some curb ramps formally ended in January 2004 pursuant to DPW Order No. 175,387, which formally adopted a standard set of plans for the design of curb ramps. 10 RT 1981-1986; Exs. DTX H04, G07. Among other things, the order requires bidirectional curb ramps on a corner and authorize "alternate" and "exception" curb ramps where topographical, legal or other constraints preclude installation of the preferred design. *Id.* Importantly, the

City formally abandoned the use of curb ramp lips, opting instead for a detectable warning surface to assist vision-impaired persons identify the transition at the end of ramp. *Kirola I*, 74 F. Supp. at 1206[6]; *see also* 10 RT 1981-1982. Although curb ramps constructed since 2004 no longer contain a lip, Plaintiff nonetheless avers that some pre-2004 curb ramps with lips remain and pose a safety hazard. The City responds that Plaintiff's curb ramp lip claim is time-barred and is otherwise unsubstantiated.

a) Statute of Limitations

As an initial matter, the City contends that any claim arising from the City's pre-2004 practice of installing detectable lips on state-funded curb ramps is time-barred. Defs.' Mot. for J. as a Matter of Law, Dkt. 751 at 16 n.5. For ADA Title II actions brought in California, the statute of limitations is three years. *Sharkey v. O'Neal*, 778 F.3d 767, 770 (9th Cir. 2015). Although the Ninth Circuit has not expressly held that a three-year limitations period also applies to section 504 claims, the weight of district court authority supports such a conclusion. *Ahmed v. Regents of Univ. of California*, No. 17CV0709-MMA (NLS), 2018 WL 3969699, at *6 (S.D. Cal. Aug. 20, 2018) ("numerous district courts have applied the three-year limitations period to Section 504 claims") (citing cases); *but see*

[6] A more detailed discussion of the City's ADA-compliant curb ramp construction standards in force since January 2004 is set forth in the Court's Findings. *Kirola I*, 74 F. Supp. 3d at 1206-207, 1252-53.

C.C. v. Rocklin Unified Sch. Dist., No. 2:17-CV-02645-MCE-AC, 2019 WL 803904, at *4 (E.D. Cal. Feb. 21, 2019) (finding that a section 504 claim is subject to a two year limitations period). "Under federal law a cause of action accrues, and the statute of limitations begins to run, when a plaintiff knows or has reason to know of the injury that is the basis of the action." *Alexopulos v. San Francisco Unified Sch. Dist.*, 817 F.2d 551, 555 (9th Cir. 1987).

In the instant case, the City argues that because it ceased installing curb ramp lips by January 2004 at the latest, and because Plaintiff did not file suit until over three years later in July 2007, Plaintiff's claim necessarily is time-barred. Plaintiff concedes that she filed suit outside the three-year limitations period, but counters that her ADA and Rehabilitation Act claims are timely under the continuing violations doctrine. Dkt. 758 at 30 n.4. The continuing violations doctrine extends the accrual of a claim if the plaintiff alleges "a systematic policy or practice of discrimination that operated, in part, within the limitations period." *Douglas v. Cal. Dep't of Youth Auth.*, 271 F.3d 812, 822 (9th Cir. 2001).

Plaintiff asserts that "the class' claims are based on a systemic policy and practice of *installing* and *leaving* in place noncompliant curb ramps that has continued into the limitations period. . . ." Dkt. 758 at 30 n.4. This contention lacks merit. The policy and practice of *installing* non-compliant curb ramps (i.e., with lips)—which was attributable to conflicting state and federal standards—ceased in 2004. There is no evidence that

Plaintiff or any class member experienced difficulty using a curb ramp due to a lip after 2004.[7] Even so, the purported continuing impact from the City's former policy of installing curb ramp lips does not save Plaintiff's claim. *See Knox v. Davis*, 260 F.3d 1009, 1013 (9th Cir. 2001) (in assessing the timeliness of a claim, "this court has repeatedly held that a 'mere' continuing impact from past violations is not actionable").!

As for the alleged policy of "*leaving in place* the noncompliant curb ramps," *see* Dkt. 758 at 30 n.4, Plaintiff presented no evidence that any such policy exists. To the contrary, the record developed at trial shows that "the City endeavors to remove [curb ramp lips] where possible, in accordance with its current . . . Transition Plan." *Kirola I*, 74 F. Supp. 3d at 1206 n.4. With respect to Plaintiff's argument that the City failed to remove curb ramp lips in a sufficiently expeditious or responsive manner, this complaint lies with the City's Transition Plan or the City's maintenance or grievance procedures. This Court ruled in favor of the City on such claims. *Kirola I*, 74 F. Supp. 3d at 1259-263. Because Plaintiff did not appeal those rulings, any attempt to revisit them is beyond the scope of the mandate.

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[7] Plaintiff never testified to having encountered a curb ramp lip. Although three class members stated that they had occasional problems with navigating curb ramps with lips, there was no testimony as to when and where those incidents occurred. *See* 5 RT 1002 (Ms. Dechanedes), 5 RT 1031-1032 (Ms. Cherry), 5 RT 867 (Mr. Grant).

In sum, the Court finds that insofar as Plaintiff's Title II and Section 504 claims are based on the curb ramp lips, such claims are barred by the statute of limitations.

b) Evidentiary Showing

Even if Plaintiff's curb ramp lip claim was not time-barred, it fails for lack of compelling evidence. Plaintiff relies on the expert testimony of David Seamon, who reviewed the CRIS (i.e., the City's curb ramp database). Mr. Seamon claimed that CRIS showed 957 curb ramps that had "a lip too high" with respect to streets paved between 1977 and 1992. 3 RT 472. However, the Court previously found this testimony uncompelling for a number of reasons, including that he relied on obsolete data and that he provided inaccurate geographic representations of the CRIS data. *Kirola I*, 74 F. Supp. at 1224. Notably, Plaintiff has not addressed any of those particular credibility concerns in her response to the instant motion. That aside, it is unclear how curb ramps "found on streets paved from 1977 and 1992" are germane, since only post-January 26, 1992 construction and alterations are at issue for purposes of ADAAG noncompliance. *See* 28 C.F.R. § 35.151; *Brown v. Gen. Tel. Co. of Cal.*, 108 F.3d 208, 209 (9th Cir. 1997) ("[t]he ADA is not retroactive and it does not apply to actions taken prior to . . . the effective date of the Act") (per curiam).

Another expert, Jeffery Scott Mastin, testified that, with respect to streets resurfaced between

January 26, 1992 and November 29, 2009, 1,152 ramps had lips that were "too high." 4 RT 487.[8] Mr. Mastin inspected a total of 1,432 curb ramps in various parts of the City and found that 503 of the ramps had lips at the bottom of the ramp greater than 1/4" high and 494 ramps had lips greater than 1/2" high. 6 RT 1215-1218. In its Findings, the Court found Plaintiff's expert testimony regarding curb ramps unpersuasive, because, among other reasons, it did not take into account specifically when the curb ramp was constructed or altered. The Court explained:

> Kirola's experts indiscriminately applied the ADAAG to each curb ramp assessed without taking in account ***when*** the curb ramps were constructed or altered. The fact that Kirola's experts inappropriately applied the ADAAG to every curb ramp assessed without first ascertaining when the curb ramp was constructed or altered and whether the ADAAG therefore applied undermines both their credibility and the probative value of their testimony.

Kirola I, 74 F. Supp. 3d at 1223 (emphasis in original). The Ninth Circuit validated this criticism, holding that "the district court properly faulted Kirola's experts for applying ADAAG to all curb ramps without

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[8] Since 1989, the City has required that when roads are paved and the paving extends into an intersection (including the cross-walk), curb ramps are constructed or reconstructed if they do not meet the City's current curb ramp design standards. *Kirola I*, 74 F. Supp. 3d at 1207.

first identifying whether those ramps were constructed or altered after January 26, 1992, thereby bringing them within ADAAG's purview." *Kirola II*, 860 F.3d at 1182. For the foregoing reasons, the Court does not find the testimony of Plaintiff's experts to be persuasive.

Plaintiff does not dispute that her experts failed to consider when the curb ramps they inspected were constructed or altered. Nor does she explain precisely how the Court can assess whether ADAAG applies to a particular curb ramp in the absence of such critical information. Instead, Plaintiff argues that "the Court of Appeals did not consider these criticisms to be sufficiently serious to support judgment in favor of the City." Dkt. 758 at 24. Plaintiff reads too much into the Ninth Circuit's opinion. The appellate court simply held that the Court "should have made its credibility assessment [of Plaintiff's experts] on the premise that ADAAG applies to [parks and playgrounds and right-of-way]." *Kirola II*, 860 F.3d at 1181. In other words, the appellate court made it clear that the evaluation of Plaintiff's experts' credibility, including their failure to account for when a curb ramp was constructed or altered, is a matter for this Court to resolve. *Id.*; *See Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 575 (1985) (holding that under Rule 52, the district court is empowered to evaluate a witness' credibility).

As discussed above, the mandate from the Ninth Circuit requires the Court, as an initial matter, to "reevaluate the extent of ADAAG noncompliance" with respect to the City's newly constructed or altered

facilities. *Kirola I*, 860 F.3d at 1185. It is axiomatic that a determination of ADAAG noncompliance is dependent, as an initial matter, on whether ADAAG applies in the first instance. *Kirola II*, 860 F.3d at 1182 (holding that only curb ramps constructed or altered after January 26, 1992 are "within ADAAG's purview"). Thus, without proof as to *when* the curb ramps examined by Plaintiff's experts were constructed or altered, the Court, by extension, cannot meaningfully assess the "extent of ADAAG noncompliance" as to those ramps. Given this fundamental flaw in Plaintiff's experts' analysis, the Court finds their testimony unpersuasive and that Plaintiff has failed to satisfy the threshold burden of showing that the curb ramps examined are subject to ADAAG.

3. Curb Ramp Slopes

ADAAG § 4.8 states that the permissible slope and rise of a curb ramp depends on whether the ramp is new construction or is being constructed on an existing site or facility. The "run" refers to the *horizontal* length of the ramp, while "rise" refer to the vertical height of the ramp. Specifically, ADAAG § 4.8.2 provides:

> 4.8.2 Slope and Rise. The least possible slope shall be used for any ramp. The maximum slope of a ramp in new construction shall be ***[8.3%]***. The maximum rise for any run shall be 30 in (760 mm) (see Fig. 16). Curb ramps and ramps to be constructed on existing sites or in existing buildings or facilities may have slopes and rises ***as allowed in 4.1.6(3)(a)*** if

> space limitations prohibit the use of a 8.3% slope or less.
>
> Tabular or graphical material not displayable at this time.

ADAAG § 4.8.2 (emphasis added). Under subsection 4.1.6(3)(a), "[a] slope between [10 percent] and [8.3 percent] is allowed for a maximum rise of 6 inches (150 mm)." ADAAG § 4.1.6(3)(a)(i). Where the maximum rise is 3 inches, "a slope of 1:8 [12.5 percent] and 1:10 [10 percent] is allowed. . . ." *Id.* § 4.1.6(3)(a)(ii). Thus, under ADAAG, a ramp slope may range from 8.3 to 12.5 percent, depending on the specific circumstances presented.

Again relying the City's CRIS database, Mr. Seamon identified 5,675 curb ramps as having running slopes exceeding 10 percent. 3 RT 472, 475. He added that for curb ramps adjacent to streets paved between January 27, 1992, and November 23, 2009, CRIS data indicated that there were 4,262 curb ramps with a slope exceeding 10 percent. 3 RT 487; Exs. PX 4103A, PX 4103C. For the same reasons discussed above, the Court accords little weight to Mr. Seamon's testimony. *Kirola I*, 74 F. Supp. at 1224. In addition, nothing in the record shows that Mr. Seamon took into account the provisions of ADAAG § 4.8.2 or 4.1.6(3)(a), which allow for slopes to exceed 10 percent in certain cases. As such, the mere fact that some curb ramps exceeded a 10 percent slope, standing alone, does not ipso facto establish a violation of ADAAG.

After inspecting 1,432 curb ramps around the City, Plaintiffs' expert, Mr. Mastin, found that 175 of the curb ramps had running slopes greater than 10 percent, and 178 had running slopes above 12.5 percent. RT 1216-1218. But, as with Mr. Seamon, the probative value of Mr. Mastin's testimony is undermined by the inconsistent methodology he employed in taking measurements and failing to elaborate on specific details of each curb (that, in turn, bear upon which of the different slope tolerances specified in ADAAG). *See*, *e.g.*, *Kirola II*, 860 F.3d at 1183 (affirming certain of the Court's criticisms of Plaintiff's expert's analysis) (citing *Kirola I*, 74 F. Supp. 3d at 1222-23). Moreover, like Plaintiff's other experts, Mr. Mastin failed to specify *when* the curb ramps he inspected were constructed or altered. Without that information, Plaintiff cannot show that ADAAG applies to the curb ramps inspected by her experts. *Id.* at 1182. The Court therefore finds that Plaintiff has failed to persuasively prove the City's curb ramps violate 28 C.F.R. § 35.151.

4. Sidewalks and Crosswalks

The City's Transition Plan, which governs curb ramps and sidewalks, includes a Sidewalk Inspection and Repair Program ("SIRP"), which governs the maintenance of the City's 2,000 miles of sidewalks. *Kirola I*, 74 F. Supp. 3d at 1209-210. Under SIRP, the City proactively inspects every City block on a twenty-five-year cycle, notifies the responsible parties of any access barriers identified, and ensures the remediation of these barriers. *Id.* The City prioritizes sidewalk

inspection and repairs for areas with high pedestrian usage based upon criteria set forth in SIRP. *Id.* "DPW determined that a twenty-five year inspection cycle is reasonable, given the size of San Francisco, the fact that the inspection program operates in tandem with a grievance procedure, fiscal and staffing constraints, and the prioritization of repairs where pedestrian volume is the greatest." *Id.* at 1209. SIRP works in tandem with the City's grievance procedure, which facilitates the remediation of public complaints regarding disabled access to its facilities, programs and services. *Id.* at 1203-205, 1209. "Accessibility complaints regarding sidewalks are given high priority and responded to immediately, and are typically resolved in ninety days." *Id.* at 1244.

Plaintiff alleges that the City's network of sidewalks and crosswalks contains "pervasive" barriers that pose safety hazards for mobility-impaired persons. Pl.'s Trial Brief, Dkt. 303 at 23, 25. At trial, Plaintiff and class members testified that they encountered uneven and cracked sidewalks, missing curb ramps, excessive slopes and exposed tree roots in various City neighborhoods. *Kirola I*, 74 F. Supp. 3d at 1218. Plaintiff's expert Peter Margen identified tree wells that were not level with the sidewalk on Fillmore Street and Guerrero Street, 2 RT 324-25, as well as an excessive cross slope on the sidewalk near the Upper Noe Recreation Center, 6 RT 1141-43. Plaintiff's expert Dr. Edward Steinfeld observed tree roots pushing through sidewalk near Jefferson Square Park, 4 RT 709, and cracks in the sidewalk near the park, 4 RT 712.

In her trial brief, Plaintiff's principal claim regarding the City's sidewalks was that the City's policies governing sidewalk repair and maintenance, including SIRP, fail to ensure that accessibility complaints regarding sidewalks are promptly and adequately addressed in accordance with the ADA. Dkt. 303 at 25. As a result, hazardous conditions allegedly are left unaddressed for up to one or two years. *Id.* Plaintiff reiterated this contention in her post-trial briefing, Pl.'s Opp'n to Defs.' Post-Trial Mot. for J., Dkt. 672 at 26, and Proposed Findings of Fact and Conclusions of Law, 646 at 12-13. In its Findings, the Court rejected Plaintiff's challenges to the City's maintenance and repair policies. *Kirola I*, 74 F. Supp. 3d at 1246, 1262. Plaintiff did not appeal the Court's ruling on those particular policies.

Plaintiff now contends the City's sidewalks violate ADAAG because "[its] policy documents regarding sidewalks and crosswalks—the . . . Transition Plan, DPW's Guidelines for Inspection of Sidewalk Defects, and the Crosswalk Assessment Checklist-Pilot Study, Fall 2010—do not state that ADAAG applies to those types of facilities, and in fact, permit conditions that violate ADAAG." Dkt. 758 at 29. Plaintiff did not raise this argument in her trial brief, post-trial briefing, or Proposed Findings of Fact and Conclusions of Law. Nor did she raise this argument with the Ninth Circuit. As such, the Court finds that Plaintiff has waived any opportunity to raise this newly asserted claim and thus it is not properly before the Court. *See*, *e.g.*, *Daewoo Elecs. Am. Inc. v. Opta Corp.*, 875 F.3d 1241, 1245 n.1

(9th Cir. 2017) (holding that an issue not raised on appeal is waived). Waiver aside, the argument fails. As an initial matter, Plaintiff fails to cite to where in the voluminous record any of her experts testified that any aspect of the City's policies, including "policy documents," pertaining to sidewalk maintenance and repairs violate any provision of ADAAG. *See Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (a court need not consider arguments unsupported by citations to the record).

Plaintiff's argument also is beyond the scope of the Ninth Circuit's mandate. The salient question on remand is whether Plaintiff has demonstrated that the City's sidewalks violate ADAAG. With respect to that question, Plaintiff has neither alleged nor presented evidence to support allegations that the City installs new sidewalks or crosswalks or alters or repairs existing sidewalks and crosswalks that are inconsistent with ADAAG.[9] Rather, her claim is that the City's

[9] Plaintiff attempts to make much of the testimony of Ken Spielman (a City employee involved in implementing the Transition Plan), suggesting that he was unfamiliar with ADAAG and did not use ADAAG as a standard for determining whether to replace a curb ramp. Dkt. 758 at 28; *see* 7 RT 1400-1409. The testimony offered by Mr. Spielman pertained to the Transition Plan, which, as discussed, endeavored to modernize curb ramps and achieve curb ramp saturation throughout the City. Importantly, there is no evidence that he was evaluating newly-constructed or altered curb ramps for ADAAG compliance. While Mr. Speilman's lack of knowledge regarding ADA accessibility requirements might have been pertinent to the propriety of the Transition Plan, Plaintiff's claims regarding the Transition Plan are no longer before the Court. More importantly, Mr. Spielman's testimony is not

policies fail to sufficiently rectify such defects in a timely manner. As a result, defective sidewalks allegedly remain unrepaired for an unreasonable length of time, which, in turn, exposes mobility-impaired persons to hazardous conditions. Such concerns, at their core, are directed at the sufficiency of the City's maintenance and repair policies. Since the Court ruled against Plaintiff on that claim, and since Plaintiff did not appeal that ruling, her complaint regarding the sufficiency of the City's policy documents is not properly before the Court.[10]

5. Summary

The Court finds that Plaintiff has failed to demonstrate by a preponderance of the evidence that the City's public right-of-way violate ADAAG.

B. PARKS AND PLAYGROUNDS

There are approximately 220 parks in the City. *Kirola I*, 74 F. Supp. 3d at 1256. In her opposition brief, Plaintiff has identified a few parks and playgrounds

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probative of whether newly constructed or altered curb ramps comply with ADAAG.

[10] Even if the Court were to construe Plaintiff's claim as extending beyond the City's maintenance and repair policies, the Court ascribes little weight to her experts' testimony regarding City sidewalks. As with the curb ramps, her experts failed to distinguish when the sidewalks were constructed or altered. In addition, the shortcomings in their methodology further undermines their credibility. *See Kirola II*, 860 F.3d at 1183 (citing Kirola I, 74 F. Supp. 3d at 1222-23).

which she alleges are newly constructed or altered facilities that are in violation of ADAAG. Dkt. 758 at 15. Specifically, Plaintiff argues that she, her experts and certain class members encountered access barriers at Alamo Square Park, St. Mary's Playground, Holly Park, the Children's Playground at Golden Gate Park, the Japanese Tea Garden, the Conservatory of Flowers, Stow Lake, and some restrooms at Golden Gate Park. *Id.* at 17-18. The Court addresses Plaintiff's contentions regarding these facilities seriatim.

1. Alamo Square Park

Tabular or graphical material not displayable at this time.

Alamo Square Park was constructed prior to 1906 and is located on a steep hill. *Kirola I*, 74 F. Supp. 3d at 1256 (citing 7 RT 1385, 1394). At some time after January 26, 1992, a new playground was constructed at the park. 8 RT 1505; Ex. PTX 0148A. Based on information from Google Maps, the Court takes judicial notice that Alamo Square Park is bounded by Scott Street, Fulton Street, Steiner Street and Hayes Street. *See United States v. Perea-Rey*, 680 F.3d 1179, 1182 n.1 (9th Cir. 2012) (noting that information from Google Maps is subject to judicial notice because it can be "accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

Plaintiff contends that the Alamo Square Park lacks an accessible route to the park and playground. Dkt. 758 at 15-16. Under ADAAG, a public entity need

only provide one accessible path of travel to access. ADAAG §§ 4.3.2; 4.1.6(2). At trial, the City's Deputy Director for Physical Access, John Paul Scott, testified that there is a "useable" route into the park from Scott Street and Fulton Street. 8 RT 1508. He further stated that when the new playground was constructed, the existing route to the park from Hayes Street and Steiner Street was "totally rebuilt to provide an accessible route to the playground." *Id.*[11]

At trial, Plaintiff did not present any expert testimony regarding any accessibility barriers at Alamo Square Park. She did, however, personally testify that "the accessible [corner] entrance is steep to use," and that if she ascends the access ramp "at the wrong angle," it is possible for her to "slide back or do a wheelie in [her] [wheel]chair." 7 RT 1385. Plaintiff further claimed that there are "some places where the slope of the paths are steep so it makes it hard to use those areas at the park," and that she was not able "to get in the children's play area with [her] chair." *Id.*

As noted, expert testimony is not required to establish a violation of the ADA, as a lay witness such as Plaintiff may estimate "size, weight, distance, speed

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[11] Subsequent to trial, Alamo Square Park underwent a $5.3 million renovation Since 1989, the City has required that when roads are paved and the paving extends into an intersection (including the cross-walk), curb ramps are constructed or reconstructed if they do not meet the City's current curb ramp design standards and has since reopened. *See* https://sf.curbed.com/2017/5/26/15700818/ alamo-square-park-reopen (last visited Dec. 10, 2020).

and time even when those qualities could be measured precisely." *Strong*, 724 F.3d at 1046. At the same time, the information provided by the witness must be sufficiently specific to persuade the Court that the perceived barrier, in fact, constitutes a violation of ADAAG or the ADA. *Id.* (noting that the trier of fact may "discount such personal observations," depending on the information provided).

Plaintiff testified that the angle of one of the park's ramps was too steep for her to use safely, that some paths are difficult to navigate and that she could not enter the children's play area. However, Plaintiff did not establish that she experienced these challenges on the accessible route to the play area from the entry point at the corner of Hayes Street and Steiner Street. Nor did she provide an estimate of any objective criteria that would demonstrate a violation of ADAAG. While Plaintiff's frustrations appear credible, her counsel did not elicit sufficiently specific testimony to demonstrate a violation of ADAAG. *See Kohler*, 782 F.3d at 1070 & n.3 (finding that the plaintiff's "vague" testimony that he encountered clothes in the store aisles, without a corroborating expert report, was insufficient to sustain an accessibility claim under the ADA); *Doran*, 524 F.3d at 1048 (non-specific testimony by the plaintiff was insufficient to establish an ADAAG violation).

2. St. Mary's Playground

Class member Jill Kimbrough testified at trial regarding the difficulties her mobility-impaired daughter Millie experienced while accessing St. Mary's Playground. 4 RT 822-23. Ms. Kimbrough explained that there is a steep hill leading from the parking area to the playground area and that the access route is difficult for mobility-impaired individuals to traverse:

> Typically developing children can take a slide that goes straight down to the playground, however, the only other way for Millie to get down was to take a right and take a really steep hill down. And it just kind of took you to a grassy area where that was pretty much all that was—that stopped right there. That was all she could do unless we lifted her and carried her.

4 RT 835-36.

Plaintiff's expert Peter Margen elaborated on various access issues at St. Mary's Playground, including the one discussed by Ms. Kimbrough. 2 RT 279-93. According to Mr. Margen, the designated path to the playground area requires using an elevated, arched bridgeway system. 2 RT 287-289; Ex. PX 4104R. He noted that the bridge is only 35.5 inches wide, when, because of its slope, it should be a minimum of 48 inches in width. 2 RT 288. In addition, Mr. Margen testified that he measured the gradient on both sides of the bridgeway and found a running slope of 13.7 percent, which exceeds the ADAAG limit of 8.33 percent. 2 RT 289-290. As an alternative to traversing the

bridge, he noted that an individual could use a "service road," but that it has a 13 to 15 percent slope. 2 RT 289. Because of the aforementioned and other barriers, Mr. Margen claimed that the playground is "highly inaccessible." 2 RT 288, 291.

Citing testimony from its expert Larry Wood, the City counters that the 13 to 15 percent slope on the access road was dictated by the "severe site constraints" at St. Mary's Playground and "precluded traditional designs for an accessible route." Dkt. 759 at 10 (citing 11 RT 2110-11). Though not stated specifically, this argument appears to be predicated on ADAAG § 4.1.6(1)(j), which provides that "if compliance with [the alteration guideline] is technically infeasible, the alteration shall provide accessibility to the maximum extent feasible." "Technically infeasible" means, in relevant part, that "other existing physical or site constraints prohibit modification or addition of elements, spaces, or features which are in full and strict compliance with the minimum requirements for new construction and which are necessary to provide accessibility." ADAAG § 4.1.6(1)(j).

In the instant case, the City has failed to carry its burden of demonstrating technical infeasibility. *See Heightened Indep. & Progress, Inc. v. Port Auth. of New York & New Jersey*, 693 F.3d 345, 353 (3d Cir. 2012) (noting that technical infeasibility acts as "a kind of affirmative defense to otherwise applicable ADA compliance requirements" and therefore the defendant bears the burden of proving the defense). Mr. Wood did not testify that physical or site constraints precluded

the modification or addition of features to ensure that the access route to the playground was in full and strict compliance with ADAAG. *See* ADAAG § 4.1.6(1)(j). Rather, he merely commented that the facility was "unique" and that the City had used "a very innovative way of making the site accessible." 11 RT 2110-2111. Moreover, the City does not address Mr. Margen's testimony regarding the accessibility issues present on the arched bridgeway, which he claimed is the designated accessible path to the playground area. Accordingly, the Court finds that Plaintiff has shown that St. Mary's Playground lacks an accessible route that is ADAAG compliant.

3. Holly Park

Holly Park is located at the top of a hill and there is a steep pathway to the playground. 4 RT 837. Ms. Kimbrough stated that it is "very, very difficult" for Millie to use the pathway without assistance. *Id.*

Plaintiff's accessibility claim with respect to Holly Park lacks sufficient evidence to establish a violation of the ADA. First, it is unclear from the record whether the pathway described by Ms. Kimbrough is in reference to Millie's experience using the sidewalk or another pathway within the park. Second, Plaintiff has not cited any testimony by her experts regarding any ADAAG violations at Holly Park. *See Indep. Towers of Wash.*, 350 F.3d at 929 (a court need not consider arguments unsupported by relevant authority or citations to the record). Indeed, the Court, upon independently

reviewing the record, was unable to locate any such testimony, let alone any mention of Holly Park. The Court therefore finds that Plaintiff has failed establish that the City violated ADAAG with respect to the Playground at Holly Park.

4. Children's Playground at Golden Gate Park

Ms. Kimbrough testified as to her experiences with Millie at the Children's Playground at Golden Gate Park. 4 RT 832-833. She stated that (1) the play area is inaccessible because of a "pretty steep hill" to enter the playground and (2) "none of the features of the play structure are accessible to Millie." 4 RT 832-33. The information provided by Ms. Kimbrough is vague. Aside from characterizing the hill as steep, she provided no other information from which the Court can discern a violation of ADAAG. *See Strong*, 724 F.3d at 1046. She also offered no explanation as to why she believed the play structure was inaccessible to Millie. Nor was any expert testimony offered to corroborate Ms. Kimbrough's claim of inaccessibility. In view of the testimony presented, Plaintiff has thus failed to establish that the City violated ADAAG with respect to the Playground at Golden Gate Park. *See Kohler*, 782 F.3d at 1070 & n.3; *See Doran*, 524 F.3d at 1048.

5. Japanese Tea Garden

The Japanese Tea Garden ("Tea Garden") is located within Golden Gate Park. Since 2004, the Tea

Garden has been listed on the National Register of Historic Places ("Register"). 12 RT 2324-25. In general, to qualify for the Register, the property must be at least fifty years old. *See* 36 C.F.R. § 60.4. Under the ADA, historic properties are defined as "those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under state or local law." 28 C.F.R. § 35.104. Although compliance with the ADA is generally required, a relevant consideration is whether the proposed modification would threaten or destroy the historic significance of the building or facility. *See* 42 U.S.C.A. § 12204(c); ADAAG § 4.1.7.[12]

Ms. Kimbrough and fellow class member Erica Monasterio testified regarding access issues their respective children encountered while visiting the Tea Garden. Ms. Kimbrough testified that her daughter "couldn't get into the tea house," "onto the high bridge" or traverse "stepping stones that go over the water." 8 RT 831. Ms. Monasterio testified that her daughter was unable to participate in a school field trip to the Tea Garden because "she couldn't go on the walk with the other kids." 6 RT 1237-38. The inability of Ms. Monasterio and Ms. Kimbrough's children to fully experience the Tea Garden was undoubtedly frustrating and distressing to both parent and child. Nonetheless, the testimony elicited from them did not include sufficient information from which the Court is able to discern a

[12] At the time of trial, the Tea Garden was undergoing construction to improve accessibility. 12 RT 2325.

specific ADAAG violation. *See Kohler*, 782 F.3d at 1070 & n.3.

Plaintiff's expert testimony fares no better. Gary Waters inspected the Tea Garden and opined that "the accessible path of travel in and through the facility is extremely limited." 7 RT 1316-321. He observed that there are no handrails on the entry stairs and that the pathway just past the main entry point "becomes too steep," thereby limiting access to disabled persons. 7 RT 1318, 1324, 1325. While noting that many of the pathways within the Tea Garden are "in general . . . pretty good," Mr. Waters believed that a few of the "typically stone bridges that cross the water features . . . are typically very narrow, from—anywhere from . . . 28 inches to 30, 32 inches, 33 inches in width." 7 RT 1319-320. He stated that the bridges should be widened and that such an alteration would not "fundamentally alter" the Tea Garden. *Id.*

The expert testimony that Plaintiff proffered at trial lacks credibility and is otherwise unpersuasive. Mr. Waters offered contradictory testimony regarding the lack of handrails on the entry stairway. While claiming at trial that this was an accessibility violation, Mr. Waters opined just the opposite during his deposition—that there was no ADAAG violation "because the two levels of stairs are also served by a ramp." 7 RT 1362-63.

Similarly, Mr. Waters offered inconsistent testimony regarding the stone bridges. While opining that the bridges could be widened without fundamentally

altering the Tea Garden, he admitted to testifying during his deposition that he was not in a position to render such an opinion. 7 RT 1361. Mr. Waters also admitted that he is "not an expert" in Japanese tea garden design. 7 RT 1319-320. Additionally, there is no indication in the trial record whether the bridges are original to the Tea Garden and thus are more than 50 years old, or whether they were constructed or altered after January 26, 1992. As such, Plaintiff cannot show, as an initial matter, that the bridges are governed by ADAAG. *See Daubert*, 760 F.3d at 985-86; *see also Kirola II*, 860 F.3d at 1182.

Finally, Mr. Waters' testimony regarding inaccessible internal pathways is undermined by the lack of any measurements to substantiate his opinion. *See Doran*, 524 F.3d at 1048 (holding that non-specific testimony "unsupported by any measurements" is insufficient to demonstrate an accessibility violation).

In sum, Plaintiff has failed to establish that the City violated ADAAG with respect to the Tea Garden at Golden Gate Park.

6. Conservatory of Flowers

The Conservatory of Flowers is a greenhouse and botanical garden located in Golden Gate Park and is the oldest greenhouse in the United States. 11 RT 2113. Ms. Monasterio testified as follows regarding barriers encountered by her daughter at the Conservatory of Flowers:

> Q. Have you been to the Conservatory of Flowers?
>
> A. Yes.
>
> Q. And have you—has Maira had any access problems there?
>
> A. She can get in, no problem, *but she can't get through.* So you can get into the first part of the Conservatory of Flowers, but you can't go all the way through it. *It's narrow and there's a lot of plants and pots that are sort of on the walking area.*
>
> Q. Is there—
>
> A. *Where the little bridges, she can't go in there.*
>
> Q. She can't cross the bridge; is that correct?
>
> A. No, she can't cross the bridge.
>
> Q. And has Maira visited the Conservatory of Flowers with her school?
>
> A. Yes. She's gone with us and she also went with her school. When she went with her school, she had to wait on the other side of the bridge while the other children went through the conservatory.

6 RT 1237:3-20.

Ms. Monasterio's testimony purports to identify two accessibility barriers: (1) narrow walkways with "a lot plants and pots that are sort of on the walking area" and (2) "little bridges" that Maira cannot traverse.

Plaintiff presented no expert testimony regarding the aforementioned, alleged barriers.[13]

Potted plants are not architectural barriers, but, if not promptly removed, could pose an obstruction sufficient to violate a public entity's maintenance obligations under 28 C.F.R. § 35.133.[14] *Kirola I*, 74 F. Supp. 3d at 1247 (citations omitted). The Court, however, previously rejected Plaintiff's maintenance claim and she did not appeal that ruling. *Id.* That aside, the testimony provided by Ms. Monasterio regarding the accessibility issues experienced by Maira lacks sufficient detail to establish any specific ADAAG violation. *See Kohler*, 782 F.3d at 1070 & n.3; *Doran*, 524 F.3d at 1048. Even if sufficient detail were provided, it is unclear whether the pathways or bridges were altered after January 26, 1992, and thus were subject to ADAAG. The Court therefore finds that Plaintiff has failed to demonstrate that there are barriers within the Conservatory of Flowers that violate the ADA.

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[13] Although Plaintiff's expert Mr. Mastin did not identify any accessibility issues inside the facility, he opined that the distance from the parking area to the entrance of the Conservatory of Flowers is too far for mobility-impaired persons. The Court has already considered and rejected this claim. *Kirola I*, 74 F. Supp. 3d at 1257 (citing 11 RT 2112-2114; Ex. DTX F37). In addition, in her opposition, Plaintiff has not identified any ADAAG requirements with respect to the distance from an accessible parking space to a facility entrance.

[14] Under 28 C.F.R. § 35.133(a), public entities "shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities[.]"

7. Stow Lake

Stow Lake is a man-made lake located in Golden Gate Park. Plaintiff contends that: (1) the signage at the lake directing visitors to an accessible path is inadequate; and (2) the paths are obstructed by tree roots and have steep running slopes. Dkt. 758 at 18.

Class member Elizabeth O'Neil testified that she went to Stow Lake to attend a friend's wedding ceremony on the Pagoda, which is located on an island within the lake. 3 RT 587. Because of the poor signage, she missed the accessible route and ended up on another route composed of "giant square blocks of concrete." 3 RT 588. *Id.* Ms. O'Neill's husband had a difficult time navigating her manual wheelchair over this route. *Id.*

Plaintiff alleges that the signage violates ADAAG § 4.30.3, which states:

> **4.30.3 Character Height**. Characters and numbers on signs shall be sized according to the viewing distance from which they are to be read. The minimum height is measured using an upper case X. Lower case characters are permitted.
>
> **Height Above Finished Floor** Suspended or Projected Overhead in compliance with 4.4.2 **Minimum Character Height** 4 in (75 mm) minimum

Plaintiff contends that "Ms. O'Neill testified that the directional signage to the designated accessible route to the Pagoda on the Lake was not visible

because it was small and high up." Dkt. 758 at 18; 3 RT 587. However, no objective or more specific details were elicited from Ms. O'Neill from which the Court can ascertain whether the sign, in fact, violates ADAAG. In addition, neither Ms. O'Neill nor any expert provided any measurements pertaining to the sign to demonstrate non-compliance with ADAAG §§ 4.30.3 or 4.4.2. In the absence of such information, Plaintiff cannot establish a violation of ADAAG. *See Kohler*, 782 F.3d at 1070 & n.3; *Doran*, 524 F.3d at 1048.

Plaintiff's claim regarding the paths around Stow Lake also is unsubstantiated. Plaintiff's expert Mr. Mastin opined that the paths contain barriers that are "extreme," including numerous "bumps and convolutions" that result in "excessive cross slopes and running slopes" in the range of 10 to 15 percent. 6 RT 1193; Ex. PX2124A. *Id.* Plaintiff has not pointed to any proof in the record that the paths at issue have been altered since 1992. In the absence of such evidence, Plaintiff cannot demonstrate that ADAAG applies to the path inspected by her experts.[15]

In sum, Plaintiff has failed to establish that the City violated ADAAG with respect to Stow Lake.

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[15] In addition, John Paul Scott, who led the City's transition plan for facilities, acknowledged that the paths have been impacted by the growth of tree roots, thus creating an "issue of maintenance." 8 RT 1487. However, any claim regarding inadequate maintenance is no longer before the Court.

8. Restrooms at Golden Gate Park

Ms. Kimbrough testified that there "aren't many signs as to where the bathrooms are" near the Children's Playground. 4 RT 832. Plaintiff cites no ADAAG requirements addressing the number of restroom signs in a given area. Nor is there is any evidence or testimony detailing the number of signs in use, their locations, or why the existing signs are insufficient.

Class member Margie Cherry testified that the pathway to the restroom "over by" the de Young Museum and California Academy of Sciences was a "problem" for her daughter, who uses a walker. 5 RT 1041-42. Specifically, she stated that the disabled stall is too "narrow" and "not up to par to be easily accessed." 5 RT 1041-42. In her view, it would be better if the disabled stall were located before the other stalls (as opposed to the rear of the restroom), as her daughter has a very difficult time turning around with her walker. 5 RT 1043. Like the other testimony presented by Plaintiff, the deficiency in Ms. Cherry's presentation is the lack of specific information or any measurements upon which the Court could conclude that an ADAAG violation has been established. In addition, no ADAAG provision has been cited to support the proposition that the accessible stall must precede the other stalls.

Class member Timothy Grant testified that he has found it difficult to find accessible restrooms within Golden Gate Park ballpark area due to the lack of signage. 5 RT 892-94. He recounted using a restroom, which, while accessible, only had one grab bar in the

stall. *Id.* Without the second bar, he had difficulty transferring himself to and from his wheelchair onto the toilet. *Id.* Mr. Grant's complaint regarding his difficulty in finding accessible restrooms fails for insufficient detail (i.e., the number of signs present or specific reasons why he found it difficult to locate a restroom). However, the lack of a second grab bar in the restroom stall could violate ADAAG. ADAAG § 4.17.3 & Fig. 30 (requiring two grab bars on both sides of the toilet when the stall is 36 in width); *see also id.* §§ 4.22.4, 4.23.4. The City contends that the absence of a second grab bar is likely due to vandalism. This contention is unsupported by any evidence and is therefore unpersuasive.

In sum, Plaintiff has failed to establish that the City violated ADAAG with respect to restrooms within Golden Gate Park, except for the missing grab bar in one of the restroom stalls in the ballpark area.

9. Summary

The Court finds that Plaintiff has established ADAAG violations with respect to the lack of an accessible route at St. Mary's Playground and a missing grab bar in a restroom located near the Golden Gate Park ballparks.

C. LIBRARIES

The City operates a Main Library and twenty-seven branch libraries. *Kirola I*, 74 F. Supp. 3d at 1213.

Plaintiff's principal complaint is that she occasionally encountered misplaced step stools at the Main Library and the Western Addition and Parkside Branch Libraries. In addition to the stool issue, she offered lay and expert testimony regarding other alleged accessibility violations at the Main Library and the Eureka Valley, Harvey Milk, Marina, Mission Bay, Mission, Parkside, Richmond, Sunset, Visitation Valley and West Portal Branch Libraries.

1. Misplaced Step Stools

Plaintiff testified that she occasionally encountered step stools in the stacks at certain libraries, which blocked her way and made it difficult to maneuver her wheelchair. 7 RT 1385-386. The Court previously considered and rejected this claim in its Findings. *Kirola I*, 74 F. Supp. 3d at 1241, 1262. The record developed at trial showed that the library staff inspect the library facilities on a daily basis to maintain the accessibility of each library, thereby ensuring that any obstruction was corrected within a 24-hour period. *Id.* No evidence was presented that any misplaced stools remained in the aisles for more than 24 hours; that the stools prevented Plaintiff or any unnamed class member from accessing library services; or that the stools posed any danger. *Id.* Since the occasionally misplaced step stool, at worst, posed a temporary obstruction, the Court concluded that Plaintiff had failed to demonstrate an ADA violation with respect to the City's libraries. *Id.*

In her opposition to the instant motion, Plaintiff again argues that "moveable objects" constitute barriers under the ADA. Dkt. 758 at 20 (citing *Chapman v. Pier 1 Imports (U.S.) Inc.*, 779 F.3d 1001 (9th Cir. 2015)). The Court construes Plaintiff's argument as a motion for reconsideration and rejects said request. *See Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991) ("Treating the motion for reconsideration as one brought under Rule 59(e), the trial court did not abuse its discretion in denying the motion, because the [plaintiffs] presented no arguments which the court had not already considered and rejected."). Additionally, the Ninth Circuit's remand did not include reconsideration of the Court's determination that the misplaced step stools Plaintiff occasionally encountered were not architectural barriers subject to the ADA. Rather, the Ninth Circuit mandate directs this Court to reevaluate the credibility of Plaintiff's experts (taking into account that ADAAG applies to the public right-of-way, parks and recreational facilities) in the course of analyzing Plaintiff's claims under 28 C.F.R. § 35.151 (new construction and alterations) for ADAAG compliance.

The above notwithstanding, the Court finds that reconsideration is not warranted. Plaintiff erroneously relies on *Chapman* to support her claim that a step stool can constitute a barrier within the meaning of the ADA. In *Chapman*, the plaintiff, a wheelchair user, brought an action under Title III (which is applicable to private entities) to challenge numerous access barriers at a retail merchandise store, including

obstructions left in its aisles. The defendant argued that the obstructed aisles amounted to "isolated or temporary interruptions in . . . access" under 28 C.F.R. § 36.211(b). *Id.* at 1007.[16] On appeal, the Ninth Circuit agreed with the district court that the evidence did not support such a defense. *Id.* Specifically, the evidence showed that the plaintiff encountered merchandise blocking the aisles each of the eleven times she visited defendant's store. *Id.* In addition, the merchandise was left in the aisles by store employees, who neglected to rectify the blockages within a reasonable amount of time. *Id.*

In the present case, Plaintiff testified that she encountered stools left in the stacks "about 40 percent of the time." 7 RT 1386. While this may facially suggest that the encounters were not isolated, the probative value of Plaintiff's testimony is undermined by the lack of information regarding how often she visited any of the libraries in question. Moreover, unlike *Chapman*, there is no evidence here that City employees were responsible for the misplaced stools. In addition, the uncontroverted evidence showed that any obstructions at City libraries are removed within a twenty-four-hour period—which the Court finds to be a "reasonable period of time." *See Chapman*, 779 F.3d at 1008. The Court thus remains unpersuaded that Plaintiff's occasional encounters with misplaced step stools at the Main Library and the Western Addition and Parkside branch libraries precludes them from being

[16] The corresponding regulation applicable to Title II of the ADA is 28 C.F.R. § 35.133.

readily accessible or otherwise constitutes an ADA violation. *See Kirola I*, 74 F. Supp. 3d at 1241-42, 1262; *e.g.*, *Sharp v. Islands Rest.-Carlsbad*, 900 F. Supp. 2d 1114, 1126 (S.D. Cal. 2012) (granting summary adjudication on a claim that the path of travel was blocked by chairs because "the ADA only applies to 'architectural barriers' and not temporary or removable barriers").

2. Aisles

Plaintiff contends that ten City libraries violate ADAAG due to "[n]arrow aisles (less than 42") and turnaround obstructions (less than 48" of space) at the end of aisles where the bookshelves are less than 48" wide." Dkt. 646 at 18; Dkt. 758 at 26. These purported violations were not experienced by Plaintiff or any class members. Rather, these issues were identified by Plaintiff's experts at Parkside, Sunset, West Portal, Eureka Valley, Harvey Milk, Marina, Mission Bay, Mission, Richmond and Portola Branch Libraries. 2 RT 296-298, 302-308; 4 RT 741-742.

The trial record does not persuasively demonstrate that the aisles at the aforementioned libraries violate ADAAG. Regarding the width of the aisles, ADAAG § 8.5 provides that the minimum width between stacks must comply with the accessible route standards of ADAAG § 4.3, "with a minimum clear aisle width of 42 in (1065 mm) *preferred where possible.*" (Emphasis added). The minimum accessible route is 36 inches. ADAAG § 4.3; 11 RT 2093. Thus, section

8.5 merely states that a 42-inch width is preferred, not that it is required without exception in all circumstances.

Also without merit is Plaintiff's assertion that the aforementioned libraries lack sufficient clearance at the end of aisles for wheelchair users to make a U-turn. Dkt. 758 at 26. Citing ADAAG § 4.3.3 and accompanying illustration Fig. 7(b), Plaintiff contends that if the library bookshelves (back to back) are less than 48 inches wide, the area at the end of the bookshelves must be at least 48 inches to facilitate the U-turn. Dkt. 758 at 26; 2 RT 297-98 (Margen). The Court disagrees. As the City's expert pointed out, the 48- inch requirement depicted in Fig. 7(b) only applies where the U-turn is restricted to a confined space. 11 RT 2093-94 (Wood). There is no evidence in the trial record establishing that the end aisles in the libraries are in an enclosed, confined space, and therefore subject to ADAAG's 48-inch clearance requirement. *Id.* The Court finds that Plaintiff has failed to sufficiently substantiate her claim regarding the library aisles.

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3. Access Ramp at the Richmond Branch Library

Plaintiff contends that the disabled access ramps at the Richmond branch library violate ADAAG. Dkt. 758 at 27. At said library, there are four access routes to enter the facility, three of which are designated

accessible routes. *Id.* Plaintiff's expert Dr. Steinfeld testified that two of the new disabled accessible ramps leading to the entrance of the Richmond branch library exceed the maximum running slope of 8.33%. 4 RT 738-739; 817-819; Ex. 569S. While acknowledging that one of those ramps is ADAAG compliant, Plaintiff, citing ADAAG § 4.1.6(b), argues that *all* newly-constructed or altered ramps must comply with ADAAG. Dkt. 758 at 27.

ADAAG § 4.1.6(b) provides, in relevant part, as follows: (b) If existing elements, spaces, or common areas are altered, then each such altered element, space, feature, or area shall comply with the applicable provisions of 4.1.1 to 4.1.3 Minimum Requirements (for New Construction)." However, ADAAG § 4.1.2(1), which governs new construction of exterior facilities (such as an entrance path), specifies that "[a]t least *one accessible route* complying with 4.3 shall be provided within the boundary of the site from public transportation stops, accessible parking spaces, passenger loading zones if provided, and public streets or sidewalks, to an accessible building entrance."[17] These sections construed together do not require that every newly-constructed access path be accessible within the meaning of ADAAG; rather, there need only be "one accessible" route to the building entrance. Plaintiff does not

[17] Similarly, the 2010 standard states "At least one accessible route shall be provided within the site from accessible parking spaces []; public street and sidewalks; and public transportation stops to the accessible building or facility entrance they serve." § 206.2.1.

dispute that the City has provided an accessible route at the Richmond library. Thus, even if one of the new ramps is not ADAAG-compliant, the City has provided the requisite access to the library consistent with ADAAG.

4. Security Gate at the Richmond Branch Library

Dr. Steinfeld testified that the security gate located near the entrance to the Richmond Branch Library is "too narrow" to comply with ADAAG. 4 RT 740-41; Ex. 569T. The "gate," is not a gate in the traditional sense, but instead consists of three freestanding vertical panels (that presumably can detect whether a book has been checked out) through which library patrons must walk upon entering and exiting the library. Exh. 569T. Dr. Steinfeld opined that the distance between the panels is 35 inches, in contravention to ADAAG, which allegedly requires 36 inches. 2 RT 740. While acknowledging that ADAAG allows for a 32-inch passage width for a "certain distance," Dr. Steinfeld testified that the panels "exceed the depth that the ADAAG would allow as what is called in the field a pinch point." 4 RT 740.

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It is unclear to which particular ADAAG provision Dr. Steinfeld was referring, as he did not identify any provision while testifying. Nor does Plaintiff identify the pertinent provisions in her papers. Presumably,

Dr. Steinfeld's opinion was based on ADAAG § 4.2.1, which states that "[t]he minimum clear width for single wheelchair passage shall be 32 in (815 mm) at a point and 36 in (915 mm) continuously. . . ." The 36-inch requirement is applicable where the passage is 24 inches long or greater. *Id.* Fig. 1. Dr. Steinfeld opined that the 36-inch—as opposed to 32- inch—requirement is relevant because the security panels are too long. 3 RT 740. However, he did not testify as to the dimensions of the panels. Without that information, the Court cannot determine whether ADAAG's 32-or 36-inch width requirement is controlling. *See Indep. Towers of Wash.* 350 F.3d at 929. Accordingly, the Court finds that Plaintiff has failed to demonstrate that the security gate at the Richmond Branch Library violates ADAAG.

5. Main Library

a) Restrooms

i. Reach Ranges

Plaintiff alleges that her experts found purported accessibility violations at the restrooms located in the Main Library, the Marina, the Mission, the Sunset, Eureka Valley, and the West Portal Branch Libraries. Pl.'s Prop. Findings of Fact and Conclusions of Law, Dkt. 646 at 18-19.[18] Neither Plaintiff nor any class member testified that they encountered any such barriers. Rather, Plaintiff's expert Mr. Margen identified improper

[18] The Main Library was constructed after 1992 and therefore qualifies as new construction subject to ADAAG. 2 RT 298.

or excessive reach ranges to accessories (i.e., soap dispensers, towel dispensers, toilet paper dispensers, etc.) in the restrooms. RT 304-311. However, except as noted below, Mr. Margen did not identify any applicable ADAAG provision or its requirements with respect to reach ranges; nor did he provide any measurements to establish the height of those accessories. In the absence of such information, the Court ascribes little weight to Mr. Margen's testimony.

The only specific measurement provided by Mr. Margen pertained to the mounted height of electric hand dryers in one of the restrooms in the Main Library. He testified that the dryers were 46 inches high, whereas the California Building Code specifies 40 inches. 2 RT 306; Ex. 4140V. However, he again failed to identify any applicable *ADAAG* provision containing such a requirement, most likely because none exists. The Court notes that the 2010 ADAAG (unlike the 1991 version) includes a section that expressly governs reach ranges. 2010 ADAAG § 308. Section 308.2.1 in particular provides that: "Where a forward reach is unobstructed, the high forward reach shall be 48 inches (1220 mm) maximum . . . above the finish floor or ground." *Id.* § 308.2.1. Thus, even if the Court were to apply the 2010 standard, it would appear that the dryer height is ADAAG compliant.

The Court therefore finds that Plaintiff has failed to sufficiently prove any ADAAG violations with respect to the reach ranges at the aforementioned restrooms.

ii. Supply and Drain Line Insulation

Mr. Margen testified that the supply and drain lines for the lavatories in the third floor restroom in the Main Library lack insulation. 2 RT 305, 378 & Ex. 2156 (item 6.7); RT 378 & Ex. 2156 (item 6.16).[19] Though not cited by Plaintiff, ADAAG specifically requires such insulation: "Exposed Pipes and Surfaces. Hot water and drain pipes under lavatories shall be insulated or otherwise configured to protect against contact. There shall be no sharp or abrasive surfaces under lavatories." ADAAG § 4.19.4.

The City does not dispute Mr. Margen's findings but contends that the lack of insulation presents a maintenance issue, as opposed to a design or construction issue that implicates ADAAG. Dkt. 759 at 24. The City provides no authority or evidence to support this argument. The Court thus finds that the lack of insulation on supply and drain lines for the lavatories in the third floor restroom in the Main Library violates ADAAG. *E.g.*, *Moore v. Chase, Inc.*, No. 1:14-CV-01178-SKO, 2016 WL 866121, at *11 (E.D. Cal. Mar. 7, 2016) (finding that the defendant violated ADAAG by failing to insulate the hot water and drain pipes in its restroom).

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[19] Such insulation is intended to protect individuals with reduced or no sensation in their legs from burning or injuring themselves should they come into contact with hot pipes. 2 RT 305.

iii. Semi-Ambulatory Toilet Stalls

ADAAG specifies that in restrooms where there are six or more toilet stalls, ambulatory accessible stalls must be provided. ADAAG §§ 4.22.4, 4.23.4. Ambulatory accessible stalls contain parallel grab bars on both sides and a self-closing door and are designed to accommodate people who may have difficulty walking, sitting, or rising. *Id.*

At trial, Mr. Margen testified that at the Main Library, semi-ambulatory stalls were lacking in the first lower level women's restroom, the first floor women's restroom, and the first floor men's restroom. 2 RT 374. The City does not dispute Mr. Margen's findings. Dkt. 759 at 24.[20] Therefore, the Court finds that Plaintiff has demonstrated an ADAAG violation as to the three restrooms at the Main Library identified by Mr. Margen.

iv. Knee Space under Lavatory

ADAAG specifies heights and clearances pertaining to lavatories, including a minimum knee clearance of 8 inches underneath a lavatory. ADAAG § 4.19.2, Fig. 31. Mr. Margen testified that the sink area in the Latino/Hispanic meeting room lavatory on the lower

[20] The City asserts that, even accepting Mr. Margen's findings that some of the Main Library restroom stalls are not ADAAG-compliant, his testimony "falls short of establishing widespread or systemic noncompliance at the Main Library." Dkt. 759 at 24. The Court will address this contention in the section of this Order discussing what, if any, class-wide injunctive relief is appropriate to address any ADAAG noncompliance.

level of the Main Library fails to meet those requirements. 2 RT 367. The City does not respond to this contention. The Court therefore finds that Plaintiff has demonstrated a violation of ADAAG with respect to the aforementioned lavatory.

v. Door Pressure

ADAAG specifies a maximum force for pushing or pulling open a door, depending on the type of door (i.e., fire doors, exterior hinged doors, interior hinged doors, sliding or folding doors). ADAAG § 4.13.11. Interior hinged doors, in particular, are limited to 5 pounds of force. *Id.* § 4.13.11(2)(b). For safety reasons, fire doors may require more force to close than other types of doors. 11 RT 2098 (Wood).

Mr. Margen testified that the following restroom doors at the Main Library require *more than* 5 pounds of force to open: a women's restroom door on the ground floor requires 13 pounds of force to open, RT 373; the boy's restroom entry door requires 11 pounds of force to open, RT 378; 1170; Ex. 2156 (item 5.14); the entry door to the unisex restroom in the Blind Center requires 13 pounds of force to open, RT 378; Ex. 2156 (item 5.19); the entry door for the women's restroom on the third floor requires 12 pounds of force to open, RT 378; Ex. 2156 (item 6.1); the entry door for the sixth floor women's restroom requires 17 pounds of force to open, RT 378; Ex. 2156 (item 7.1); and at the lower level of the Main Library, the entry door to the restrooms from the hallway corridor requires 12 pounds

of force to open, 2 RT 373. In addition, Mr. Margen testified that the doors within the Koret Auditorium (a space within the Main Library), the Deaf Services Center, the Blind Center, the six study rooms on the third floor and other locations, required between 8 and 14 lbs. of force to open, instead of the maximum 5 lbs. allowed under ADAAG. RT 364-366.

The City does not challenge Mr. Margen's pressure measurements but counters that he failed to take into account that the doors he mentioned were fire doors, which have different door pressure requirements. Dkt. 751 at 14. In addition, the City contends that Plaintiff is conflating the requirements for automatic doors with power-assisted doors. Dkt. 759 at 19. But the City fails to cite any record evidence to support its assertion that some or all of the doors cited by Mr. Margen, in fact, were fire doors or any type of automatic or pressure-assisted door. The City also asserts that the excessive door pressure presents a maintenance issue, rather than an ADAAG issue. However, the City offers no legal or factual support for that assertion. The Court therefore finds that Plaintiff has demonstrated an ADAAG violation with respect to the aforementioned restroom door pressures.

vi. Toilet Stalls

Mr. Margen testified that the door to one of the toilet stalls in the women's ground floor restroom opens in front of the toilet rather than in front of a clear space next to the toilet. 2 RT 373. He also noted the lack of a

pull handle on the outside of the same door. *Id.* Plaintiff avers that these purported deficiencies constitute accessibility violations under ADAAG. The City does not respond to Mr. Margen's claims regarding the women's ground floor restroom.

Neither Mr. Margen nor Plaintiff cites any particular ADAAG provision imposing requirements as to where a toilet stall door must open or an outside door pull. As to the door location, Mr. Margen may have been referring to ADAAG § A4.17.3, which pertains to the "size and arrangement" of toilet stalls. In particular, that section specifies that a bathroom stall must provide a "clear space" on one side of the toilet to enable the wheelchair user to perform a side or diagonal transfer from the wheelchair to the toilet. ADAAG § A4.17.3. Though not stated explicitly, a requirement that the stall door must open into the clear space, and not in front of the toilet, is apparent from the sample stall layouts shown in Figure 30 (partial)—which show the entry to the toilet stall located in front of the clear space. Thus, the City's installation of a door that does not open into the stall's clear space violates ADAAG.

Tabular or graphical material not displayable at this time.

As to Mr. Margen's observations regarding the lack of a pull handle, however, the Court is unconvinced that this constitutes an ADAAG violation. Again, Plaintiff offers no citation to support her assertion that ADAAG requires a handle on the outside of a stall door. Such requirement does exist in the 2010

ADAAG, which states that "[a] door pull complying with 404.2.7 shall be placed on both sides of the door near the latch." 2010 ADAAG § 604.8.1.2. This requirement does not appear in the 1991 ADAAG, however. Because only the 1991 ADAAG is pertinent, the Court finds that the lack of an outside door handle does not constitute an ADAAG violation for purposes of this action.

Finally, Mr. Margen claimed that he found two toilets in the Main Library that violate ADAAG's requirement that the toilet centerline be 18 inches from the side wall. ADAAG § 4.22.3 and Fig. A6. One toilet was 18 3/4 inches from the wall, while the other was 18 1/2 inches from the wall. A facility may deviate from ADAAG requirements, as "[a]ll dimensions are subject to conventional building industry tolerances for field conditions." ADAAG § 3.2. Here, the City presents evidence that the aforementioned deviations are within industry tolerances. *See* Defs.' Req. for Jud. Not. Ex. I, Dkt. 583-8. Plaintiff offers no argument or evidence to the contrary. The Court therefore finds that the two erroneously mounted toilets fall within the purview of ADAAG § 3.2 and thus do not constitute accessibility violations under ADAAG.

b) Other Accessibility Issues

In addition to the above, Mr. Margen claimed that he observed the following accessibility violations at the Main Library: (1) a lack of companion seating adjacent to the wheelchair seating spaces in the Koret

Auditorium, 2 RT 366, *see* ADAAG §§ 4.1.3(19)(a) and 4.33.3; (2) a doorway to the video phone booth on the first floor within the Deaf Service Center has only 29 inches of clear opening width instead of the 32 inch minimum, 2 RT 367:6-24, *see* ADAAG § 4.13.5; (3) the interior side of the video booth has a landing that is 31 inches deep instead of the minimum 48 inches depth, required so a wheelchair user can make a 90 degree turn to face the camera, 2 RT 367, *see* ADAAG § 4.31.2; and (4) tables in the Deaf Services Center, Human Resources, the Fisher Children's Study Center, the Teen Center, and the café lack sufficient clearance for a wheelchair user to fully pull up underneath the table, 2 RT 368, *see* ADAAG §§ 8.2, 4.32 and 4.32.3.

Of the aforementioned alleged accessibility violations, the City only addresses the one pertaining to the lack of sufficient table clearances—and then, only with respect to tables in the children and teen centers. Dkt. 759 at 24. In particular, the City suggests that Mr. Margen failed to take into account that ADAAG's specifications are "adult dimensions" that do not apply to furniture intended for use by minors. *See* ADAAG § 2.1 ("The specifications in these guidelines are based upon adult dimensions and anthropometrics."). Whether, or to what extent, ADAAG applies to facilities intended for children has not been adequately briefed by the parties. Nevertheless, the Court is not persuaded by Mr. Margen's opinion regarding the tables in general, due to his failure to provide any details, such as the number of non-compliant tables at issue or their measurements. Without such information, the Court cannot

conclude that the tables in the children and teen centers, in fact, violate ADAAG. As for the other accessibility issues at the Main Library identified in the foregoing paragraph, the Court finds, based on the City's lack of response thereto, that they constitute violations of ADAAG.

6. Summary

In sum, the Court finds that Plaintiff has established ADAAG violations with respect to the following: (1) the sinks in the third floor restroom in the Main Library lack insulation; (2) three restrooms at the Main Library lack semi-ambulatory stalls; (3) the sink area in the Latino/Hispanic meeting room on the lower level of the Main Library does not comply with ADAAG specifications for heights and clearances pertaining to lavatories; (4) various doors at the Main Library identified by Mr. Margen do not comply with ADAAG requirements for restroom door pressures; (5) there is no companion seating adjacent to the wheelchair seating spaces in the Koret Auditorium; and (6) there is insufficient opening clearance in the video phone booth in the Deaf Service Center at the Main Library.

D. SWIMMING POOLS

The City operates nine public swimming pools. At the time of trial, six of the nine pools had been renovated and made accessible. RT 2767:8-2769:17; DTX F16. The three other pools—Garfield Pool, Balboa Pool and Rossi Pool—have been designated as "limited

access" pools. *Kirola I*, 74 F. Supp. 3d at 1231; Ex. DTX F16. As to those three pools, however, renovations were in progress or in the planning to become ADA-compliant. *Kirola I*, 74 F. Supp. 3d at 1231.

Plaintiff and class members Ms. Cherry, Ms. Kimbrough and Ms. Monasterio testified regarding accessibility issues at Garfield Pool, Balboa Pool, Rossi Pool, Sava Pool, Hamilton Pool and Martin Luther King, Jr. ("MLK") Pool. Plaintiff's experts inspected Coffman Pool, Garfield Pool, Hamilton Pool, Balboa Pool and Rossi Pool. 1 RT 164-165; 2 RT 408; 4 RT 651-652; 7 RT 1312-13.

1. Garfield Pool

Class member Ms. Monasterio testified that there is "not a safe place" for her disabled daughter to sit and shower at Garfield Pool. 6 RT 1233. Plaintiff testified that the facility has "narrow locker rooms and no accessible restrooms." 7 RT 1388.

The record contains no information as to when Garfield Pool, a limited access facility, was constructed or when, if at all, it was altered. In the absence of such evidence, Plaintiff cannot establish that those particular features are subject to ADAAG. *See Kirola II*, 860 F.3d at 1181. But even if they are, the testimony from Ms. Monasterio and Plaintiff lacks sufficient factual details of any such violations, and there is no expert testimony to establish noncompliance with ADAAG. The Court finds that Plaintiff has failed to establish any violations of ADAAG at Garfield Pool.

2. Balboa Pool

Plaintiff contends there are numerous accessibility issues at Balboa Pool, another "limited accessibility" facility, that prevent or render it difficult for mobility-impaired individuals to use. In support, Plaintiff cites class member Ms. Monasterio's testimony that her disabled daughter experienced problems at Balboa Pool that were "similar" to those at Garfield Pool; specifically, the lack of a "safe space for her to sit and shower." 6 RT 1233-34. Plaintiff identified the lack of accessible locker rooms along with a steep ramp as presenting accessibility challenges at Balboa Pool. 7 RT 1388. Class member Ms. Kimbrough testified that her daughter cannot enter the pool or spectator area, and that the ramp does not lead to the pool. 4 RT 838-39.

Dr. Steinfeld did not identify any accessibility issues pertaining to the locker rooms at Balboa Pool, although he did criticize the two slightly curved 30-foot long entry ramps to the Balboa Pool. He stated that the ramp lacks a landing area where a wheelchair user can stop and rest while ascending the ramp, which is important because of its extended length. 4 RT 670. He further noted that the ramp had a 15 percent slope, when the maximum allowable slope is 8.33 percent. 4 RT 670-71.

As an initial matter, it is unclear when Balboa Pool was constructed or when, if at all, it was altered. In the absence of such evidence, Plaintiff cannot establish that any of the particular features addressed at trial

are subject to ADAAG. *See Kirola II*, 860 F.3d at 1181. That aside, Plaintiff fails to present sufficient evidence to demonstrate any specific ADAAG violations. With regard to the ramps, Mr. Margen testified that the facility was accessible through the first floor. 4 RT 673. ADAAG only requires at least one accessible route to enter a building. ADAAG § 4.3.2(1). In view of Mr. Margen's testimony that there is an accessible route to enter through the first floor, the Court does not credit his conclusion that Balboa Pool is inaccessible because of the ramps.[21]

As to the other accessibility challenges alleged, the testimony presented by class members and Plaintiff's expert lacked sufficient detail to demonstrate the violation of any particular ADAAG provision. The Court finds that Plaintiff has failed to establish any ADAAG violations at Balboa Pool.

3. Rossi Pool

Plaintiff has not visited Rossi Pool because an unspecified City employee advised against visiting the pool, which at that time was not designated as accessible. 7 RT 1386. In addition, Plaintiff stated that "a friend that uses a power chair" told her "that it was difficult to get in the pool." *Id.* Notably, neither

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[21] At the time of trial, Balboa Pool was slated for renovations. *Kirola I*, 74 F. Supp. 2d at 1231. The Court takes judicial notice that the renovations have been completed and that the pool reopened in February 2019. *See* https://sfrecpark.org/553/Balboa-Pool (last visited Dec. 4, 2020).

Plaintiff nor any of her experts identified any specific barriers at Rossi Pool or offered testimony to demonstrate any ADAAG violations. There also is no information as to when Rossi Pool was constructed or altered. Therefore, the Court finds that Plaintiff has failed to establish any ADAAG violations at Rossi Pool.

4. Coffman Pool

Dr. Steinfeld testified that the Coffman Pool along with the Balboa Pool "had barriers in the rest rooms and the locker rooms. . . . [and] in one case a gate [and] seating area, curb ramp. . . ." 4 RT 428; Dkt. 758 at 38. However, he did not elaborate specifically as to the nature of those barriers or present any relevant measurements to support his conclusion. Because of the conclusory testimony presented by Dr. Steinfeld, the Court accords no weight to his opinion and finds that Plaintiff has failed to establish any ADAAG violations at Coffman Pool.

5. MLK Pool

Plaintiff contends that testimony by one of her experts and a class member shows that there are accessibility violations at the MLK Pool. Dkt. 758 at 38; Dkt. 646 at 16. At trial, Dr. Steinfeld testified that "Martin Luther King Pool had barriers in terms of ramp slopes, handrails, entry doors," "[a] significant number of barriers in the interior and bathroom stall doors" and "limitations on access to sinks and showers, and curb ramps." 4 RT 728-29.

Citing Exhibit PX 569Q, Dr. Steinfeld stated that the pipes under the restroom sinks lack proper insulation to protect wheelchair users from injury. 4 RT 734-35. He also testified that the sink is "a little bit too low to provide proper . . . knee clearance." 4 RT 735. However, Dr. Steinfeld relied on a photograph of a sink identified as "Coffman Pool," not "Martin Luther King Jr. Pool." Ex. PX 569Q. In addition, Dr. Steinfeld was unable to recall "the proper knee clearance" required by ADAAG, nor could he remember the actual clearance under the sink. 4 RT 735. Given the ambiguity and lack of specificity in Dr. Steinfeld's testimony, the Court is unpersuaded that Plaintiff has demonstrated any ADAAG violations with respect to the restroom sink at the MLK Pool.

Dr. Steinfeld also testified that the interior latch to one of the restroom stall doors cannot be opened "without tight grasping and pinching," making it "difficult to open." 4 RT 736; Ex. PX 569R. He did not offer any testimony regarding any particular latch requirements or otherwise suggest that the latch violated ADAAG. To the contrary, Dr. Steinfeld acknowledged that this was an "unusual" situation which suggested that "there wasn't a good inspection of this site" by the City. 4 RT 737. As for the remaining purported accessibility issues identified by Dr. Steinfeld at the MLK Pool, no details regarding the nature, basis, or extent of the purported violations have been provided.

Finally, Plaintiff points to the testimony of class member Ms. Cherry, who stated that she could not use the swimming pool because the pool lift (which allows

her to enter the pool) was broken for over a one-month period. 5 RT 1043-45. Ms. Cherry's testimony does not demonstrate that the pool was designed or constructed in an inaccessible manner, and thus, in violation of 28 C.F.R. § 35.151. Rather, her complaint presents a maintenance issue under 28 C.F.R. § 35.133. *See* 28 C.F.R. pt. 35, app. B ("allowing obstructions or 'out of service' equipment to persist beyond a reasonable period of time would violate this part, as would repeated mechanical failures due to improper or inadequate maintenance"). Since there is no 28 C.F.R. § 35.133 maintenance claim presently before the Court, Ms. Cherry's testimony is inapt. Even if a maintenance claim were presented, Plaintiff has failed to offer evidence that the apparent delay in repairing the lift was not reasonable under the circumstances presented. *See Cherry v. City Coll. of San Francisco*, No. C 04-04981 WHA, 2006 WL 6602454, at *8 (N.D. Cal. Jan. 12, 2006) (noting that the plaintiff bears the burden under 28 C.F.R. § 35.133 of demonstrating that the "blockage" was "beyond a reasonable period of time").

Based on the record presented, the Court finds that Plaintiff has failed to demonstrate ADAAG noncompliance with respect to any features at the MLK Pool.

6. Hamilton Pool

Plaintiff has not demonstrated the existence of any ADAAG violations at Hamilton Pool, which was renovated in 2010. 7 RT 1393. Her lone complaint

regarding this pool is that she cannot use the children's slide. 7 RT 1387. However, Plaintiff admitted that the slide "is intended for children," and she has no idea whether "they let adults try it." *Id.*

Given Plaintiff's admission that the slide is not intended for adult use, Plaintiff is hard pressed to characterize her inability to use the children's slide as an ADAAG violation. Cf., ADAAG § 2.1 ("The specifications in these guidelines are based upon adult dimensions and anthropometrics."). The Court therefore finds that Plaintiff has failed to demonstrate ADAAG noncompliance with respect to any features at the Hamilton Pool.

7. Sava Pool

Plaintiff contends she "encountered ADAAG violations when attempting to use Sava Pool." Dkt. 758 at 16. At trial, Plaintiff testified that she had recently visited Sava Pool and confirmed that "the renovation was good" and that she did not have any problems "inside" the facility. 7 RT 1386. However, she complained there were "cracks on the sidewalk" on the "east side of 19th" which made getting to the facility difficult. *Id.* at 1386-1387. To avoid those "bumps," Plaintiff "had to take the bus." *Id.*

Plaintiff has not demonstrated that the presence of cracks in the sidewalk violates ADAAG or otherwise shows that Sava Pool is not "readily accessible" within the meaning of 28 C.F.R. § 35.151(a)(1). The applicable 1991 ADAAG standard relating to accessible paths of

travel provides: "At least one accessible route *within the boundary of the site* shall be provided from public transportation stops, accessible parking, and accessible passenger loading zones, and public streets or sidewalks to the accessible building entrance they serve. The accessible route shall, to the maximum extent feasible, coincide with the route for the general public." ADAAG § 4.3.2(1) (emphasis added). A "site" is a "parcel of land bounded by a property line or a designated portion of a public right-of-way." ADAAG § 3.5. Plaintiff has not shown that the cracked sidewalk was located within the boundary of the Sava Pool site, as defined by ADAAG.

The Court finds that Plaintiff has failed to demonstrate ADAAG noncompliance with respect to any features at the Sava Pool.

8. Summary

The Court finds that Plaintiff has failed to demonstrate by a preponderance of the evidence that any of the aforementioned pools contain features that violate ADAAG.

E. CLASS-WIDE INJUNCTIVE RELIEF

Having found ADAAG violations with respect to certain features at two of the City's parks and the Main Library, the next question presented to the Court is whether class-wide injunctive relief is warranted.

Plaintiff seeks a permanent injunction requiring, inter alia, the City to: (1) "develop plans and implement all actions necessary to bring the City . . . into full compliance with the requirements of Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, andCalifornia Government Code Section 11135 et seq., and the regulations promulgated under each of these Acts"; and (2) to "[d]evelop and implement plans to ensure that all new construction and alterations to City facilities comply with ADAAG standards and CBC standards, whichever is stricter, and that any previous new construction and alterations that do not conform to 28 C.F.R. § 35.151 and/or the CBC should be remediated to the maximum extent feasible by a date no later than six months after the date of entry of judgment in the above-captioned matter." Jt. Pretrial Stmt., Dkt. 305 at 4-5. The City contends that classwide injunctive relief is inappropriate because Plaintiff was not injured by any ADAAG violation and she has otherwise failed to demonstrate that any violations are attributable to a systemic deficiency in the City's policies and practices. Dkt. 751 at 21-23.

Injunctive relief, whether temporary or permanent, is an "extraordinary remedy, never awarded as of right." *Winter v. NRDC, Inc.*, 555 U.S. 7, 24 (2008). "According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-part test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to

compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).

A district court has "broad discretion in fashioning a remedy" through injunctive relief. *Melendres v. Arpaio*, 784 F.3d 1254, 1265 (9th Cir. 2015). "The scope of injunctive relief is dictated by the extent of the violation established." *Lewis v. Casey*, 518 U.S. 343, 359 (1996); *see also Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (stating that injunctive relief "must be tailored to remedy the specific harm alleged"). For class-wide relief to be justified, the class representative must have suffered actual injury from the statutory violation *and* the inadequacy causing such injury was "widespread enough to justify systemwide relief[.]" *Id.* at 359-60. "'[I]f injunctive relief is premised upon only a few isolated violations affecting a narrow range of plaintiffs, its scope must be limited accordingly.' However, 'if the injury is the result of violations of a statute . . . that are attributable to policies or practices pervading the whole system (even though injuring a relatively small number of plaintiffs),' then '[s]ystem-wide relief is required.'" *Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1072-73 (9th Cir. 2010) (internal citations omitted, alternations in original).

In the instant case, Plaintiff has failed to demonstrate, by a preponderance of evidence, that she

encountered ADAAG violations with respect to the City's public right-of-way, libraries or swimming pools. The Court did find violations at two parks: (1) the lack of an accessible route at St. Mary's Playground, and (2) a missing grab bar in a restroom located somewhere near the ballparks within Golden Gate Park. Plaintiff also established violations at the Main Library; namely, non-ADAAG compliant features in certain restrooms, the Latino/Hispanic meeting room, the Koret Auditorium and the Deaf Services Center. However, Plaintiff personally encountered none of these particular violations. *See Kirola I*, 74 F. Supp. 3d at 1240 (listing barriers encountered by Plaintiff). As such, Plaintiff cannot satisfy her burden of demonstrating that she was actually injured as a result of the ADAAG violations identified by the Court. *See Lewis*, 518 U.S. at 358 (holding that injunction provisions that addressed harms not experienced by the named plaintiff were improper); *see also Kirola II*, 860 F.3d at 1175 ("Through a properly framed injunction, the district court can ensure that the City alters or removes the access barriers *Kirola encountered.*") (emphasis added); *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1045 (9th Cir. 1999) ("system-wide injunctive relief is not available based on alleged injuries to unnamed members of a proposed class") (citing *Lewis*, 518 U.S. at 357).

Even if Plaintiff had sustained the requisite actual injury for securing class-wide injunctive relief, there is no showing that the proven violations are widespread or "are attributable to policies or practices

pervading the whole system." *Armstrong*, 622 F.3d at 1072-73 (reversing grant of class-wide injunctive relief in an ADA class action where "plaintiffs presented insufficient evidence to justify the system-wide relief ordered by the district court"). To the contrary, the City has implemented a robust, multi-faceted infrastructure to address the needs of its disabled, including the mobility-impaired, population. *Kirola I*, 74 F. Supp. 3d at 1202-1205. Moreover, the violations the Court has identified must be considered in context. There are hundreds, if not thousands, of measurements specified in ADAAG that govern restrooms and buildings, respectively. *Kirola I*, 74 F. Supp. 3d at 1259. As such, the fact that the Court has identified some ADAAG violations at three facilities does not suggest, let alone support the conclusion that the violations are pervasive or of a systemic nature. Taking into account the pertinent considerations for awarding injunctive relief, the Court concludes that injunctive relief is not warranted in this action. *See eBay Inc.*, 547 U.S. 391.

III. CONCLUSION

The Court has carefully reviewed the trial record and the arguments presented by Plaintiff and the City. It is apparent that the City is not without accessibility challenges and that class members have unfortunately encountered certain imperfections. At the same time, Plaintiff's presentation at trial suffered from a lack of detail and questionable expert testimony. Although Plaintiff has demonstrated a handful of ADAAG violations, class-relief is not warranted because Plaintiff did

not encounter, and thus, was not injured by, any of them. But even if she were injured, Plaintiff has failed to show by a preponderance of the evidence that any proven violations are pervasive or attributable to any policy or practice pervading the facilities at issue.

Accordingly, the City's Motion for Judgment (Dkt. 754) is GRANTED. The Clerk shall close the file and terminate all pending matters. The further case management conference scheduled for March 18, 2021 is VACATED.

IT IS SO ORDERED

860 F.3d 1164
United States Court of Appeals, Ninth Circuit.

Ivana KIROLA, On Behalf of Herself and
The Certified Class of Similarly Situated Persons,
Plaintiff-Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO;
Gavin Newsom, in his official capacity as Mayor;
Aaron Peskin, in his official capacity as President
of the Board of Supervisors; Jake McGoldrick;
Michela Alioto-Pier; Ed Jew; Chris Daly;
Sean Elsbernd; Bevan Duffy; Tom Ammiano;
Sophie Maxwell; Ross Mirkarimi; Gerardo Sandoval,
in their official capacities as members of the
Board of Supervisors, Defendants–Appellees

No. 14-17521
|
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San Francisco, California
|
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Appeal from the United States District Court for the Northern District of California, Saundra B. Armstrong, District Judge, Presiding, D.C. No. 4:07-cv-03685-SBA

Before: Diarmuid F. O'Scannlain, Ronald M. Gould, and Milan D. Smith, Jr., Circuit Judges.

OPINION

GOULD, Circuit Judge:

Title II of the Americans with Disabilities Act provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. We address whether the City and County of San Francisco have complied with their obligations under this law. In particular, we are concerned with whether San Francisco's public right-of-way, pools, libraries, parks, and recreation facilities are readily accessible to and usable by mobility-impaired individuals.

I

Plaintiff-Appellant Ivana Kirola suffers from cerebral palsy and moves within the city in a wheelchair. A resident of San Francisco, her ability to move about the city and benefit from its public services depends in part on the City and County's compliance with disability access laws.

On July 17, 2007, Kirola filed a putative class action alleging that the City and County of San Francisco, the Mayor of San Francisco, and members of the

San Francisco Board of Supervisors (collectively, "the City") had systematically failed to comply with federal and state disability access laws, seeking declarative and injunctive relief. Relevant here, Kirola alleged that the City's public libraries, pools, Recreation and Parks Department ("RecPark") facilities,[1] and pedestrian right-of-way did not comply with Title II of the Americans with Disabilities Act ("ADA") and related regulations.

On June 7, 2010, the district court certified a class consisting of:

> All persons with mobility disabilities who are allegedly being denied access under Title II . . . due to disability access barriers to the following programs, services, activities and facilities owned, operated and/or maintained by the City and County of San Francisco: parks, libraries, swimming pools, and curb ramps, sidewalks, crosswalks, and any other outdoor designated pedestrian walkways in the City and County of San Francisco.

The district court estimated that about 21,000 persons with mobility disabilities live in San Francisco. In this lawsuit, Kirola seeks to advance their important rights.

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[1] ADA regulations define "Facility" broadly to include "all or any portion of buildings, structures, sites, complexes, equipment, rolling stock or other conveyances, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located." 28 C.F.R. § 35.104.

In April and May of 2011, the district court held a five-week bench trial featuring testimony by 36 different witnesses. *Kirola v. City & Cty. of San Francisco*, 74 F.Supp.3d 1187, 1200 (N.D. Cal. 2014). The district court made the following findings of fact:

Class Members. Seven class members or mothers of class members testified, including Kirola. *Id.* at 1217. Each class member suffered from a disability and was mobility-impaired. *Id.*

Kirola testified that as a resident of San Francisco, she had encountered the following access barriers related to the City's public services:

> (1) three stretches of sidewalk containing "bumps," (2) a sidewalk where her wheelchair became stuck in a tree well; (3) one street corner that lacked curb ramps, (4) one street corner that provided only a single curb ramp, (5) errant step stools at three of the City's libraries, (6) three inaccessible pools, and (7) steep paths at one park.

Id. at 1240. The other testifying class members or their mothers described various other access barriers that they had encountered while enjoying San Francisco's public services. *Id.* at 1217–21.

Accessibility Infrastructure. San Francisco handles disability access concerns through a collection of institutional mechanisms. At the top is the Mayor's Office on Disability ("MOD"), an eight-person office that oversees the "various departments, positions, policies, and programs" dedicated to disability issues. *Id.* at

1202. The staff of MOD "regularly work with and receive input from a variety of organizations devoted to disabled access," as well as maintain a public website with extensive information on disability access resources. *Id.* at 1202–03.

Next is the Mayor's Disability Council, an advisory body of members of the disabled community that "provide[s] a public forum to discuss disability issues." *Id.* at 1203. The Mayor's Disability Council acts as the primary liaison to San Francisco's disabled community. *Id.*

Third are ADA coordinators located in each City department that has more than fifty employees. *Id.* The ADA coordinators investigate disability access complaints and serve as resources for their respective departments on disability access issues. *Id.*

Last is a citywide grievance procedure overseen by MOD. *Id.* Upon receipt of an access complaint, MOD sends a copy to the ADA coordinator at the relevant department, who in turn conducts an investigation. *Id.* at 1204. There is a separate procedure for complaints related to curb ramps. *Id.* at 1204–05.

Funding for disability access improvements is governed by the City's Capital Plan. *Id.* at 1205. The City estimates that it will spend $670 million on ADA compliance between 2012 and 2021.[2] *Id.*

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[2] A significant portion of the trial was also dedicated to evidence of the City's various plans and policies for addressing access

Public Right-of-Way. San Francisco operates a network of "approximately 2,000 miles of sidewalks, 27,585 street corners, and roughly 7,200 intersections," all overseen by the Department of Public Works. *Id.* at 1205.

Scott Mastin, one of Kirola's experts, testified that he inspected 1,432 curb ramps throughout the pedestrian right-of-way and identified 1,358 as inaccessible or noncompliant with ADA standards. *Id.* at 1222. Another expert, Dr. Edward Steinfeld, conducted fourteen site inspections involving the public right-of-way and at thirteen of them found curb ramp access barriers. *Id.* Expert Peter Margen inspected ten intersections or street segments and found "major barriers to accessibility" that rendered "the system as a whole not accessible." *Id.* Finally, expert David Seaman analyzed curb ramp data held in a government database, and prepared maps depicting which corners lacked curb ramps or had ramps in low condition. *Id.* at 1224.

The City presented experts that disagreed with these conclusions and criticized the methods employed by Kirola's experts. Defense expert Larry Wood testified that among Kirola's experts, "there was no common way of measuring anything, such as slopes, sidewalks, [and] curb ramps." *Id.* at 1222 (alteration in original). Rather, "they all seemed to have a different approach that was somewhat haphazard." *Id.* Wood criticized Mastin in particular for not considering

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barriers. *See*, *e.g.*, *id.* at 1216. The specific content of these plans and policies is not relevant to the issues on appeal.

dimensional tolerance in his measurements. *Id.* at 1222–23. According to Wood, dimensional tolerances are industry-accepted deviations from applicable design requirements, such as those required by the ADA and its regulations. *Id.* Wood also faulted Mastin for using an incorrect benchmark when determining whether the slopes of curb ramps were ADA compliant. *Id.* at 1223. And Woods complained that Kirola's experts cited potholes or utility grates as access barriers, even when there was a wide path around the pothole or grate. *Id.*

The district court took issue with Kirola's experts' methods as well. The court noted that her experts did not "consider the height of the curbs or widths of the sidewalks they examined," even though those are "critical measurements that may impact the design, construction, and accessibility conclusions of the curb ramps at issue." *Id.* at 1222. Agreeing with Wood, the district court explained that Kirola's experts used inconsistent methods to measure slopes, sidewalks, and curb ramps. *Id.* The district court also criticized Kirola's experts for recording curb-ramp slope by measuring the "maximum localized variation," which is the steepest individual point along the slope of a ramp. *Id.* at 1223. In the district court's view, Kirola's experts should have considered the overall "rise in run," which is the average slope of the ramp. *Id.*

In evaluating the pedestrian right-of-way, Kirola's experts applied the standards found in the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities ("ADAAG"). *Id.* at 1222. The

district court faulted Kirola's experts for this as well, stating that ADAAG was inapplicable to public rights-of-way. *Id.* 1222–23. The district court also stated that even if ADAAG did apply to the public right-of-way, it only applied to parts of the right-of-way that had been constructed or altered after January 26, 1992. *Id.* at 1223. The district court found that Kirola's experts had applied ADAAG to all curb ramps, without first determining the date on which each ramp had previously been constructed or altered. *Id.*

Furthermore, the district court found that Seamon's analysis of government curb ramp data did not include analysis of accessible curb ramps, even when those accessible ramps provided an alternative means of using a sidewalk. *Id.* at 1224. The district court also found that the information that Seamon relied on was not up to date or comprehensive. *Id.*

Finally, the district court expressed concern about the qualifications of the individuals who conducted Kirola's inspections. *Id.* at 1222. The court noted that Steinfeld used mostly student interns for his inspections, and that Margen was not an architect. *Id.* Nevertheless, the district court qualified Mastin, Steinfeld, Margen, Seamon, and another witness named Gary Waters, all as experts. *Id.* at 1221.

Library Program. San Francisco's library program consists of a main library and twenty-seven branch libraries located throughout the City. *Id.* at 1210. Kirola's experts inspected eighteen of the City's twenty-eight total libraries. *Id.* at 1226. Margen,

Mastin, and Steinfeld all testified to discovering access barriers at the libraries, including "narrow aisles, inadequate turnaround space at the end of aisles, inaccessible restrooms, inaccessible seating, and excessive door pressure." *Id.*

The City's experts conducted their own inspections, visiting sixteen of the libraries that Kirola's experts inspected. *Id.* at 1229. Wood testified that based on his inspection, each of the sixteen libraries featured:

> (1) an accessible route from the entrance to the public sidewalk; (2) an accessible entrance; (3) automatic door openers; (4) elevators within multi-story buildings; (5) access to all library levels; (6) accessible checkout counters; (7) accessible tables; (8) accessible doors along all accessible routes; (9) accessible copy machines; (10) accessible toilet rooms for men and women; (11) accessible drinking fountains; and (12) accessible book stacks.

Id. Nevertheless, based on Wood's inspection, MOD advised the library of three to four access barriers that it thought should be addressed, as well as several maintenance issues. *Id.* At the time of trial, the City was in the process of addressing these requests. *Id.*

The City also presented evidence that the library program offers "a range of non-structural solutions to ensure access to its programs and events, including assistive technologies, books by mail, a Library on Wheels, a Library for the Blind and Print Disabled, a Deaf Services Center, and Accessibility Tool Kits." *Id.* at 1214.

The district court again criticized Kirola's experts. According to the district court, Kirola's experts improperly applied the requirement for a 48-inch-wide U-turn area to aisles between shelves, which under applicable regulations only had to be 36 inches wide. *Id.* at 1228. Moreover, some of the doors Kirola's experts examined for excessive pressure were fire doors, which the district court maintained are allowed to possess greater pressure. *Id.* The district court also found that the effects of some of the access barriers cited by Kirola's experts were alleviated by other accessible features. *Id.* For instance, some of the difficult-to-move doors had electric door openers. *Id.* And at the Richmond library, one ramp was not accessible, but another ramp leading to the same place was accessible. *Id.* The district court's criticism regarding the failure to consider dimensional tolerances applied to Kirola's experts' library examinations as well. *Id.* at 1227.

Aquatic Program. San Francisco's aquatics program consists of nine public swimming pools. *Id.* at 1210. Of these nine pools, six have been renovated to improve accessibility. *Id.* at 1213.

Kirola's experts inspected seven of the nine pools, though three of the pools they inspected were the "limited access" pools that had not been renovated to improve accessibility. *Id.* at 1226. Steinfeld testified that he found numerous access barriers at the pools. *Id.* at 1226–27. These included "inaccessible paths of travel, inaccessible parking, inadequate signage, missing handrails, inaccessible handrails, heavy doors,

drinking fountains lacking [adequate] knee clearance, and non-detachable shower heads." *Id.*

The City's experts visited five pools, three of which were pools that Kirola's experts had inspected. *Id.* at 1229. Contrary to Steinfeld's testimony, Wood explained that each of the five pools he visited had "the features necessary to facilitate accessibility." *Id.* These features included:

> (1) an accessible route from the property line to the building; (2) an accessible entry; (3) an accessible check-in counter; (4) accessible signage; (5) accessible ramps or curb ramps where necessary; (6) accessible toilets; (7) accessible showers; (8) accessible locker rooms; and (9) transfer lifts to assist individuals with mobility impairments in getting into and out of the pool.

Id.

RecPark Program. The City's RecPark program encompasses "220 parks spanning 4,200 acres of park space and 400 structures (i.e., clubhouses, recreation centers, etc.) thereon." *Id.* at 1210. The program has a website, which provides information about which of its locations are accessible. *Id.* at 1215–16.

Of the 220 total locations, Kirola's experts inspected 13 parks, 7 mini-parks, and 16 playgrounds. *Id.* at 1227. The district court gave the following description of Kirola's experts' findings:

> Kirola's experts identified various access barriers, including an inaccessible entrance ramp

> at Balboa Park, a cracked sidewalk at Jefferson Square Park, limited accessible paths of travel at Golden Gate Park's Japanese Tea Garden and Rose Garden, inaccessible paths connecting the main facilities at Glen Canyon Park, and placement of flora and fauna signage at Glen Canyon Park too far from accessible trails.

Id.

Kirola's experts also inspected thirteen of the City's seventy-three recreation centers and clubhouses. *Id.* Mastin concluded that four of the eleven recreation centers he inspected were inaccessible, based on findings "such as inadequate signage, an excessive cross-slope leading to accessible features in a restroom, a broken elevator, and an inaccessible tennis court." *Id.*

Wood and his team inspected the same recreation centers as Kirola's experts. *Id.* at 1229. Wood testified that accessibility features at those centers included:

> (1) an accessible route from the property line to the building; (2) an accessible entry; (3) accessible community rooms; (4) accessible ramps or curb ramps where necessary; (5) accessible elevators within multi-story buildings; (6) an accessible gym with accessible bleacher facilities (with the exception of the Golden Gate Senior Center, which lacked a gym); (7) an accessible weight room in facilities where a weight room was provided; (8) accessible doors; (9) an attendant for special requests; (10) accessible bathrooms for men

> and women; and (11) accessible drinking fountains.

Id. Wood's inspection did not come up completely clean, however. He concluded that 1.6 percent of the access barriers cited by Kirola's experts at San Francisco's recreation facilities and its libraries required modification. *Id.* at 1230. The evidence at trial similarly established that MOD had concluded that there were roughly 400 access barriers throughout the RecPark program in need of alteration. *Id.*

The district court's criticism of Kirola's experts' methods applied to their RecPark investigation as well. The district court faulted her experts for failing to consider dimensional tolerances, and criticized them for not using the "rise in run" approach to measuring slopes. *Id.* at 1222–23. Moreover, the district court found that Kirola's experts had once again applied the standards of ADAAG, which the district court concluded did not apply to parks and playgrounds. *Id.* at 1227–28. According to the district court, Kirola's experts also did not take into account conflicts between state and federal law, which in some instances "requir[ed] the City to decide which standard is more restrictive." *Id.* at 1228.

Conclusions. On the basis of its many critiques of Kirola's experts' methodologies, the district court ultimately found that her experts were not credible in their investigations of each public program. *See*, *e.g.*, *id.* at 1224. The district court gave little weight to the testimony of Kirola's experts. *See*, *e.g.*, *id.* By contrast,

the district court found the testimony of the City's experts convincing. *See*, *e.g.*, *id.*

On the basis of its factual findings, the district court concluded that Kirola lacked Article III standing. The district court ruled that Kirola's "minimal testimony" about encountering only a few barriers was insufficient to show "that she has been deprived of meaningful access to a challenged service, program, or activity in its entirety." *Id.* at 1239–40 (internal quotation marks omitted). For this reason, the district court held that Kirola had not established injury in fact. *Id.* at 1242. The district court went on to hold that even had Kirola shown an actual injury, that injury would not be redressed by the specific terms of her proposed injunction. *Id.* at 1243–45. Finally, the district court concluded that any injury to Kirola was not likely to recur because she had not shown that her alleged injuries stemmed from any written policy. *Id.* at 1249.

As an alternative holding, the district court addressed, and denied, Kirola's claims on the merits. *Id.* at 1250. Of those claims, two are relevant to this appeal. The first is a claim over "existing facilities," defined as facilities constructed prior to January 26, 1992. Under 28 C.F.R. § 35.150, the City is obligated to operate each existing facility so as to ensure "program access." *Daubert v. Lindsay Unified Sch. Dist.*, 760 F.3d 982, 988 (9th Cir. 2014). Program access does not require that each existing facility be disability accessible. *Id.* at 986. Rather, it requires that each "program" offered by the City, when viewed in its entirety, be "readily accessible to and usable by individuals with

disabilities." 28 C.F.R. § 35.150(a); *Daubert*, 760 F.3d at 986. The district court held that Kirola did not prove that the City's public right-of-way, aquatics, library, and RecPark programs were inaccessible when viewed in their entirety. *Kirola*, 74 F.Supp.3d at 1251, 1254–56.

Kirola's second relevant claim concerns facilities "newly constructed or altered" after January 26, 1992. Under 28 C.F.R. § 35.151(a)(1), each newly constructed or altered facility must be "readily accessible to and usable by individuals with disabilities." The City elected to meet this standard by following the standards set forth in ADAAG. *Kirola*, 74 F.Supp.3d at 1212. The district court held that because it did not find Kirola's experts credible, Kirola had established only "a few isolated departures" from ADAAG. *Id.* at 1258. The district court denied Kirola's claim, reasoning that the "few variations" with respect to newly constructed or altered facilities did not show that class members had been denied "meaningful access." *Id.* at 1259.

The district court entered judgment for the City, and Kirola timely appealed. *Id.* at 1267. We have jurisdiction under 28 U.S.C. § 1291. For the reasons that follow, we affirm in part, reverse in part, and remand, with instructions.

II

We review the district court's findings of fact following a bench trial for clear error. *See* Fed. R. Civ. P. 52(a)(6); *OneBeacon Ins. Co. v. Haas Indus., Inc.*, 634

F.3d 1092, 1096 (9th Cir. 2011). We review the district court's conclusions of law, including its conclusion regarding standing, de novo. *Id.*; *see Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013).

III

"[T]o satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). When seeking prospective injunctive relief, the plaintiff must further show a likelihood of future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983).

In the ADA context, a plaintiff may establish injury in fact to pursue injunctive relief through evidence that the plaintiff encountered an access barrier and either intends to return or is deterred from returning to the facility. *See Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 950 (9th Cir. 2011) (en banc).[3] Here,

[3] *Chapman* involved a challenge under Title III of the ADA, which addresses discrimination in public accommodations, rather than Title II, which applies to discrimination in public services. *See id.* Nevertheless, despite the titles' different application and different standards for relief on the merits, the answer to the

Kirola testified to encountering the following access barriers at San Francisco's public facilities:

> (1) three stretches of sidewalk containing "bumps," (2) a sidewalk where her wheelchair became stuck in a tree well; (3) one street corner that lacked curb ramps, (4) one street corner that provided only a single curb ramp, (5) errant step stools at three of the City's libraries, (6) three inaccessible pools, and (7) steep paths at one park.

Kirola, 74 F.Supp.3d at 1240. These barriers spanned San Francisco's public right-of-way, libraries, parks, and pools, and interfered with Kirola's access at the facilities[4] she visited. *Id.*

The district court held that Kirola's experiences were insufficient to constitute Article III injury because Kirola had not "been deprived of 'meaningful access' to a challenged service, program, or activity in its entirety." *Id.* at 1239. This was error. The district court seems to have improperly conflated Kirola's standing with whether she would prevail on the merits. *See Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) ("Our threshold inquiry into standing in no way depends on the merits of the

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constitutional question of what amounts to injury under Article III is the same.

[4] Standing for ADA claims is measured on a facility-by-facility basis, not a barrier-by-barrier basis. Once a plaintiff has proven standing to challenge one barrier at a particular facility, that plaintiff has standing to challenge all barriers related to her disability at that facility. *See Doran v. 7-Eleven, Inc.*, 524 F.3d 1034, 1047 (9th Cir. 2008).

petitioner's contention that particular conduct is illegal." (internal quotation marks and alteration omitted)). Meaningful access to a program "in its entirety" is the standard for relief *on the merits* of Kirola's program access claims. *See* 28 C.F.R. § 35.150. If that was also the standard for injury in fact, there would be no difference between Kirola succeeding on the merits and establishing standing to assert her claims in the first place. Article III is not superfluous. Its standards exist apart from the merits, and are well established.

The standard for injury in fact is whether Kirola has encountered at least one barrier that interfered with her access to the particular public facility and whether she intends to return or is deterred from returning to that facility. *See Chapman*, 631 F.3d at 950; *see also Doran*, 524 F.3d at 1039 ("The Supreme Court has instructed us to take a broad view of constitutional standing in civil rights cases.").

Kirola meets this standard. The barriers she encountered prevented her from benefitting from the same degree of access as a person without a mobility disability, and deterred her from future attempts to access the facilities she visited. This is a concrete and particularized harm. *See Doran*, 524 F.3d at 1040 ("[Plaintiff] has suffered an injury that is concrete and particularized because he . . . personally suffered discrimination as a result of the barriers in place during his visits to 7-Eleven and that those barriers have deterred him . . . from patronizing the store"). Kirola's injuries are actual because they have already happened. And she is likely to suffer harm in the future because

Kirola is "currently deterred from visiting [various public facilities] by accessibility barriers." *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 867 (9th Cir. 2014). Kirola has established injury in fact.

Kirola has also proven causation. The barriers Kirola encountered are "fairly traceable" to the City because the City is responsible for construction, alteration, and maintenance of the facilities that include those barriers. *See Kirola*, 74 F.Supp.3d at 1205.

Finally, Kirola has proven redressability. Through a properly framed injunction, the district court can ensure that the City alters or removes the access barriers Kirola encountered. As a result, Kirola "personally would benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 n.5, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). The district court, concluding to the contrary, focused on the specific terms of Kirola's proposed injunction, finding that the injunction would not remedy Kirola's injuries. *Kirola*, 74 F.Supp.3d at 1243. But Kirola's proposed injunction *would* benefit her. For example, her proposal to shorten the City's curb ramp inspection cycle would increase the timetable in which the curb barriers she encountered would be fixed. *See id.*

In any event, Kirola's proposed injunction does not control whether her claims are redressable. The district court is not bound by Kirola's proposal, and may

enter any injunction it deems appropriate, so long as the injunction is "no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 775 (9th Cir. 2008) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979)). Redressability is a constitutional minimum, depending on the relief that federal courts are *capable* of granting. Kirola does not lose standing because she proposed an injunction that the district court thought too narrow. We hold that Kirola has proven standing to challenge barriers at the facilities she visited.

We now address whether the certified class has standing to challenge the facilities Kirola did not personally visit. A panel of our court recently clarified the relationship between Article III and class certification. *See Melendres v. Arpaio*, 784 F.3d 1254, 1262 (9th Cir. 2015). Adopting the "class certification approach," the panel in *Melendres* held that "once the named plaintiff demonstrates her individual standing to bring a claim, the standing inquiry is concluded, and the court proceeds to consider whether the Rule 23(a) prerequisites for class certification have been met." *Id.* (quoting 1 William B. Rubenstein, Newberg on Class Actions § 2:6 (5th ed.)). Kirola has demonstrated individual standing to bring her claims, and the district court earlier certified a class consisting of "[a]ll persons with mobility disabilities who are allegedly being denied access . . . due to disability access barriers to . . . parks, libraries, swimming pools, and curb ramps, sidewalks, crosswalks, and any other out-door designated pedestrian

walkways in the City and County of San Francisco."[5] The class definition is broad enough to encompass every facility discussed at trial, whether Kirola personally visited that facility or not. The district court thought that it could address only facilities that were visited by Kirola. But that does not take into account the scope of the certified class and the holding of *Melendres*. We hold that the plaintiff class has standing for claims related to all facilities challenged at trial.

IV

Turning to the merits of Kirola's claims, we address those related to newly constructed or altered facilities. Title II's implementing regulations mandate that "each facility constructed" after January 26, 1992, be "readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.151(a)(1). Likewise, for "each facility altered" after January 26, 1992, the altered portion must, "to the maximum extent feasible," be "readily accessible to and usable by individuals with disabilities." *Id.* at 28 C.F.R. § 35.151(b)(1).

To ensure compliance with these mandates, a federal agency called the Architectural and Transportation Barriers Compliance Board ("Access Board") produces the ADAAG standards mentioned above. These standards are not binding when promulgated by the Access Board. Under Title II, the Department of

[5] No challenge to the class certification order is before us on this appeal.

Justice ("DOJ") is required to adopt its own *binding* access regulations that are consistent with the minimum standards put out by the Access Board. *See* 42 U.S.C. § 12134(b). The legal framework is that: (1) the Access Board sets a baseline of nonbinding requirements; and (2) DOJ must then adopt binding regulations that are "consistent with—but not necessarily identical to—the [Access] Board's guidelines." *Miller v. Cal. Speedway Corp.*, 536 F.3d 1020, 1025 (9th Cir. 2008).

Both ADAAG and DOJ's guidelines have been through multiple iterations since Congress passed the ADA in 1990. *See id.* at 1024–27 (giving partial history of ADAAG-related rulemakings and interpretations). The history of these regulations is a helpful key to full understanding of the requirements that govern Kirola's claims over new and altered facilities.

On July 26, 1991, the Access Board published its first iteration of ADAAG. *Id.* at 1025; *ADA Accessibility Guidelines (ADAAG)*, United States Access Board, *available at* https://www.access-board.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background/adaag. That same day, DOJ adopted ADAAG in full as its own accessibility regulations. *See Background*, United States Access Board, https://www.accessboard.gov/guidelines-and-standards/buildings-and-sites/about-the-ada-standards/background (hereinafter "ADAAG Background"). Through September 3, 2002, the Access Board published several supplements to ADAAG. *Id.* But because DOJ had not

re-adopted ADAAG up to this point, the supplements were nonbinding; the only binding ADAAG requirements were the original ones adopted in 1991. *See Arizona ex rel. Goddard v. Harkins Amusement Enterprises, Inc.*, 603 F.3d 666, 674 (9th Cir. 2010) ("This court has declined to give deference to Access Board guidelines that have not yet been adopted by the DOJ.").

In 2004, the Access Board published a wholesale revamp of ADAAG. *See* ADAAG Background. Again, the new regulations were not then binding. But on September 15, 2010, DOJ updated its accessibility regulations by incorporating the 2004 ADAAG standards with slight variations. *See* 2010 ADA Standards for Accessible Design, *available at* https://www.ada.gov/regs2010/2010ADAStandards/2010ADAStandards. pdf; 36 C.F.R. Pt. 1191, App. B, D; 28 C.F.R. Pt. 36, App. A.

DOJ's 2010 standards set a timetable for compliance with the newly binding 2004 ADAAG standards. For new constructions or alterations commenced before September 15, 2010, public entities could choose to comply either with the original 1991 ADAAG standards or with another set of federal standards called the Uniform Federal Accessibility Standards ("UFAS"). 28 C.F.R. § 35.151(c)(1). New constructions or alterations commenced between September 15, 2010, and March 15, 2012, could comply with the 1991 ADAAG standards, with UFAS, or with the newly adopted 2004 ADAAG standards. *Id.* § 35.151(c)(2). And new constructions or alterations commenced after March 15,

2012, had to comply with the 2004 ADAAG standards. *Id.* § 35.151(c)(3).

Here, the district court found that the City had elected to follow ADAAG over UFAS to meet its federal access obligations. *Kirola*, 74 F.Supp.3d at 1212. Though the district court did not specify which of the two ADAAG standards the City had chosen to comply with—the 1991 or 2004 standards—we can be confident that for most new constructions and alterations it was the 1991 standard. The trial took place in April and May of 2011, a year and a half after the 2004 standards became an option for the City's new constructions and alterations. So only for facilities constructed or altered during that year-and-a-half period could the City have chosen to comply with the 2004 standards. Even then, complying with the new standard was optional, not required.

We focus our analysis on the original ADAAG standards from 1991. From here on in this opinion, when we refer to "ADAAG," we refer to the 1991 ADAAG standards.

These standards state requirements "as precise as they are thorough, and the difference between compliance and noncompliance with the standard of full and equal enjoyment established by the ADA is often a matter of inches." *Chapman*, 631 F.3d at 945–46. "[O]bedience to the spirit of the ADA does not excuse noncompliance with [] ADAAG's requirements." *Id.* at 945 (internal quotation marks omitted).

ADAAG includes two categories of requirements. The first, found in Section Four, is titled "Accessible Elements and Spaces: Scope and Technical Requirements." These requirements set out detailed design guidelines for particular features of facilities. *See*, *e.g.*, ADAAG § 4.9.2 ("Stair treads shall be no less than 11 in (280 mm) wide, measured from riser to riser."); *id.* § 4.13.7 ("The minimum space between two hinged or pivoted doors in series shall be 48 in (1220 mm) plus the width of any door swinging into the space."); *id.* § 4.19.6 ("Mirrors shall be mounted with the bottom edge of the reflecting surface no higher than 40 in (1015 mm) above the finish floor."). We refer to the collection of guidelines in Section Four as the "feature-specific" requirements. The feature-specific requirements apply to "[a]ll areas of newly designed or newly constructed buildings and facilities and altered portions of existing buildings and facilities." *Id.* § 4.1.1.

The second category of guidelines is addressed not to specific features, but to specific types of facilities. We call these "facility-specific" requirements. The facility-specific requirements are spread across several different sections and give standards for particular types of facilities such as "Restaurants and Cafeterias," *id.* § 5, "Medical Care Facilities," *id.* § 6, and "Libraries," *id.* § 8. The facility-specific sections each begin with a recital that the facilities covered by that section must still comply with the feature-specific guidelines contained in Section Four. *See*, *e.g.*, *id.* § 5.1.

The district court found that Kirola had proven that the City's new or altered facilities departed from

ADAAG in only a few isolated instances. The district court reasoned in two steps, first concluding that *none* of Kirola's experts was reliable, and then concluding that *all* of the City's experts were reliable. *See Kirola*, 74 F.Supp.3d at 1222, 1227–28, 1258. It thus disregarded and discarded every ADAAG violation identified by Kirola's experts, accepting only the small number of violations identified by the City's experts. *See id.* at 1230 ("Wood found that only 1.6 percent of the access barriers cited by Kirola's experts at City libraries and recreation facilities actually needed modification.").

The district court's conclusion concerning the credibility of Kirola's experts and the extent of ADAAG compliance was erroneous because it relied on several regulatory misinterpretations. The district court's most consequential misinterpretation concerned ADAAG's applicability to public rights-of-way, parks, and playground facilities. Kirola's experts applied ADAAG's standards to San Francisco's public right-of-way, parks, and playground facilities as part of their investigation of the City's compliance with the ADA. The district court sharply disagreed with this approach, explaining that in its view, ADAAG was simply inapplicable to such facilities. *Kirola*, 74 F.Supp.3d at 1223, 1227–28. The district court based its erroneous conclusion on the fact that ADAAG in 1991 did not contain facility-specific sections for public rights-of-way, parks, and playgrounds.[6] The district court's incorrect

[6] At some point the Access Board inserted into ADAAG a placeholder heading for "Public Rights-of-Way," but the Access

interpretation of ADAAG contributed to its negative view of the credibility of Kirola's experts: "[t]he Court further discounts the probative value of Kirola's experts' opinions and reports based on their misapplication of ADAAG." *See Kirola*, 74 F.Supp.3d at 1223. But because the experts had not misapplied ADAAG, and instead it was the district court that so erred, this point did not give a valid basis on which to discount Kirola's experts' testimony.

We hold that the district court's interpretation of ADAAG was erroneous.[7] Properly interpreted, ADAAG's standards apply to public rights-of-way, parks, and playgrounds. Although ADAAG does not include facility-specific guidelines particular to those types of facilities, the Section Four feature-specific requirements apply.

Several reasons support this conclusion. First, applying ADAAG's feature-specific requirements to public rights-of-way, parks, and playgrounds is consistent with the executive branch's own interpretation of ADAAG. In 1993, DOJ issued a Technical Assistance Manual to help public entities understand their

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Board did not publish any requirements in that section. The Access Board also published an ADAAG supplement in 2002 titled "Recreation Facilities," but the supplement was not incorporated into DOJ's guidelines. *See* ADAAG §§ 14-15.

[7] Though we review the district court's ultimate conclusion as to witness credibility for clear error, where, as here, that credibility finding was based on a legal interpretation, we review that legal interpretation de novo. *See Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 n.15, 102 S.Ct. 2182, 72 L.Ed.2d 606 (1982).

obligations under the ADA. In 1994, DOJ issued a supplement to the manual that stated:

> *What if neither ADAAG nor UFAS contain specific standards for a particular type of facility?* In such cases the technical requirements of the chosen standard should be applied to the extent possible. If no standard exists for particular features, those features need not comply with a particular design standard. However, the facility must still be designed and operated to meet other title II requirements, including program accessibility.

1994 Supplement to Technical Assistance Manual, II-6.2100, *available at* https://www.ada.gov/taman2up.html (emphasis in original) (citation omitted). We recently held that the interpretations in this supplement are entitled to deference. *See Fortyune v. City of Lomita*, 766 F.3d 1098, 1104 (9th Cir. 2014) (citing *Auer v. Robbins*, 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997)); *cf. Miller*, 536 F.3d at 1028 ("The guidance provided in the technical assistance manual is an interpretation of the DOJ's regulation and, as such, is entitled to significant weight as to the meaning of the regulation." (internal quotation marks omitted)).

Applying the City's "chosen standard"—ADAAG—"to the extent possible," requires applying ADAAG's feature-specific standards to San Francisco's public right-of-way, parks, and playgrounds. As an example of what this means on the ground, while ADAAG may not have a *facility*-specific section governing parks, it does

have a *feature*-specific section governing ramps. *See* ADAAG § 4.8. Any ramp constructed or altered in a park between January 26, 1992, and September 15, 2010 (and possibly as late as March 15, 2012), had to comply with ADAAG's feature-specific ramp guidelines.

The City focuses on the next sentence from the 1994 Supplement, that "[i]f no standard exists for particular features, those features need not comply with a particular design standard." But that sentence applies to "features," not "facilities." The sentence says that if, for example, Section Four had no feature-specific requirements for ramps, then any newly constructed ramps need not comply with ADAAG. This is different from saying that if there are no facility-specific requirements for parks, then parks need not comply with ADAAG at all.

Second, the language of ADAAG supports our view. The feature-specific guidelines in ADAAG Section Four, by ADAAG's own terms, apply to "[a]ll areas of newly designed or newly constructed buildings and facilities and altered portions of existing buildings and facilities." ADAAG § 4.1.1. No provision excludes application to public rights-of-way, parks, or playgrounds. Instead, ADAAG uses the broad phrase "all areas."

The City's main argument in response relies on the *expressio unius* canon of interpretation. The City contends that the presence of facility-specific sections for *some* types of facilities precludes ADAAG's application to *other* facility types that do not have their own

specific set of regulations. We reject this argument, because the facility-specific sections are not standalone sets of regulations. Rather, they are collections of additions and exceptions. Consider the language at the head of each facility-specific section stating that the facility-specific requirements apply *in addition to* the feature-specific regulations of Section Four. *See*, *e.g.*, *id.* § 5.1. These provisions indicate that ADAAG was not structured as a regulation that applies to "apples, bananas, and oranges," permitting the reasonable inference that it does not apply to a pear. ADAAG is structured as a regulation that applies to "all fruit, but with additional rules and exception for apples, bananas, and oranges." Such a regulation would still apply to a pear. And for ADAAG, it still applies to public rights-of-way, parks, and playgrounds. For these same reasons, we are not persuaded by the district court's twist on *expressio unius* that because the Access Board has proposed facility-specific guidelines for public rights-of-way and adopted a supplement for recreation facilities, the rest of ADAAG does not apply to such facilities. *See Kirola*, 74 F.Supp.3d at 1223, 1227–28. The district court's conclusion does not follow from its premise.

Third, applying ADAAG's feature-specific requirements to public rights-of-way, parks, and playgrounds makes sense as a regulatory scheme. Imagine that ADAAG did not apply to those facilities at all. Public entities would not suddenly find themselves free to ignore access concerns when altering or building new rights-of-way, parks, and playgrounds. The

requirements of 28 C.F.R. § 35.151 would still apply, holding public entities to the "readily accessible [] and usable" standard. *Id.* § 35.151(a), (b). However, the exposition of this general standard would no longer come from experts at DOJ and the Access Board, but from the courts. In many areas of law, this is a permissible arrangement. Giving content to general standards is foundational to the judicial function. *See Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137, 2 L.Ed. 60 (1803). But when the content involves many precise dimensions such as inches of knee clearance underneath a sink, *see* ADAAG § 4.24.3, courts do not have the institutional competence to put together a coherent body of regulation. By contrast, a federal administrative agency can hire personnel with the specific skills needed to devise and implement the regulatory scheme. And as for the regulated entities, an architect putting thousands of measurements into his or her blueprint needs a holistic collection of design rules, not the incremental product of courts deciding cases and controversies one at a time.

We hold that ADAAG applies to San Francisco's public right-of-way, parks, and playgrounds. The district court therefore erred in its conclusion that Kirola's experts' application of ADAAG to those facilities made them less credible. The district court should have made its credibility assessment on the premise that ADAAG applied to those facilities.

The district court made other legal mistakes in reaching its credibility determination. For one thing, it improperly criticized Kirola's experts because they

"dwelled on minor variations," rather than "focusing on overall accessibility." *Kirola*, 74 F.Supp.3d at 1228. While, as explained below, focusing on overall accessibility is acceptable when evaluating *existing* facilities, avoiding "minor variations" is exactly what ADAAG requires of new or altered facilities. *See Chapman*, 631 F.3d at 946 (compliance with ADAAG "is often a matter of inches"). The district court's criticisms of Kirola's experts' detail-focused approach affected its assessment of those experts' credibility generally, regarding the experts' conclusions both on existing and on new or altered facilities.

The district court also improperly faulted Kirola's experts for not applying proposed federal standards for "outdoor facilities" to parks and playgrounds. *Kirola*, 74 F.Supp.3d at 1227–28. We presume by "outdoor facilities," the district court meant ADAAG's 2002 supplement on "Recreation Facilities." *See* ADAAG § 15. The district court reasoned that because ADAAG did not apply to parks and playgrounds, the proposed standards must have been applicable. *Id.* But as already discussed, ADAAG applies to parks and playgrounds. Moreover, the 2002 supplement was not binding because DOJ never adopted the supplement as part of its own standards. *See Goddard*, 603 F.3d at 674. Kirola's experts were correct to avoid applying ADAAG's proposed standards for "Recreation Facilities" because they were not binding.

The district court further erred in criticizing Kirola's experts for their approach to measuring the slopes of curb ramps. Kirola's experts measured slope

by recording the "maximum localized variation," which is the steepest individual point along the slope of a ramp. *Kirola*, 74 F.Supp.3d at 1223. The district court thought that Kirola's experts should have instead considered the overall "rise in run," which is the average slope of the ramp. *Id.* But for a mobility-impaired user like Kirola, it is the steepest point—not the average steepness—that determines whether a particular ramp is accessible. In 2007, DOJ issued an "ADA Best Practices Tool Kit" that recognized this point, stating that "rise over run" is "not useful when assessing the accessibility of a feature that has already been constructed. . . . [I]t assumes that the slope over the length of the run is consistent, which is often an inaccurate assumption." *See* ADA Best Practices Tool Kit, Introduction to Appendices 1 and 2, *available at* https://www.ada.gov/pcatoolkit/introapp1and2.htm. DOJ's approach in the ADA Best Practices Tool Kit is an interpretation of its own regulations, so it "is entitled to significant weight as to the meaning of the regulation." *Miller*, 536 F.3d at 1028. The district court erred in finding Kirola's experts less credible because of their approach to measuring slope. Because it is the steepest point on the ramp that affects whether a wheelchair user can navigate the ramp, it is the maximum localized variation, used by Kirola's experts, rather than the average slope, used by the City's experts, that is the correct benchmark. In any event, it was at least permissible and not a ground for discrediting Kirola's experts for them to stress maximum slope as a key to accessibility.

We are not saying that every legal interpretation by the district court affecting its credibility finding was erroneous. For example, the district court properly faulted Kirola's experts for applying ADAAG to all curb ramps without first identifying whether those ramps were constructed or altered after January 26, 1992, thereby bringing them within ADAAG's purview.[8] *Kirola*, 74 F.Supp.3d at 1223. The district court also correctly criticized Kirola's experts for not taking into account dimensional tolerances, for which ADAAG specifically provides.[9] *See* ADAAG § 3.2 ("All dimensions are subject to conventional building industry tolerances for field conditions."). But insofar as the district court misinterpreted applicable law, those misinterpretations led the court to an incorrect conclusion

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[8] This criticism by the district court was proper, however, only as to Kirola's claims under 28 C.F.R. § 35.151. For her claims under 28 C.F.R. § 35.150—her program access claims—compliance with ADAAG is relevant whether the facility is existing, or newly constructed or altered. This is because while the regulatory standard for claims under 28 C.F.R. § 35.150 is access on a program-wide basis, plaintiffs sometimes prove lack of programmatic access by showing that many individual barriers to access exist in the program. In evaluating these individual barriers, ADAAG's standards provide guidance. *See Pascuiti v. N.Y. Yankees*, 87 F.Supp.2d 221, 226 (S.D.N.Y. 1999) ("[E]ven though only new construction and alterations must comply with the [ADAAG], those Standards nevertheless provide valuable guidance for determining whether an existing facility contains architectural barriers.").

[9] Many of ADAAG's requirements do not involve dimensions. *See*, *e.g.*, ADAAG § 4.8.5(1) ("Handrails shall be provided along both sides of ramp segments."). A failure to consider dimensional tolerances has no effect on the application of these requirements.

about credibility, and ultimately, to the wrong conclusion about the extent of noncompliance with ADAAG.

We are aware of and do not recede from the principle that trial court credibility findings are entitled to special deference. *Allen v. Iranon*, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002). But the district court's approach to Kirola's experts' credibility was based on legal errors. We remand for reevaluation of the extent of ADAAG noncompliance.

V

We next address Kirola's claims related to existing facilities. Under 28 C.F.R. § 35.150(a), public entities must "operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." Meeting this standard does not "[n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities." *Id.* § 35.150(a)(1). It also does not require structural changes to existing facilities, if "other methods, such as relocating services to different buildings, would be effective."[10] *Cohen v. City of Culver City*, 754 F.3d 690, 696 (9th Cir. 2014); 28 C.F.R. § 35.150(b)(1). The regulation requires only

[10] If a public entity decides to make structural changes to an existing facility, however, those changes must comply with ADAAG. *See* 28 C.F.R. § 35.150(b)(1) (citing *id.* § 35.151).

that, "when viewed in its entirety," the program at issue be accessible.

On appeal, Kirola challenges the district court's program access rulings only as to the public right-of-way and RecPark programs. She first contends that for both of these programs, the district court applied the wrong standard. Kirola points to the district court's statement that for her to prevail, each program had to be "inaccessible," or "unusable," "in its entirety." *Kirola*, 74 F.Supp.3d at 1240, 1250. Kirola contends based on this language—and nothing more—that the district court required her to prove that *no part* of the City's right-of-way or RecPark programs was accessible. But we conclude that Kirola misreads the district court. By "inaccessible," or "unusable," "in its entirety," the district court appears to us to have meant inaccessible or unusable *when viewed* in its entirety.

Kirola next contends that even under the correct standard—"when viewed in its entirety"—she proved that the public right-of-way and RecPark programs were inaccessible. We disagree.

As to the public right-of-way, we agree with the district court that Kirola and the other class members' anecdotal testimony about cracked pavement, potholes, uneven sidewalks, and missing or difficult-to-use curb ramps did not establish inaccessibility at a programmatic level. *See id.* at 1251. As far as we can tell from the record, no class member testified that there were locations in the city that such class member could not reach because of access barriers.

The testimony of Kirola's experts fares no better on this particular issue. Expert Mastin inspected 1,432 curb ramps and identified 1,358 as inaccessible; expert Steinfeld conducted fourteen site inspections and found thirteen inaccessible; and expert Margen inspected ten intersections of street corners and found "major barriers to accessibility." *Id.* at 1222. But despite this partially supportive testimony, this evidence describes only a small part of the City's "approximately 2,000 miles of sidewalks, 27,585 street corners, and roughly 7,200 intersections." *Id.* at 1205. The district court also identified several problems with Kirola's experts' analysis, including that they did not consider certain "critical measurements," did not account for dimensional tolerances, used inconsistent measurement techniques, and relied on potentially unqualified individuals to assist with surveys. *Id.* at 1222–23. Kirola has not shown that these criticisms were clearly erroneous.

Kirola's best piece of evidence for inaccessibility at a programmatic level was probably expert Seamon's graphical representation showing a map of curbs lacking ramps and curb ramps with low condition scores. *See id.* at 1224. But the district court found Seamon's representation misleading because (1) it did not show accessible curbs when they were near inaccessible ones, and (2) it relied on outdated data. Kirola has not shown that these findings were clearly erroneous either.

Finally, the trial record included evidence that the City's Municipal Transportation Agency provides both

public transportation and paratransit services as part of the public right-of-way. *Id.* at 1205. The paratransit service in particular includes van and taxi service for disabled individuals. *Id.* The public transportation and paratransit services are the sorts of "other methods" that can satisfy program access even if other particular methods of benefitting from the program are inaccessible. 28 C.F.R. § 35.150(b)(1); *see Daubert*, 760 F.3d at 988 (holding that high school football games met program access standard where bleachers were inaccessible but other accessible locations provided unobstructed views of the field). In sum, we conclude that Kirola has not shown that the City operates its public right-of-way in a deficient manner so that the program, when viewed in its entirety, is not readily accessible to and usable by individuals with disabilities.

We reach the same conclusion regarding San Francisco's RecPark program. Kirola and the other class members testified to encountering barriers at some parts of various parks. *Kirola*, 74 F.Supp.3d at 1219–20. But their anecdotal experiences do not establish that the RecPark program, consisting of 220 parks and 400 structures, is inaccessible when viewed in its entirety. Kirola's experts inspected 13 parks, 7 mini-parks, and 16 playgrounds, finding access barriers at many of them. *Id.* at 1227. But their analysis still covered only a small fraction of the City's total park offerings. The same goes for her experts' analysis of recreation centers and clubhouses, where they inspected only thirteen of the City's total seventy-three. *Id.* Moreover, after expert Mastin inspected eleven

recreation centers, he concluded that only four were inaccessible. *Id.*

The City does not dispute that its parks contain some access barriers. MOD at one point concluded that the RecPark program contained roughly 400 such barriers. *Id.* at 1230. But the presence of these barriers does not establish that the RecPark program was inaccessible when viewed as a whole. We sympathize with the frustration of mobility-impaired individuals who may show up to many of San Francisco's parks and then find themselves shut out. But perfect accessibility is not the applicable standard under 28 C.F.R. § 35.150. We also note that the City operates a website that gives information on the accessibility of its various parks, information that can help disabled persons plan which parks to visit.

Kirola argues that certain parks offer unique benefits, and that when those parks are inaccessible, the existence of other, accessible parks does not provide an adequate substitute. For example, she asserts that Golden Gate Park provides inaccessible benefits such as a Model Yacht Clubhouse, a Rose Garden, and a Shakespeare Garden, among other amenities, that are unique to Golden Gate Park. But program access does not operate at such a narrow level of review. *See Daubert*, 760 F.3d at 988. There may be something unique about every park and every facility. But 28 C.F.R. § 35.150 requires only that the program as a whole be accessible, not that all access barriers—and not even all of those at the most iconic locations—be remedied.

Finally, Kirola contends that the City's own definition of an "accessible park" is too lenient to ensure meaningful access. On the RecPark website, the City defines an "accessible park" as one that has an "accessible entry" and "at least one accessible recreational opportunity." *Kirola*, 74 F.Supp.3d at 1216. But as the district court recognized, the City does not use this definition as its standard for ensuring program access. *Id.* at 1263. Rather, the City uses the definition as part of its effort to inform disabled individuals about which parks they may or may not be comfortable visiting. The above considerations lead us to conclude that Kirola has not met her burden of proving a lack of program access to the City's park system.

At bottom, Kirola's program access claims fail for lack of proof. She did not present evidence sufficient to show that the City's public right-of-way and RecPark programs, when viewed in their entirety, were not readily accessible to and usable by individuals with disabilities. The district court properly rejected Kirola's program access claims. We affirm the district court's program access holdings.

VI

In sum, we hold that the district court's credibility determinations were based on legal errors and that its conclusion regarding the scope of ADAAG non-compliance was erroneous. We also hold that the district court properly concluded that Kirola had not proven

program access violations. On remand,[11] the district court shall apply ADAAG as we have interpreted it, and reevaluate the extent of ADAAG noncompliance. Once the scope of any ADAAG violations at facilities used by Kirola and all other class members has been determined, the district court shall revisit the question of whether injunctive relief should be granted in light of the scope of violations determined by the district court, and the Supreme Court's required standards. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 130 S.Ct. 2743, 177 L.Ed.2d 461 (2010); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008); *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006).[12]

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[11] Kirola requests that this case be reassigned on remand. She contends that reassignment is necessary because (1) the district court, in her view, focused almost entirely on the City's arguments to the exclusion of her own, and (2) more than three-and-a-half years passed between the close of trial and the district court's decision. We decline to reassign this case. Though the district court erred in its conclusion regarding the extent of facilities out of compliance with ADAAG, the district court did not display partiality, and we have no reason to believe that it will not faithfully apply our instructions on remand. Moreover, the substantial period between the end of trial and the district court's decision was consumed with post-trial briefing, not needless delay. This case does not present the sort of "rare and extraordinary circumstances" that merit reassignment. *Krechman v. Cty. of Riverside*, 723 F.3d 1104, 1112 (9th Cir. 2013) (internal quotation marks omitted).

[12] There are two motions currently pending in our docket, The Motion to Exceed the Type Volume Limitation for Brief of Amicus Curiae, The Legal Aid Society—Employment Law Center, filed with this court on November 9, 2015, and Appellants'

The parties shall bear their own costs on appeal.

AFFIRMED in part, REVERSED in part, and REMANDED, with instructions.

Request for Judicial Notice, filed with this court on July 15, 2016. Both motions are **GRANTED**.

74 F.Supp.3d 1187
United States District Court, N.D. California,
Oakland Division.

Ivana KIROLA, et al., Plaintiffs,
v.
The CITY AND COUNTY OF
SAN FRANCISCO, et al., Defendants.

Case No: C 07-3685 SBA
|
Signed November 26, 2014

Attorneys and Law Firms

Mark T. Johnson, Alexius M. Markwalder, The Sturdevant Law Firm, Christian Schreiber, Guy Burton Wallace, Nancy Jinsun Park, Schneider & Wallace, San Francisco, CA, for Plaintiff.

CLASS ACTION

FINDINGS OF FACT AND CONCLUSIONS OF LAW

SAUNDRA BROWN ARMSTRONG, United States District Judge.

I. *INTRODUCTION*

Plaintiff Ivana Kirola ("Kirola" or "Plaintiff"), a mobility-impaired individual, brings the instant disability access class action on behalf of herself and similarly-situated individuals against Defendants City and County of San Francisco, the Mayor of San Francisco,

and members of the Board of Supervisors (collectively "the City"). She alleges that the City discriminates against mobility-impaired persons by failing to eliminate all access barriers from or otherwise ensure accessibility to the City's libraries, swimming pools, parks, and public rights-of-way (i.e., the City's network of sidewalks, curb ramps, cross-walks, and other outdoor pedestrian walkways). She also complains that the City's policies and practices for ensuring access, removing access barriers, and handling public access complaints are deficient.

The operative pleading is the First Amended Complaint ("FAC"), which alleges six claims for relief based on: (1) Title II of the Americans with Disabilities Act of 1990 ("Title II of the ADA" or "Title II"), 42 U.S.C. § 12131-12165; (2) the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794; (3) the Civil Rights Act of 1871, Rev. Stat. 1979, as amended, 42 U.S.C. § 1983; (4) the California Unruh Civil Rights Act ("Unruh Act"), Cal. Civ. Code §§ 51; (5) the California Disabled Persons Act ("CDPA"), *id.* § 54.1; and (6) California Government Code §§ 11135. Dkt. 294. Plaintiff seeks declaratory and injunctive relief only. The Court has subject matter jurisdiction over Plaintiff's federal claims pursuant to 28 U.S.C. §§ 1331, 1343(a)(3)-(4), and supplemental jurisdiction over her state law claims pursuant to 28 U.S.C. § 1367. Venue is proper in the Northern District of California, as all Defendants reside and the acts or omissions complained of occurred in this District. 28 U.S.C. § 1391(b)(1), (2).

The Court previously granted class certification and appointed Kirola as the sole class representative. Dkt. 285. Thereafter, the parties presented their respective cases to the Court during a court trial. Subsequent to trial, the parties submitted post-trial briefing and proposed findings of fact and conclusions of law. Dkt. 614, 616, 617, 618, 632, 634, 635, 636, 646, 662, 681, 683. Separately, the City filed a Post-Trial Motion for Judgment, focusing primarily on whether Kirola has constitutional standing under Article III to pursue any claims on behalf of herself or the class. Dkt. 666, 672, 675. Alternatively, the City contends that even if Kirola has standing, she has failed to demonstrate the substantive merit of any of her claims.

As will be set forth below in the findings of fact and conclusions of law, the Court is persuaded by the City's arguments, and, based on the evidence and testimony presented at trial, finds that Kirola lacks constitutional standing to pursue any claims on behalf of the class. Alternatively, even if Kirola had standing, she has failed to carry her burden of demonstrating, by a preponderance of the evidence, that the City has violated the ADA or any of the other federal and state laws and regulations alleged in the FAC.

II. *BACKGROUND*

A. TITLE II OF THE ADA

"Congress enacted the ADA in 1990 to remedy widespread discrimination against disabled individuals." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 674, 121

S.Ct. 1879, 149 L.Ed.2d 904 (2001). The ADA is comprised of five titles: Employment (Title I); Public Services (Title II); Public Accommodations and Services Operated by Private Entities (Title III); Telecommunications (Title IV); and Miscellaneous Provisions (Title V). *Zimmerman v. Or. Dep't of Justice*, 170 F.3d 1169, 1172 (9th Cir.1999). The purpose of the ADA's various provisions is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2).

This action is premised on Title II of the ADA, which became effective on January 26, 1992, and applies to public entities. *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1273 (9th Cir.1998) (citing §§ 108, 205, Pub. L. No. 101-336). To demonstrate a prima facie case under Section 202 of Title II of the ADA, a plaintiff must show that:

> (1) she is an individual with a disability; (2) she is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) she was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of her disability.

Sheehan v. City & Cnty. of San Francisco, 743 F.3d 1211, 1232 (9th Cir.2014) (discussing requirements of a claim brought under 42 U.S.C. § 12132). "This

prohibition against discrimination is universally understood as a requirement to provide 'meaningful access.'" *Lonberg v. City of Riverside*, 571 F.3d 846, 851 (9th Cir.2009). "An individual is excluded from participation in or denied the benefits of a public program if 'a public entity's facilities are inaccessible to or unusable by individuals with disabilities.'" *Daubert v. Lindsay Unified School Dist.*, 760 F.3d 982, 987 (9th Cir. 2014) (quoting 28 C.F.R. § 35.149).

ADA regulations recognize that "in the case of older facilities, for which structural change is likely to be more difficult, a public entity may comply with Title II by adopting a variety of less costly measures, including relocating services to alternative, accessible sites and assigning aides to assist persons with disabilities in accessing services." *Tennessee v. Lane*, 541 U.S. 509, 532, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004). Accordingly, the regulations promulgated by the United States Attorney General to implement the requirements of Title II differentiate between structures built before the effective date of the ADA and those built or altered after.

Existing facilities constructed prior to January 26, 1992, are subject to 28 C.F.R. § 35.150, which requires only "***program access***." 760 F.3d at 988. Program access does not require that each and every facility is equally accessible to disabled persons. *Cohen v. City of Culver*, 754 F.3d 690, 694-95 & n. 4 (9th Cir.2014). Rather, it simply requires a public entity to "operate each service, program, and activity so that the service, program, or activity, when ***viewed in its entirety***, is readily

accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150(a) (emphasis added).[1] "Title II's emphasis on 'program accessibility' rather than 'facilities accessibility' was intended to ensure broad access to public services, while, at the same time, providing public entities with the flexibility to choose how best to make access available." *Daubert*, 760 F.3d at 986 (internal quotations and citation omitted). Public entities are directed to develop a "transition plan" to "achieve program accessibility" by "setting forth the steps necessary to complete such changes." 28 C.F.R. § 35.150(d)(1); *Cohen*, 754 F.3d at 696.

"New construction and alterations" commenced after January 26, 1992, are subject to more exacting requirements. Specifically, under 28 C.F.R. § 35.151, "[e]ach facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is ***readily*** accessible to and usable by individuals with disabilities, . . . " 28 C.F.R. § 35.151(a)(1) (emphasis added). To be "readily accessible," the facility "must be constructed in conformance with the Americans with Disabilities Act Accessibility Guidelines for Buildings and Facilities (ADAAG), 28

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[1] By way of comparison, Title III, which applies to ***private entities*** operating a "place of public accommodation," imposes more stringent requirements aimed at ensuring that ***every facility*** is equally accessible to disabled persons. *See Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 882 (9th Cir.2004); 1 Americans with Disab.: Pract. & Compliance Manual § 2:44. This means, for example, that each and every store operated by a retailer must be ADA compliant.

C.F.R. Pt. 36, App. A, or with the Uniform Federal Accessibility Standards (UFAS), 41 C.F.R. Pt. 101-19.6, App. A." *Daubert*, 760 F.3d at 986 (emphasis added, citation omitted). "The ADAAG is a comprehensive set of structural guidelines that articulates detailed design requirements to accommodate persons with disabilities." *Id.* "[O]nly facilities that were constructed or altered after January 26, 1992, are subject to the ADAAG's requirements." *Id.* at 987.

B. CASE OVERVIEW

The original complaint named three plaintiffs: Kirola; Elizabeth Elftman ("Elftman"); and Michael Kwok ("Kwok") (collectively, "Plaintiffs"). Dkt. 1. Three years later on February 9, 2010, Plaintiffs moved for leave to file an amended complaint, requesting, inter alia, to dismiss Kwok as a named plaintiff and to substitute Linda Pillay ("Pillay") in his stead. Dkt. 121, 3:6-8. Plaintiffs also sought to refine their class allegations and claims. *Id.*, 3:9-16.

On March 2, 2010—before the Court ruled on their motion for leave to amend—Plaintiffs filed a motion for class certification under Federal Rule of Civil Procedure 23(a) and (b)(2), which sought to appoint both Kirola and Pillay as class representatives, even though Pillay was not a party to the action. Dkt. 187. Plaintiffs did not seek to have Elftman appointed as a class representative. *Id.*; Dkt. 1; Dkt. 121, Exh. A.

On April 12, 2010, the Court granted in part and denied in part the motion for leave to amend. Dkt. 238.

The Court allowed Plaintiffs to narrow the class definition alleged in the initial complaint, dismiss Kwok as a named plaintiff, and clarify their allegations concerning the City's alleged failure to comply with California Government Code § 11135. The Court, however, denied their request to join Pillay, finding that Plaintiffs had failed to establish good cause to add her as a party-plaintiff. *Id.* Consistent with the Court's ruling, Plaintiffs filed their FAC on June 24, 2010. Dkt. 238, 294.

During the interim, on June 7, 2010, the Court granted Plaintiffs' motion for class certification, and certified the following class pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2):

> All persons with mobility disabilities who are allegedly being denied access under Title II of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, California Government Code Section 11135, et seq., California Civil Code § 51 et seq., and California Civil Code § 54 et seq. due to disability access barriers to the following programs, services, activities and facilities owned, operated and/or maintained by the City and County of San Francisco: ***parks, libraries, swimming pools, and curb ramps, sidewalks, cross-walks, and any other outdoor designated pedestrian walkways*** in the City and County of San Francisco.

Dkt. 285, 7:19-25 (emphasis added). Having previously denied Plaintiffs' request to join Pillay as an additional party-plaintiff, the Court granted their remaining

request to appoint Kirola as the class representative. *Id.*, 7:26.

In the course of its briefing on the class certification motion, the City argued, among other things, that Kirola lacked standing to seek injunctive relief with respect to the alleged disability access claims at issue and therefore was not an adequate class representative. Dkt. 245, 20:7:14-21:2. At the motion hearing on May 18, 2010, the City withdrew its challenge to Kirola's adequacy as a class representative. Dkt. 285, 3:18-20. As such, in its June 7, 2010 Order Granting Plaintiffs' Motion for Class Certification, the Court did not address Kirola's standing, and, importantly, made "no finding as to the type or scope of relief [Kirola could] seek or obtain on behalf of the class[.]" *Id.*, 4:21-22. Rather, the Court ruled that "[s]uch determinations [would] be made following trial based upon the evidence presented and the relief requested." *Id.*, 4:23-24.

The parties presented their respective cases over the course of a five-week court trial. Cumulatively, thirty-six lay and expert witnesses, along with numerous exhibits in support of the parties' respective positions, were presented. Kirola testified, and presented the testimony of six class members and mothers of class members; several City employees as adverse witnesses; four accessibility experts; and two experts in other areas. The City presented testimony from members of the Mayor's Office on Disability ("MOD"), employees from various City departments, including the Department of Public Works ("DPW") and Recreation

and Parks Department ("RecPark"); two accessibility experts; and several other individual witnesses.

Subsequent to trial, the Court directed the parties to meet and confer regarding the course of further proceedings, and to thereafter submit a Joint Statement Re Further Proceedings ("Joint Statement"). Dkt. 659, 1:22-26, 2:5-8. In the Joint Statement, Plaintiff alleges that she "had encountered, and was continuing to encounter on a daily, regular or ongoing basis, numerous disability access barriers that significantly limited, interfered with, and obstructed her access to the City's pedestrian rights of way, parks, pools and libraries in violation of the meaningful access standard." Dkt. 662, 10:9-13. She also claims to have "a real and immediate threat of repeated injury" stemming from eleven policies and procedures, identified as follows:

> (1) the City's [2007-2008 Fiscal Year ("FY") Americans with Disabilities Act Transition Plan for Curb Ramps and Sidewalks ("Curb Ramp and Sidewalk Transition Plan") which does not comply with the three-year implementation period and January 26, 1995 deadline established by Title II of the ADA (28 C.F.R. § 35.150(c)) for the completion of any barrier removal necessary for program access;
>
> (2) the Sidewalk Inspection Repair Program, which only inspects and repairs access barriers on a 25 year cycle, and which also fails to comply with the January 26, 1995 deadline for program access;

(3) the City's curb ramp design standard utilized between 1994 and 2004 pursuant to which it constructed curb ramps with a ½ inch lip at the base in violation of federal disability access design standards;

(4) the City's Guidelines for Paving and Accessibility Compliance which permits the City to install curb ramps up to two years after repaving;

(5) the City's policy as stated on its website that an "accessible" park need provide only an "accessible entrance" and "at last one recreational opportunity," and which does not require the provision of accessible routes to the range of recreational opportunities provided within each park;

(6) the City's UPhAS [Uniform Physical Access Strategy], which adopts a policy of leaving disability access barriers that limit program access in place until major modernizations are performed in violation of the legal duty to remove such barriers by no later than January 26, 1995, which contains no objective definition of "accessible," and permits City officials to rely upon their "common sense" in determining what is "accessible," and which sets no deadline for when the City's parks and or libraries will be readily accessible to persons with mobility disabilities;

(7) the City's written complaint policies and forms that make no requirement that disability access barriers be removed within any particular time period, but instead permit the

> City to take up to two years to remove barriers;
>
> (8) the City's policies and procedures regarding new construction and alterations, which do not require a close-out inspection for compliance with federal disability access design standards or specific sign-off from the relevant City official that a project is in full compliance with those standards as built;
>
> (9) the City's maintenance policies and procedures which do not set specific and prompt deadlines for the identification and repair of items that are broken, non-operational or in need of repair; . . .
>
> [10] the City's failure to adopt and implement a self-evaluation and transition plan pursuant to California Government Code § 11135 . . . and
>
> [11] the City's ongoing failure to adopt any written policy or procedure regarding the identification and removal of safety hazards to persons with mobility disabilities.

Dkt. 662, 13:15-11.[2]

III. *FINDINGS OF FACT*

The Court now makes the following findings of fact pursuant to Federal Rule of Civil Procedure 52(a)(1).

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[2] Aside from a brief reference to the adequacy of the City's transition plan, the FAC does not specifically reference any of the above policies. Dkt. 294, ¶ 44.

These findings are based on the evidence and testimony presented at trial, the Court's assessment of the witnesses' credibility, and the legal arguments presented by counsel. To the extent that any of the findings of fact are more appropriately construed as conclusions of law, or vice-versa, they shall be deemed as such.

In this section, the Court will assess: (1) the City's infrastructure to ensure accessibility for disabled persons to its programs, services and activities, as they relate to the public right-of-way system and the library, aquatics and RecPark programs; (2) the accessibility of the aforementioned programs, services and activities; (3) the City's grievance procedure for making accessibility complaints; and (4) the credibility of Kirola, class members, and the parties' experts as their testimony relates to the claims alleged in this action.[3]

A. INFRASTRUCTURE TO ENSURE ACCESSIBILITY

1. Mayor's Office On Disability

1. According to the 2000 census, approximately 20% of the City of San Francisco's population (150,000 people) live with disabilities. The City's disabled population includes individuals with mobility impairments, cognitive and psychiatric challenges, sensory impairments and self-care challenges. Reporter's

[3] Kirola filed two post-trial requests for judicial notice, *see* Dkt. 587, 621, which are denied on the ground that none of the documents submitted with those requests is germane to the Court's decision.

Transcript ("RT") 1596:6-22, 2489:12-20; DTX H27 [11, 14-15].

2. To ensure that disabled persons have meaningful access to its services and programs consistent with the ADA and state law, the City has created a sophisticated and robust infrastructure, which includes the establishment of various departments, positions, policies, and programs, which are overseen by MOD.

3. The City created MOD to ensure that every program, service, benefit, activity and facility operated or funded by the City is fully accessible to, and usable by, people with disabilities. RT 1561:16-18; 1566:8-1567:9; DTX A35.

4. MOD is charged with representing the needs of the disabled community. RT 1592:6-22. MOD staff regularly work with and receive input from a variety of organizations devoted to disabled access. RT 1596:24-1597:16.

5. Susan Mizner ("Mizner") has been Director of MOD since 2003. RT 561:1421. Mizner oversees a staff of seven full-time employees, all of whom have disabilities and many years of experience advocating for the disabled.

6. Joanna Fraguli ("Fraguli") is MOD's Deputy Director for Programmatic Access.

7. John Paul Scott ("Scott") is MOD's Deputy Director for Physical Access.

8. Jim Whipple ("Whipple") and Carla Johnson serve as MOD access compliance officers who conduct plan and site reviews, and Ken Stein is MOD's Program Administrator. RT 1588:13-1592:5.

9. As part of its efforts to promote access for disabled persons, MOD maintains a public website that provides extensive information on various topics, including: (1) new developments; (2) architectural access; (3) the City's review process for ensuring that publicly-funded facilities comply with access laws; (4) the City's ADA transition plans; (5) the rights of persons with disabilities under the ADA; and (6) the City's grievance procedure. RT 1565:14-19, 1567:16-1588:4, 1571:24-1574:6; DTX A35.

10. MOD has also prepared brochures and other materials to publicize its services and to inform the disabled population of their access rights. RT 1575:20-1576:17; 1578:241579:21; *see*, *e.g.*, DTX A31; DTX E27 [000017].

2. Mayor's Disability Council

11. Since 1998, the Mayor's Disability Council ("MDC") has advised the Mayor on disability issues and worked with MOD on access compliance.

12. MDC consists of between nine to eleven appointed members from the disabled community and serves as an advisory body to the Mayor and MOD.

13. The purpose of the council is to ensure ADA compliance and to provide a public forum to discuss disability issues. RT 1593:10-2; DTX A35 [000003].

14. MDC is MOD's primary liaison to the City's disabled community and provides guidance on a variety of disability issues, including website guidelines, transportation, housing, and priorities for ADA transition plan projects. RT 1593:10-17, 1595:14-1596:13.

3. ADA Coordinators

15. Mizner serves as the Citywide ADA Coordinator.

16. Every City department with over fifty employees has a designated ADA Coordinator responsible for investigating disability access complaints and serving as a resource for the department on disability access issues. RT 1583:7-1584:9, 1854:241856:21; *see also* DTX A35 [000110-113].

17. MOD works closely with the ADA Coordinators for the departments involved in this action; namely, DPW and RecPark, and the San Francisco Public Library ("Library"). RT 1857:21-1859:6, 1861:2-1863:6.

18. MOD provides technical assistance and support to all City departments and employees regarding accommodations necessary to ensure access to City services, programs, and activities.

19. In addition, MOD regularly conducts training for virtually all City departments on matters such as disability rights and access requirements. RT 1852:11854:7, 1584:22-1586:7, 1839:20-1840:19; DTX A31 [000003]; *see*, *e.g.*, DTX E45. The trainings emphasize, among other things, the importance of maintaining accessible features. RT 1863:9-1865:3; DTX E45 [000022-023]. RT 1849:4-1850:23. MOD also provides specific training for ADA Coordinators. RT 1854:16-1856:3; DTX E27; DTX E47.

4. Grievance Procedure

20. MOD oversees a citywide grievance procedure for handling public complaints regarding disabled access to its facilities, programs and services. Instructions regarding this procedure are contained on a website operated by MOD which explains how to submit a complaint, inter alia, by using the "ADA Complaint and Assistance Form." RT 1579:23-1580:12-1581:22; DTX A35 [000105-109]. MOD chose this title, believing that it would encourage people to submit requests, including persons who did not characterize their requests as "complaints." RT 1581:11-22.

21. Upon receipt, MOD transmits a copy of the complaint to the appropriate ADA Coordinator. The assigned ADA Coordinator, in turn, conducts an investigation, and, in the course of investigating and responding to the complaint, may seek assistance from MOD or the City Attorney. DTX A35 [000105]; RT 1866:19-25.

22. Within thirty days of receiving a complaint, a written response, approved by MOD and signed by both the ADA Coordinator and the department head, is sent to the complainant. DTX A35 [000105]. The City responds to complaints received "fairly consistently" within thirty days and handles a significant number of complaints through its grievance procedure. RT 1711:18-20-1712:8. However, depending on the complexity of the issue, some complaints take longer to resolve. RT 2001:2-7. MOD monitors the grievances received to identify trends and develop programs to improve access. RT 1869:6-21.

23. During the three year period prior to trial, 40 percent of the grievances received by MOD were related to housing issues, 25 to 30 percent were related to public transportation and paratransit, and 20 percent were related to physical access (the majority of which were curb ramp requests). RT 1868:9-1869:5.

24. Fraguli oversees the City's grievance procedure. RT 1866:11-14. Between the time she joined MOD in 2006 and trial, Fraguli received only one complaint related to a library (pertaining to assistive technology) and a "few" complaints related to physical access in RecPark facilities, which were resolved "fairly quickly." RT 1869:22-1870:13. She has never received a complaint from Kirola or any testifying class member. RT 1870:14-1871:9.

25. Aside from Fraguli, ADA Coordinators at the City's various departments also receive and address access complaints and/or requests regarding

their respective departments. *See*, *e.g.*, RT 2253:22-2254:24 (complaints regarding access to libraries), 2306:3-2309:14, 2336:16-18 (complaints regarding access to RecPark activities, facilities, or programs), 1999:12-2001:1 (complaints regarding access to the City's public right-of-way). MOD receives a monthly report indicating the types of complaints received by the various City departments and whether any departments have been dilatory in issuing responses. RT 1869:6-17.

26. Curb ramp requests or complaints may be submitted through the complaint form on MOD's website, by telephone, written correspondence, or e-mail, either to MOD or DPW, or through the City's 3-1-1 system (which is used to request City services). RT 1619:15-23, 2416:23-2417:2, 2727:13-17.

27. Curb ramp requests submitted through the City's grievance procedure trigger an investigation by DPW. If appropriate, DPW coordinates with other City departments or offices as needed, assigns an engineer to design the individual curb ramp, and works with MOD to prioritize the inquiry list based on the date each request was received and the priorities set forth in the City's Curb Ramp and Sidewalk Transition Plan, i.e., the ADA transition plan specific to its public right-of-way system at issue in this action. RT 2000:718, 2385:14-2386:22; DTX A15.

28. The City also proactively solicits curb ramp requests. For instance, the City became concerned that it had received a disproportionally low number of curb

ramp requests from certain low-income neighborhoods, despite the fact that those neighborhoods had fairly high rates of disability. The City thus instituted a public outreach program to solicit curb ramp requests from those neighborhoods. RT 1634:5-10, 2417:12-2419:1. The City funded a bus advertisement campaign and sent postcards to paratransit riders explaining the process for making curb ramp requests. RT 1634:11-14; DTX L4. The City also trained its staff to go door-to-door in the poorest neighborhoods to speak with community members about their disability access needs. RT 1634:15-17.

29. At the time of trial, the City's curb ramp request log contained outstanding curb ramp requests for 124 intersections across the City. RT 2440:3-4. Of those 124 intersections, 44 corresponded to requests from individuals with disabilities and were therefore categorized as "higher priority" requests. RT 2440:4-6. At the time of trial, the City was in either the design or construction phase on fully-funded curb ramp projects at 132 intersections. RT 2440:7-10.

30. William Hecker ("Hecker"), one of the City's program access experts, opined that the City's grievance procedure is consistent with the requirements and provisions of the ADA and its regulations. RT 2727:5-19.

5. Funding for Access Improvements

31. Funding for access improvements is governed by the City's Capital Plan. The Capital Plan for

Fiscal Years 2012 to 2021 allocates a total of $177 million in fully-funded capital spending over the 10-year period to disability access improvements, which includes $24 million for facility improvements and $153 million for public right-of-way improvements. RT 1543:2-6; PTX 4057[7]. Considering other categories of spending that would include disability access improvements (such as street repaving projects, earthquake and public safety improvements, facility renewals, and critical deferred maintenance), the City's Capital Planning department estimated the total amount of planned ADA spending from 2012 to 2021 to be approximately $670 million. RT 1544:6-14, 1543:7-1544:4, 1539:19-1540:19.

B. PUBLIC RIGHT-OF-WAY

32. DPW oversees the City's public right-of-way network, which consists of approximately 2,000 miles of sidewalks, 27,585 street corners, and roughly 7,200 intersections. RT 2391:23-25, 2447:6-18.

33. DPW's Disability Access Coordinator is responsible for monitoring access issues related to the public right-of-way; reviewing publicly-funded construction projects designed by or contracted through DPW; training staff on access issues; and serving as the key DPW contact for individuals who seek information regarding accessibility or who submit access complaints or curb ramps requests. RT 1910:18-1911:16, 2443:25-2444:10.

34. Separate from DPW, the City's Municipal Transportation Agency, provides paratransit services and public transportation as important components of an accessible public right-of-way. RT 1636:4-12. The City operates and subsidizes a paratransit system that offers van and taxi service for persons with disabilities who are unable to use public transportation. RT 1634:18-1635:1, 1635:21-1636:3.

35. The City has enacted procedures and policies setting standards for new construction and alterations, as well as ensuring program access with respect to existing pathways, both of which are discussed below.

1. New Curb Ramp Construction and Alterations

36. The City began installing curb ramps in the 1970s, and created formal design standards for curb ramp construction in the 1980s, prior to the enactment of the ADA. RT 1996:6-1997:6; 2467:21-2468:13; DTX H06 [000959].

37. In 1989, DPW established its Curb Ramp Program and developed priorities for the design and installation of curb ramps based on input from the disabled community. DTX H06 [000959].

38. In 1994, the City revised its curb ramp design standards to provide more detailed specifications. RT 2467:21-2471:20. In particular, new curb ramp standards were developed in order to address conflicting federal and state requirements regarding use of a

half-inch curb lip at the point where the ramp meets the street. RT 1994:18-1995:4. At that time, state accessibility standards required a half-inch lip at the base of the curb ramp which could be detected by a visually-impaired person using a cane. Federal law, however, specified flush or smooth transitions. Accordingly, non-federally-funded curb ramps were built with a lip, while federally-funded curb ramps were not. RT 1993:21-1995:22, 1608:13-1609:4; DTX H05. In 2004, the City updated its curb ramp design standards, which eliminated use of the half-inch lip.[4]

39. In 1995, DPW issued Order No. 169,270, which memorialized the City's plan to install curb ramps in compliance with disability access laws, while recognizing that funding constraints might delay full implementation of this policy. DTX G18. DPW prioritizes curb ramp installation as follows: (1) replace existing curb ramps in poor condition; (2) install curb ramps where none exist; (3) provide for a second curb ramp, where feasible, on corners with a single curb ramp; (4) construct or reconstruct curb ramps in locations with physical or other constraints; and (5) reconstruct curb ramps that are safe but that do not meet

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[4] The California Building Code previously required a half-inch lip at the base of curb ramps "as a detectable way-finding edge for persons with visual impairment." *See*, *e.g.*, 2001 Cal. Bldg. Code, § 1127B.5. In 2006, the half-inch lip requirement was removed from the California Building Code. Although some legacy curb ramp lips still exist, the City endeavors to remove them where possible, in accordance with its current Curb Ramp and Sidewalk Transition Plan. RT 1978:12-1980:1, 1981:16-1990:19; DTX H04.

the City's construction standards. RT 1951:8-1952:15; DTX G18.

40. In or about May 2004, DPW issued Order No. 175,387, which adopted the City's design standards requiring the use of bi-directional curb ramps (i.e., a ramp aligned in parallel to the cross-walk) or at least one curb ramp per corner. RT 1978:12-1980:1, 1981:16-1990:19; DTX G07, DTX H04 [000002, 000004]. Although bi-directional curb ramps are not required by the ADA, the City installs them to enhance access for disabled individuals. Bi-directional curb ramps are preferred by the disabled community, including Kirola and testifying class members. RT 552:12-553:20, 542:8-543:13, 875:14-876:9, 1005:4-14, 1007:7-16, 1025:9-18, 1384:13-21, 2066:24-2067:22.

41. City Procedure No. 10.6.2 requires that: (1) curb ramps shall be designed in accordance with DPW Order No. 175,387; (2) any deviations must be approved; and (3) curb ramp designers must coordinate with other City departments and third parties. RT 2381:4-2385:4; DTX A41.

42. When installing curb ramps, the City evaluates the entire intersection to ensure accessibility. Curb ramps will be constructed to current standards, if necessary, at all corners of the intersection. RT 2376:6-17. The City's design standards ensure an accessible path of travel in traffic islands, medians, and trackways within the street. RT 1992:11-1993:9; DTX H07.

43. The City has established Quality Assurance ("QA") Checklists for the design and construction of curb ramps and sidewalks to ensure they meet the applicable requirements and established quality standards. RT 2377:24-2380:20; DTX A13 [QA Checklist 5.2 [A-13-000050-52]; RT 2376:18-2377:14; DTX H14.

44. Since 1989, the City has required that when roads are paved and the paving extends into an intersection (including the cross-walk), curb ramps are constructed or reconstructed if they do not meet the City's current curb ramp design standards. RT 2471:22-2472:10; 2473:4-12; 2426:2-2427:4. This practice is memorialized in the DPW's Guidelines for Paving and Accessibility Compliance ("Paving Guidelines"). DTX N23 [000003]; RT 2426:9-2429:16, 2471:22-2481:8.

45. The Paving Guidelines allow the City to defer curb ramp installation in connection with a street paving project for up to twenty-four months when a preplanned project would demolish the newly constructed curb ramp within that time period. DTX N23 [000003]. If the subsequent project is delayed or discontinued, the curb ramps at issue are to be installed immediately. RT 2428:19-2429:16, 2445:11-15; DTX N23 [000003].

46. The City's Bureau of Sewer and Street Repair ("Bureau") typically repaves City blocks one block at a time, without affecting the crosswalk. In these cases, the Bureau's obligation to install curb ramps is not triggered. RT 2480:4-2481:8. No evidence was presented showing that the City has a policy and/or

practice of intentionally avoiding crosswalks in order to evade an obligation to construct curb ramps.

2. Transition Plan

47. The City's first curb ramp transition plan in Fiscal Year ("FY") 1992/1993 estimated 52,000 curb ramps were needed citywide. RT 1950:3-24; DTX H20 [000959]. The City updated its transition plan in 1998 and again in FY 2007/2008. RT 1951:81952:15; DTX H20; PTX 22. The FY 2007/2008 amendments, which are at issue in this action, are set forth in the Curb Ramp and Sidewalk Transition Plan. PTX 22.

a) Curb Ramps

48. One of the goals of the Curb Ramp and Sidewalk Transition Plan is "curb ramp saturation"—that is, to construct a curb ramp compliant with its current design standards at the end of every pedestrian crossing or least one curb ramp per corner. This approach often involves installing bi-directional curb ramps at every corner. RT 2390:1018.

49. The 2008 revisions organized the priorities outlined in DPW Order No. 169,270 into a "priority matrix." DTX A35 [000023]. The priority matrix prioritizes—installations/upgrades based on: (1) locations requested by citizens; (2) locations serving government offices and public facilities; (3) locations serving public transportation; (4) locations serving public accommodations, employers, and commercial districts; and (5)

warehouse districts and residential areas. RT 1441:11-1442:15, 1617:2-1619:13, 1618:4-1619:13, 1956:6-1958:16, 2416:19-22; DTX A35 [000023].

50. DPW employs a curb ramp grading or evaluation system to prioritize curb ramp repair and replacement. RT 1606:23-1607:22, 1615:10-24. In establishing the curb ramp grading system, the City solicited and incorporated recommendations from the MDC's Physical Access Committee and the City's disabled community to establish the grading system. RT 1607:18-22, 1608:8-1614:12.

51. Under the curb ramp grading system, each existing curb ramp is assigned a "condition score" based on a 100-point scale. RT 1607:2-13. Each curb ramp begins with a 100 point score, from which a specific number of points is then deducted, depending on the type of disability access barrier presented. For example, 5 points are deducted for lips greater than a half-inch; 12 points for a running slope between 8.33 percent and 10 percent; 25 points for a running slope greater than 10 percent; and 13 points for lack of a level bottom landing. RT 1607:23-1608:7, 1611:10-13; PTX 0023.[5]

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[5] The blind and low-vision community expressed concern that the City would eliminate the half-inch lip present on some of the City's curb ramps. As indicated previously, detectable lips provide a means for blind or low-vision individuals to locate the edge of the ramp. Such discussions were factored into the City's decision to deduct only five points for curb ramps with a half-inch lip. RT 1611:10-13. In lieu of a detectable half-inch lip, the City now uses a detectable warning surface (i.e., tiles with "bumps" or

52. The City presumes that curb ramps with a score greater than 75 are good and usable; curb ramps with a score of between 70 and 75 are low priorities for replacement; and curb ramps with a score of 69 or below are high priorities for replacement. RT 1615:14-24.

53. The City tracks citizen requests, curb ramp attributes, and curb ramp condition scores through a Curb Ramp Information System ("CRIS") database.

54. The City also uses a geographic information service ("GIS") to map citywide curb ramp locations by grade based on the data contained within the CRIS database. RT 1621:2-25; DTX F11. These maps include public transit stops, civic buildings, health facilities, libraries, police stations, cultural centers, and public schools. RT 1621:21622:10; DTX F11.

55. At the time the current Curb Ramp and Sidewalk Transition Plan was drafted, the City had yet to identify every location where a new or upgraded curb ramp was required to achieve curb ramp saturation. RT 2390:19-2391:11. By January 2011, however, the City had surveyed all potential curb ramp locations and uploaded information about each location into the CRIS database. More specifically, the survey confirmed whether there was an existing curb ramp at the location, the condition of any existing curb ramp, and whether the location actually served a pedestrian

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tactile domes) on all new curb ramps it constructs. RT 1608:13-1609:4.

crossing and thus warranted installation of a curb ramp. RT 2395:22-2396:23.

56. Based on information in its CRIS database, the City has determined that 23,401 curb ramps are needed to meet the City's goal of curb ramp saturation. RT 2410:19-2411:21.

57. Consistent with its Curb Ramp and Sidewalk Transition Plan, the City installs approximately 1,200 new curb ramps each year. RT 2785:17-2787:13, 2789:3-2790:18; PTX 0022 [003798].

58. The Curb Ramp and Sidewalk Transition Plan does not include a specific deadline for achieving curb ramp saturation. RT 2015:16-29, 2413:17-2414:1. However, at the time of trial, the City estimated that it would complete construction of the 23,401 curb ramps by Fiscal Year 2028/2029. RT 2410:19-2414:1. That projection, however, was based on an overestimation of the number of curb ramps needed for curb ramp saturation. RT 2396:19-2397:7, 2401:14-16, 2403:12-2404:9. The City now projects that, taking into account accelerated curb ramp installation, curb ramp saturation can be achieved by Fiscal Year 2026/2027. Dkt. 657, 4:12-13.

59. The determination of the particular curb ramps to be constructed in the upcoming fiscal year is based on available and procured funds. RT 1637:4-1638:6, 2027:10-12. The City prioritizes construction consistent with the priorities set forth in the Curb Ramp and Sidewalk Transition Plan. RT 1958:18-1959:2, 2027:4-19. In the process of prioritizing future

curb ramp construction, the City also evaluates the information contained within the CRIS database along with information regarding any planned paving projects and outstanding curb ramp requests. RT 1627:16-1633:24.

60. At the time of trial, the Curb Ramp and Sidewalk Transition Plan did not explicitly include the City's crosswalks. RT 2013:13-22. The City nevertheless has initiated a pilot project pursuant to which City engineers are to evaluate the accessibility of crosswalks when constructing corresponding curb ramps in order to determine whether the crosswalk contains cracks, potholes, or other barriers that adversely impact the crosswalk's accessibility. RT 2430:13-22. The City plans to incorporate the results of the pilot project into its Curb Ramp and Sidewalk Transition Plan. RT 2430:9-2431:19. The City also has developed a crosswalk assessment checklist for use in the pilot study and implementation into the Curb Ramp and Sidewalk Transition Plan. RT 2431:2-3; DTX Z58.

b) Sidewalks

61. The Curb Ramp and Sidewalk Transition Plan includes a Sidewalk Inspection and Repair Program ("SIRP"), first implemented in FY 2006/2007, which governs the maintenance of the City's 2,000 miles of sidewalks. RT1974:7-21, 2447:6-18; PTX 22.

62. Under SIRP, the City proactively inspects every city block on a twenty-five year cycle, notifies the responsible parties of any access barriers identified,

and ensures the remediation of these barriers. RT 1974:7-21, 2447:12-18; PTX 0022 [18-20]. DPW determined that a twenty-five year inspection cycle is reasonable, given the size of San Francisco, the fact that the inspection program operates in tandem with a grievance procedure, fiscal and staffing constraints, and the prioritization of repairs where pedestrian volume is the greatest. RT 1974:3-21, 2453:9-17.

63. Under SIRP, the City prioritizes sidewalk inspection and repair along city blocks with high pedestrian usage as characterized by or based on: (1) commercial districts; (2) public transportation routes; (3) proximity to schools, public facilities, hospitals, or senior centers; and (4) population density. RT 1974:22-1977:9, 2448:11-22; PXT 0022 [18-20]; DTX AA23. Consistent with guidance from the Department of Justice ("DOJ"), the City also prioritizes locations based on citizen requests, requiring that requests from the disabled community be given top priority. RT 1974:22-1976:2, 2450:12-24.

64. City policy specifies that private property owners are responsible for the repair and maintenance of sidewalk areas in front of their property. RT 1101:1-4. Once the City identifies a defective sidewalk and sends the property owner a notice to repair, the owner has thirty days to commence repairs. RT 1101:14-17. The City has endeavored to streamline the process by incenting property owners to use a City contractor in exchange for a waiver of permit fees. RT 2451:3-2452:4. If the owner fails to repair the sidewalk after having been duly notified, the City is entitled to perform the

repair and invoice the property owner for the cost of inspection and abatement. RT 2451:11-15. The City's practice at the time of trial was to bill property owners through property liens. RT 2451:1516.

65. The SIRP, which is considered a "proactive" program, operates in conjunction with a "reactive" program known as the Accelerated Sidewalk Abatement Program ("ASAP"), whereby the City responds directly to complaints or requests submitted by the public. RT 2453:18-2454:12. Under ASAP, issues or problems with sidewalks that impact accessibility are given "high priority" for remediation. RT 2454:1-12. If a high priority complaint is received for a sidewalk that is scheduled for repair within a few months, the City dispatches an inspector typically within one business day to investigate the matter. If the inspector finds a defect, he or she will immediately issue a notice of repair and an abatement order to the property owner. Repairs are generally completed within ninety days. RT 2454:13-2455:22.

66. In addition to the foregoing, the City has adopted various other policies to ensure accessibility of the City's sidewalks. RT 1959:13-1960:2, 2443:25-2444:10. These policies include: guidelines regarding the placement of barriers at construction sites; guidelines regarding the placement of scaffolding; permit requirements regarding the use of tables and chairs on the sidewalk; requirements regarding temporary occupancy of the public right-of-way; guidelines regarding displaying merchandise on the sidewalk; regulations regarding tree planting and maintenance; and requirements

regarding slip-resistant metal covers and grates. RT 1960:7-1971:9; DTX A9; DTX A21; DTX G19; DTX F43; DTX F44; DTX F45; DTX G17; DTX F48; DTX G10.

C. FACILITIES AND PROGRAMS

67. Separate and apart from its public right-of-way system, the City operates a number of programs, i.e., aquatic, library and RecPark programs, which are offered through various facilities located throughout San Francisco.

68. The library program is provided through the Main Library and twenty-seven branch libraries located throughout San Francisco. RT 2222:13-15.

69. The aquatic program is provided through nine swimming pools, RT 2763:212765:5.

70. The RecPark program is provided through approximately 220 parks spanning 4,200 acres of park space and 400 structures (i.e., clubhouses, recreation centers, etc.) thereon. RT 2264:13-17, 2302:12-16.

71. The City has enacted procedures and policies to ensure meaningful access, including program access, to its aquatic, library and RecPark programs, as summarized below.

1. Facilities Transition Plan

a) History and Objectives

72. In 2003, MOD hired Logan Hopper ("Hopper") as a facilities transition plan consultant. RT 1603:12-18. Hopper surveyed approximately 700 facilities across the City and prepared a draft transition plan. The draft transition plan identified the "essential—services" offered by various city departments, including Library and RecPark, and estimated costs and timelines for removing the identified access barriers. RT 1603:22-1604:3, 1603:22-1604:3; PTX 0034 [000470, 000476, 000522-523, 000528-538].

73. Mizner, the Director of MOD, testified that because Hopper was not familiar with construction practices in San Francisco, she felt that he had significantly underestimated both the projected cost and the amount of time necessary to complete a particular project. RT 1603:12-1604:18. Accordingly, Mizner recruited Scott to lead the development of the City's facilities transition plan. RT 1604:14-18, 1770:10-12, 1777:211779:11. Scott, who had been the ADA Coordinator for the Port of San Francisco, is a licensed architect with more than twenty years of experience working on architectural access issues and is a former member of the U.S. Access Board's Recreation Access Advisory Committee and Places of Amusement Committee. RT 1771:21-1773:22, 1775:911.

b) Uniform Physical Access Strategy or UPhAS

74. In 2007, under Scott's leadership, the City developed its facilities transition plan known as the Uniform Physical Access Strategy ("UPhAS"). Scott's plan is based on the extensive work performed by Hopper and Gilda Puente Peters, another access consultant retained by the City, the capital plans of various City departments such as Library and Rec Park, and out-reach to the disabled community to understand their priorities. RT 1452:20-23, 1779:12-1780:9; 1784:7-22; DTX B07, PTX 0035.

75. UPhAS governs the City's libraries and Rec Park facilities. RT 1791:151792:15; 1797:20-1798:5. The plan seeks to provide maximum access for the disabled to each City building and facility, RT 1785:14-1786:22; prioritize physical access solutions and limit the use of a program access approach (which allows a city to move programs to other sites rather than make access improvements), RT 1789:6-19; and offer programs and services in the most integrated setting possible, RT 1789:20-1790:10; DTX B07 [005317]). UPhAS calls for input from the public and MOD, as well as an annual assessment of access priorities. RT 1786:23-17878:4; PTX 0040.

76. UPhAS has no schedule or deadline for the removal of access barriers, but instead, sets funding targets to facilitate their removal. RT 1456:18-1457:15, 123:11-12, 612:2-9; PTX 0040. As such, the City's plan for implementing UPhAS changes annually, depending on funding. RT 612:2-4.

77. The City constantly re-evaluates UPhAS by tracking projects as they are created, built and completed. RT 1791:2-1791:14. Scott uses complex, color-coded spreadsheets and maps to track the status of each facility evaluated as part of the Hopper surveys and to graphically represent the accessibility of City facilities. RT 1798:6-1799:25; 1801:24-1802:2; 1810:6-25; PTX B39. Each color signifies a different status. RT 1799:425. Blue dots "signify a building that had undergone new construction or alterations," based on a post-2000 capital improvement project. RT 1463:8-1464:12; *see*, *e.g.*, PTX 0148A. For instance, one of the maps shows all of the City's swimming pools located in San Francisco. DTX F16. Some pools are identified by a blue dot, while others are denoted with a red dot, which signifies "limited access." *Id.*

78. Trial testimony established that a blue dot was not intended to suggest that every element of the facility was 100 percent compliant with all applicable facilities access regulations; rather, it signifies that the facility was fulfilling the City's program access intent under UPhAS. RT 1464:14-23. In other words, a blue dot indicates only that the facility offers some accessible program or programs, and not necessarily that every physical element of the facility is compliant with disability access regulations.

79. Through UPhAS, the City seeks to attain a level of access *greater than* required under law (i.e., more than the legally-mandated program access) with respect to almost all of its various programs, services, and activities. RT 1785:23-1788:21. For example, the

City strives to ensure that all libraries are accessible to disabled individuals, even though Title II does not require that the City make each library facility accessible. RT 1797:5-19. owever, due to the broad, varying and diverse scope of RecPark facilities, the City aims for program access (as opposed to access greater than legally required) as to RecPark programs, services, and activities. RT 1797:20-1798:5.

2. New Construction and Alterations

80. Federal regulations promulgated to enforce the ADA require that each new facility or part of a facility constructed or altered after January 26, 1992, conform to either (1) the ADAAG (i.e., ADA Accessibility Guidelines for Buildings and Facilities) or (2) the UFAS, thereby allowing public entities to choose between the two accessibility standards. *See* 28 C.F.R. § 35.151.

81. The City has elected to use ADAAG as its standard for ensuring that newly constructed or altered facilities comply with federal access laws. RT 1919:20-24.

82. Since June 22, 1998, the City has required that all projects involving new construction or alterations of a building funded, in whole or in part, by the City, undergo review by City staff to ensure compliance with disability access laws. RT 1568:111569:24; 1914:17-1917:5; 1918:12-22; 1919:6-19; DTX P11; DTX A35 [000126-141]. To that end, City staff members regularly meet with architectural teams during the

planning and design stage, review construction plans before permits are issued, visit sites during the construction process, and conduct post-construction field inspections to ensure access compliance. RT 1744:19-1748:15, 1901:15-1903:22, 1914:17-1917:5, 1918:12-22, 1919:619, 1568:11-1569:24; DTX P11; DTX A35 [000126-141].

83. The City also requires that sidewalks and curb ramps adjacent to newly constructed or altered City buildings be accessible to persons with disabilities. As a result, whenever a City facility is constructed or altered, the City evaluates the condition of the sidewalk and curb ramps bounding the perimeter of the project site, evaluates the path of travel from the facility to the public right-of-way, nearby parking and public transportation, and corrects any access problems identified. RT 1936:4-1938:11.

84. In January 2010, DPW adopted and implemented Procedure 9.8.24, which is a written accessibility compliance procedure that sets forth the review process for all projects designed by or contracted through DPW to ensure that all construction plans and completed facilities meet applicable access regulations and City standards. RT 1920:241921:24; DTX A14.

85. Procedure 9.8.24 requires DPW Disability Access Coordinator to conduct: (1) accessibility reviews during the planning and design of DPW-managed City projects, which includes the review of construction drawings and plans prior to submission to the Department of Building Inspection; (2) accessibility reviews

during construction; and (3) post-construction inspections for disability access compliance before the building is certified for occupancy. DTX A14; RT 1921:25-1935:19; DTX J21; DTX K10. Publicly-funded projects reviewed by MOD undergo similar access reviews. RT 1742:23-1743:6, 1743:16-1748:15, 1901:15-1904:8. The Department of Building Inspection will not issue a building permit, or certify a project as complete, without written approval from MOD's compliance officers for each stage of design and construction. RT 1747:1-1748:15, 1901:15-1904:8.

86. Hecker opined that the City staff members responsible for design and construction review of publicly-funded projects are "well qualified, competent, detail-oriented professionals that really understand the accessibility requirements of the ADA." RT 2729:17-2730:3. The Court finds Hecker, who serves as a consultant to the DOJ in ADA enforcement actions, to be a credible witness and credits his testimony accordingly. RT 2720:6-2721:15.

3. Specific Programs

87. In addition to the City's public right-of-way system, Kirola challenges the City's compliance with Title II of the ADA with respect to its swimming pools, libraries and parks. These facilities are the means through which the City provides its aquatic program, library program and RecPark program, respectively.

a) Aquatic Program

88. The City's aquatic program is provided through nine public swimming pools. Six of the nine pools have been renovated and made accessible. RT 2767:8-2769:17; DTX F16.

89. Wood credibly opined that renovated pools have the features necessary to provide program access, namely: (1) an accessible route from the property line to the building; (2) an accessible entry; (3) an accessible check-in counter; (4) accessible signage; (5) accessible ramps or curb ramps, wherever necessary; (6) accessible toilets; (7) accessible showers; (8) accessible locker rooms; and (9) transfer lifts to assist individuals with mobility impairments to get into and out of the pool. RT 2136:7-2137:5.

90. Balboa Pool, Garfield Pool and Rossi Pool are coded with red dots, meaning that they are "limited access" pools. DTX F16. However, at the time of trial, a barrier removal project was underway at Garfield Pool, RT 1813:13-1814:4, and Rossi Pool and Balboa Pool have since been scheduled for barrier removal, Dkt. 658-1.

91. Hecker credibly opined that the number and distribution of accessible pools (six out of nine) is sufficient to provide program access for the City's aquatic program. RT 2767:8-2769:17; DTX F16.

b) Library Program

92. The City's library program is provided through its Main Library and twenty-seven branch libraries. RT 2222:13-15; DTX 132.

93. In 2000, the City embarked on a $153 million Branch Library Improvement Program ("BLIP"), a program largely funded by a voter-approved $106 million bond measure. RT 2222:16-2223:3; DTX C37; PTX 4057 [000113-114].

94. BLIP's express priorities are to ensure that twenty-four of the City's branch libraries are ADA compliant and seismically retrofitted. RT 2222:16-2223:3, 2228:252229:9; DTX C37; DTX D1; DTX F22; PTX 4057 [00118]; PTX 0045[72].[6] Although MOD had previously determined that the City was sufficiently providing program access to its library system through its four ADA-compliant libraries, it nevertheless approved BLIP after determining that the project met UPhAS's goal of providing a higher level of accessibility than the legally-mandated minimum program access. RT 1797:5-19.

95. As of April 29, 2011, the City had completed construction and/or renovation of seventeen of the twenty-four branch libraries covered under BLIP. The City anticipated completing work at five additional

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[6] Prior to the passage of the BLIP bond in 2000, the Main Library and three branch libraries (i.e., Chinatown, Ocean View, and Mission Branch) were seismically-upgraded and rendered ADA-compliant. As such, BLIP focused on the remaining twenty-four branch libraries. *Id.*

branch libraries between May and September of 2011. As to the two remaining projects, one was under construction at the time of trial and the other was anticipated to conclude in 2014. RT 2227:7-21; DTX I32.

96. Kevin Wesley Jensen ("Jensen"), DPW's Disability Access Coordinator, conducted disability access reviews pursuant to Procedure 9.8.24 for all BLIP projects, other than the Mission Bay Branch Library (which was reviewed by Whipple). RT 1900:24-1904:8, 1938:20-1939:24, 1939:25-1940:8. Jensen reviewed the projects at various points, including during design, planning, and construction. RT 2230:6-2233:13. Following the completion of the project, Jensen decided whether the building should be certified for occupancy. *Id.*

97. On a number of occasions, including one involving the Glen Park Branch Library, Jensen found that the construction work did not meet access requirements. In those instances, he withheld occupancy approval and required the library to correct the deficiencies before opening the branch location in question to the public. RT 2232:82233:13.

98. Jensen also evaluated the path of travel from each branch library to the public right-of-way, nearby parking and public transportation. Where necessary, he implemented access improvements, including the repair or replacement of sidewalks. RT 1943:81945:17.

99. In addition to the above, the City has undertaken additional efforts to ensure accessibility of its libraries. For example, the Library employs two

dedicated accessibility coordinators—one who specializes in programmatic access and who trains staff on a variety of issues related to accessibility, and another who specializes in ensuring that library facilities are physically accessible. RT 2224:8-23.

100. Library staff use a Daily Facility Checklist to maintain the accessibility of each library facility. Each morning, trained library staff inspect their respective facilities, move furniture (including misplaced/errant step stools and chairs) or other objects that may impede the path of travel, and report any access issues that cannot safely or readily be corrected. Library staff members have various tools, such as door pressure monitors, to conduct these daily inspections. RT 2235:22-2237:13, 2252:10-2253:21; DTX A45. Pursuant to the Library's policy of conducting daily inspections, misplaced furniture impeding an accessible path of travel remains out of place for, at most, twenty-four hours. *See* DTX A45.

101. The Library also offers a range of non-structural solutions to ensure access to its programs and events, including assistive technologies, books by mail, a Library on Wheels, a Library for the Blind and Print Disabled, a Deaf Services Center, and Accessibility Tool Kits, which include simple tools such as magnifying glasses, magnification sheets, book holders, pencil grips, and special rulers. DTX A43; RT 2248:72252:9.

102. At the time of trial, the City had instituted a policy requiring the installation of automatic door openers to increase accessibility in all buildings, even

when not required under applicable access regulations. RT 2238:16-2239:6. The City also implemented custom access standards for use when purchasing furniture and equipment for its facilities. RT 1940:9-1942:24, 2233:14-2235:3; DTX V26; DTX V27; DTX V28.

103. Any public complaints regarding accessibility are handled by the Library's ADA Coordinator for Programmatic Access. Whenever possible, complaints are handled immediately. Some complaints, however, require investigation and assistance from other City departments, and others require funding and must be budgeted. RT 2253:22-2254:24.

c) RecPark Program

104. RecPark manages approximately 4,200 acres of park land, which includes more than 220 parks and 400 built structures, including pools, recreation centers, clubhouses, and playgrounds. RT 2302:10-23, 2264:13-17.

105. Due to the scale and geographic distribution of its facilities, the City relies on a program access approach to provide disability access to RecPark programs, services, and activities (as opposed to making each and every RecPark facility individually and fully accessible). RT 1797:20-1798:5.

106. RecPark evaluates all of its recreation programs to ensure that they are accessible to individuals with disabilities, provide a range of accommodations, and maintain an inclusion services department that

works with disabled individuals to meet their individualized needs. RT 2304:7-2305:6.

107. RecPark has three employees dedicated to accessibility: an ADA Programmatic Access Coordinator; an ADA Facilities Coordinator; and an Inclusion Services Director. RT 2305:8-2306:2.

108. The ADA Programmatic Access Coordinator serves as a liaison between the public, RecPark and MOD, provides staff training, and works to resolve access complaints. RT 2336:3-18.

109. The ADA Facilities Coordinator focuses on ensuring physical access to RecPark facilities via barrier removal and works closely with the City's Capital Division. RT 2305:22-2306:2.

110. The Inclusion Services Coordinator works with individuals who request custom accommodations, such as aides, wheelchair transportation, and assistive listening devices. RT 2336:24-2340:13.

111. RecPark requires daily inspection of its buildings and facilities for safety hazards or other issues that might impact access before they are opened to the public. RT 2315:15-2317:18; DTX Z60 (Employee Daily Facility Preparation Quick-Sheet).

112. RecPark also undertakes a semi-annual accessibility survey whereby it inspects its facilities using a more detailed accessibility checklist and corrects items that may affect physical access. RT 2318:2-2319:18; DTX Z61 (Semi-Annual Facility Accessibility Survey).

113. As mandated by Proposition C, a 2003 voter referendum, RecPark regularly inspects features such as pathways, playgrounds, athletic courts, and trees. These inspections promote accessibility by focusing on path of travel issues, such as surface quality of pathways, the operability of gates and latches, and removal of barriers such as low hanging tree limbs. RT 2320:2-2321:6.

114. RecPark has a written policy that categorizes and prioritizes maintenance requests and complaints as follows: emergencies, which are to be addressed immediately; health, safety and accessibility issues, which are to be addressed within forty-eight hours; and routine issues.[7] RT 2306:3-2309:14; DTX A10.

115. The public may obtain information relating to the department's programs, services, and activities—including accessibility information—through RecPark's website. RT 2344:25-2348:19; PTX 3875.

116. The website contains a webpage specifically dedicated to disability access issues, which provides information regarding facility accessibility and programmatic accessibility, as well as contact information for further access inquiries. RT 2347:242348:19; PTX 3875 [075767]. It also provides instructions for submitting individualized requests for inclusion services or accommodations, as well as a list of available adaptive recreation classes and activities. RT 2347:24-2348:19, 2354:10-24; PTX 3875 [075768]. The website includes

[7] The trial record does not indicate RecPark's timeframe for addressing routine issues.

a map function that identifies parks and recreation facilities as either "accessible" or "limited wheelchair accessibility." PTX 3875 [075769].

117. The purpose of the website is to provide the public with "shorthand information" regarding City facilities that contain programs accessible to wheelchair users. RT 1502:13-16. As such, the website defines an "accessible" park or out-door area as one that has a wheelchair accessible entry and "at least one accessible recreational opportunity." RT 1476:24-1477:14, 2329:11-16; PTX 3875 [075767]. The website advises the public that due to the terrain, age, and natural features of the City's outdoor areas, "there will be sites labeled 'accessible' in which some areas of the site are not accessible to wheelchair users." PTX 3875 [075767].

118. RecPark makes reasonable efforts to fulfill special accommodation requests made by persons with disabilities. RT 2348:20-2354:3. Although RecPark requests seventy-two hours' notice for such requests, it nonetheless strives to accommodate requests received less than seventy-two hours in advance, as well. RT 2310:12-2312:24, 2348:202350:1.

119. At trial, RecPark's ADA Coordinator for Programmatic Access testified that he was unaware of any situation in which RecPark had been unable to fulfill a request for accommodation, and there has been no showing to the contrary. RT 2352:16-19.[8]

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[8] RecPark also works with the community to accommodate requests from gardeners with disabilities. RT 2282:18-2283:15.

120. Since 2000, RecPark has spent over $500 million on capital projects to improve the City's RecPark facilities through its Capital Improvement Program. RT 2265:2-2266:2; DTX C32 [000003].

121. As RecPark renovates each park and facility under its Capital Improvement Program, it makes access improvements as necessary to ensure compliance with access regulations. RT 2274:3-2275:7.

122. In 2008, RecPark estimated its capital need for its entire system to be roughly $1.7 billion. RT 2267:2-12.

123. The majority of funding for RecPark improvements derives from voter approved measures, including the 2008 Clean and Safe Neighborhood Parks General Obligation Bond ("2008 Bond"), while the remainder came from other sources, such as the City's General Fund. RT 2266:11-2267:2.

124. In connection with the 2008 Bond, RecPark conducted a year-long community outreach campaign to select the parks to be included in the bond measure. Based on the feedback it received, RecPark selected fourteen neighborhood parks or park facilities for inclusion based on the following four criteria: (1) earthquake safety hazards; (2) physical condition; (3) location in dense urban areas; and (4) the provision of "core park amenities," such as a play area, green space,

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Trial testimony, however, does not establish that Kirola or any of the other class members ever attempted to visit any of San Francisco's community gardens. As such, the Court does not discuss the City's community garden program in detail.

recreation facility, athletic field, or athletic court. RT 2267:13-2272:24, DTX O37 [00029-35]. All of the 2008 Bond projects include expenditures for access improvements. *Id.*

125. At the time of trial, RecPark and MOD were planning a $150 million general obligation bond for further park improvements for inclusion on the November 2012 ballot. RT 2277:3-12, 1808:18-1809:23.

126. Pursuant to UPhAS, MOD studies and tracks RecPark's capital projects. RT 1802:25-1803:3, 1805:1-22. MOD works closely with RecPark staff and provides guidance on accessibility issues, such as the priorities selected for the 2008 Bond and the accessibility standards to apply. RT 1806:3-18, 1808:11-17.

127. DPW's Disability Access Coordinator and MOD's Access Compliance Officers perform disability access reviews for RecPark's capital improvement projects. RT 1945:18-1946:14, 1901:3-14.

128. Jensen, DPW's Disability Access Coordinator, followed Procedure 9.8.24, which sets forth the review process for compliance with accessibility standards, for all RecPark projects he reviewed. RT 1946:15-1947:1. He also evaluated the path of travel from each site evaluated to the corresponding public right-of-way, nearby accessible parking, and public transportation, and he required access improvements where necessary. RT 1948:7-1949:4. In addition, Jensen used the playground and recreation accessibility standards developed by the U.S. Access Board when reviewing RecPark

projects, even though they had not yet been adopted by the DOJ. RT 1947:7-1948:6.

D. LAY WITNESS TESTIMONY

129. Kirola has been a resident of the City since 1993. RT 1389:8-9. She suffers from cerebral palsy and uses a motorized wheel chair for mobility and to travel around San Francisco. RT 1380:12-1381:3.

130. Aside from her own testimony, Kirola presented the testimony of three class members and three mothers of class members.

131. Timothy Grant ("Grant") is a class member with multiple sclerosis who uses a wheelchair for mobility. He resides in Albany, California, and travels to San Francisco four to five times a week. RT 873:8-15, 881:18-23.

132. Margie Cherry ("Cherry") is a class member with chronic arthritis. She resides in San Francisco. RT 1028:22-23, 1029:18.

133. Elizabeth O'Neil ("O'Neil") is a class member with cerebral palsy who often uses crutches or a wheelchair for mobility. She resides in San Francisco. RT 537:13-24, 539:18-540:20.

134. Jill Kimbrough ("Kimbrough") is the mother of a nine-year-old class member with Rett syndrome who requires assistance to walk. RT 822:1:823:4. Kimbrough and her family reside in San Francisco. RT 821:6-8.

135. Audrey DeChadenedes ("DeChadenedes") is the mother of a twenty-five year-old class member with Rett syndrome who requires a wheelchair for mobility. RT 1001:14-19. DeChadenedes and her daughter reside in San Francisco. RT 997:24-998:10.

136. Erica Monasterio ("Monasterio") is the mother of a thirteen year-old class member with cerebral palsy who uses a wheelchair for mobility. Both reside in San Francisco. RT 1226:3-4, 23-24.

1. Public Right-of-Way

137. Upon questioning from Class Counsel at trial, Kirola testified only to a very limited number of specific barriers she encountered while utilizing the City's public right-of-way. In particular, Kirola noted that while travelling around San Francisco, she encountered bumps and/or uneven surfaces along: (1) the east side of Fulton Street ("Fulton") between Fillmore Street ("Fillmore") and Steiner Street ("Steiner"); (2) Steiner between Grove Street ("Grove") and Fulton; and (3) the east side of 19th Street one block north of Wawona Street. RT 1381:14-21, 1382:4-16, 1382:16-18, 1386:-1387:18.

138. Kirola claims that the bumps on the east side of Fulton caused her wheelchair to "hesitate," and that she "got to spend extra time deciding where [she is] going to go." RT 1382:8-18. No further information was elicited regarding the nature or extent of the alleged bumps and uneven surfaces. In addition, it is unclear from Kirola's testimony whether the bumps

prevented her from accessing the sidewalk. Indeed, Kirola testified that she is able to travel on the "west" side of Fulton along the sidewalk segment in question. RT 1382:5-9.

139. With respect to the bumps along Steiner, Kirola testified that her wheelchair "refuses to go down that way." RT 1382:16-18. With respect to the bumps along the east side of 19th Street, Kirola alleges that she "didn't know where to go to avoid the bumps" and "had to take the bus." RT 1387:12-13. Again, however, Kirola offered no further details regarding the severity of the alleged bumps and uneven surfaces she encountered, or any alleged burden imposed by having to take an alternative route, if any.

140. Kirola also testified that on one occasion she ran her wheelchair into an uncovered tree well on McAllister Street ("McAllister"). RT 1383:3-12. The record shows, however, that there was a 48" wide unobstructed path around the tree well. RT 1383:3-12, 431:3-10; PTX 4140Y.

141. Kirola further testified that she encountered a corner with only one curb ramp (as opposed to bi-directional ramps) at the intersection of McAllister and Fillmore, but did not submit a complaint. RT 1384:13-21. She also found no curb ramps at the corner of Hayes Street ("Hayes") and Fillmore. As a result, Kirola had to make a conscious effort to take a "different route" to her friend's house. RT 1384:8-10. No testimony was elicited regarding the details of the different or alternate route, such as the additional

distance and/or travel time involved, if any. Kirola submitted a curb ramp request for the corner of Hayes and Fillmore, and the City installed the requested curb ramps within twenty months. RT 1383:19-1884:8, 1391:18-1392:2.

142. Kirola identified no other specific barriers regarding the City's sidewalks, and she did not testify regarding any alleged access barriers within the City's crosswalks. In addition, Kirola testified that she routinely and independently travels across the City, using the City's public right-of-way, public transportation systems, and paratransit service. RT 1380:12-22, 1392:17-23, 1393:12-23.

143. O'Neil, Grant, Cherry, Kimbrough and DeChadenedes each testified to having encountered uneven and cracked sidewalks, exposed tree roots and missing curb ramps, all of which impeded their access. *E.g.*, RT 541:14-19, 566:3-8, 541:24-542:5, 546:4-25, 553:21-24, 563:24-564:10, 542:8-543:13, 553:9-20, 867:1-13, 824:13-825:11, 821:17-18, 1031:22-1032:17, 1039:14-16.

2. Libraries

144. Kirola testified to having used three of the City's twenty-eight libraries: the Main Library, the Western Addition Branch Library, and the Parkside Branch Library. RT 1385:22-1386:5. At each of those libraries, Kirola encountered misplaced or errant step stools left in the stacks which blocked her access to the particular aisle. RT 1385:221386:5.

145. The Western Edition Branch Library is located in Kirola's neighborhood. She visits that particular branch about once every two months. She found misplaced stools—apparently left by inconsiderate library patrons—on about 40 percent of those visits, which amounts to about 2.4 times per year. RT 1385:17-1386:8.

146. With respect to the Main Library and Parkside Branch Library, no testimony was offered regarding the frequency of her encounters with misplaced stools.

147. No testimony was presented showing that the misplaced stools prevented Kirola from utilizing the library or the library program in general.

148. Kirola also did not testify to encountering any other access barriers in the City's libraries.

149. No class member testified to any access barriers at any of the City's libraries.

3. Swimming Pools

150. Kirola routinely swims at Hamilton Pool and Martin Luther King Jr ("MLK") Pool, which were previously renovated and made accessible. RT 1392:17-1393:23.

151. Hamilton Pool is the closest pool to her home. RT 1393:2-3. Kirola's only complaint regarding that pool is that she cannot use the children's slide because it lacks a lift. RT 1392:17-1393:23. She

acknowledged, however, that the slide at Hamilton Pool is intended for children and was unaware whether adults are allowed to use it. RT 1387:16-18.

152. MLK Pool is her "favorite pool." RT 1393:1-3, 1392:17-19. Travelling to MLK Pool takes a "long time" on public transit, but is "not hard to get to." RT 1392:19-21.

153. Kirola found Sava Pool to be accessible, but encountered a cracked sidewalk near the facility on 19th Street. RT 1386:22-1387:13.

154. Kirola testified to experiencing accessibility issues at Balboa Pool, Garfield Pool and Rossi Pool. These pools are classified as "limited access," as opposed to accessible. DTX F16.

155. At Balboa Pool, Kirola encountered a steep entrance ramp and an inadequate locker room. RT 1388:5-6. She likewise found insufficient clearances in the locker room and restrooms at Garfield Pool. RT 1388:7-17. As for Rossi Pool, Kirola claims that she was deterred from visiting that facility after being informed that it was inaccessible. RT 1386:15-19.

156. Kimbrough testified that the ramp at Balboa Pool is too steep for her daughter to use, and as a result, she cannot watch her sister take swimming lessons or access the pool. RT 838:12-839:19. Although Coffman Pool is only a mile further away than Balboa Pool, Kimbrough prefers not to go there because her eldest daughter's swimming instructor teaches at

Balboa Pool, and she feels that Coffman Pool is not located in a safe neighborhood. RT 849:10-17, 852:19-853:2

157. Monasterio testified that the closest pool to her is Garfield Pool but that "there's not a safe space for her to sit and shower." RT 1233:18-24. Although she believed that Garfield is designated as accessible, it is not. *See* RT 1234:10-12; DTX F16.

158. Cherry testified that she attempted to take a swimming class at MLK Pool but that she had been forced to discontinue the class as a result of the lift being consistently broken for an entire month. RT 1043:15-1045:19.

4. Parks

159. At trial, Kirola testified regarding accessibility issues only with respect to Alamo Square Park. More specifically, Kirola stated that "the accessible entrance is steep to use," RT 1385:5; that she was "not able to get in the children's play area," RT 1385:1415; and that there were "some places where the slope of the paths are steep so it is hard to use those areas of the park," RT 1385:7-169.

160. Kirola did not offer any testimony or evidence as to *when* the features of Alamo Square Park about which she complained were constructed. She also acknowledged that the park is located on a steep hill. RT 1394:2.

161. Aside from Alamo Square Park, Kirola did not testify or complain about any accessibility issues at any other City park or park facility.[9]

162. Cherry stated, without elaboration, that all of the parks in her area "need help" and "haven't been maintained the way they should." RT 1041:1-5. She commented that her daughter had difficulty with a bathroom at Golden Gate Park and felt that the disabled stall should be located in the front. RT 1041:19-21.

163. Kimbrough complained that her daughter: (1) could not enter the Tea House at the Japanese Tea Garden (Golden Gate Park) because of the "stepping stones that go over the water," RT 831:16-20; (2) could not enter the children's playground at Golden Gate Park, RT 832:3-833:4; (3) had difficulty going to the duck pond at McLaren Park, RT 834:16-835:11; (4) found the pathway to the play area at the St. Mary's playground too steep, RT 835:16-8; (5) was unable to access one part of the play area at Balboa Park, though was otherwise able to use almost all of the play structures there, RT 836:17-837:9; and (6) encountered steep paths at Holly Park, which "is on the top of a hill," RT 837:19838:5.

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[9] At trial, some of Kirola's lay and expert witnesses offered testimony regarding access barriers at Golden Gate Park and various RecPark facilities contained within the Park. Kirola, however, made no mention during her examination of any access barriers she encountered at Golden Gate Park or any Golden Gate Park facility.

164. Monasterio testified that her daughter: (1) had difficulty accessing parts of Glen Canyon Park, which is located in a "Eucalyptus forest" that is "very wild," RT 1234:16-1237:2; (2) could not enter certain parts of the exhibit at the Conservatory of Flowers (Golden Gate Park) because plants were in her way, RT 1237:3-20; and (3) could not enter the Japanese Tea Garden for unspecified reasons, RT 1237:23-1238:1.

5. Grievance Procedure

165. Fraguli, who is in charge of the grievance procedure operated by MOD, never received any complaints from Kirola or any testifying class member or parent of a class member. RT 1866:11-14, RT 1870:14-1871:9. She was surprised to have not received any complaints from Kirola, whom she knows socially, or O'Neill, who had previously worked at MOD. RT 1870:14-22.

166. Though Kirola did not utilize the City's grievance procedure, she did contact her district supervisor in July 2006 to complain about the lack of curb ramps at the corner of Hayes and Fillmore. In April 2008, the City installed the curb ramps per Kirola's request. RT 1383:19-1884:8, 1391:18-1392:2. The City also installed curb ramps at all the locations alleged in the pleadings. RT 1392:3-16. Kirola did not make any other formal access complaints to the City prior to the filing of this lawsuit.

167. In 2006 or 2007, Monasterio ran into her then supervisor, Tom Ammiano, at the video store and

complained to him about having "curb cuts" installed along Cortland Avenue. RT 1228:18-1229:9. In response, DPW consulted with Monasterio to understand her daughter's needs. RT 2001:8-2002:5. The City constructed all curb ramps requested by Monasterio within a year after the requests were made. RT 2419:13-2420:4; 2001:82002:5; 1228:18-1229:6.[10]

168. O'Neil testified about three curb requests. First, O'Neil claims that in 1991 she left a message with DPW regarding the curb ramps at Fillmore Street ("Fillmore") and Beach Street ("Beach"), and thereafter followed up many times, without success. RT 568:6-11, 569:1-572:11. A curb ramp at that location was installed in April 2011, based on the request of a person other than O'Neil. RT 2423:15-2424:5, 573:22-574:1.

169. Second, she called DPW to complain about a curb ramp at the corner of Van Ness Avenue ("Van Ness") and Olive Street ("Olive"). RT 589:2-18. She indicated that she made the complaint sometime between 2006 and 2009, and that the curb ramp was fixed in about one year. RT 571:7-8, 589:6-7, 589:21-590:4.

170. Third, O'Neil claims that on March 17, 2011, she submitted a complaint regarding steep curb ramps at the corner of Van Ness and Hickory Street ("Hickory"), a location where the City had received a prior curb ramp request. RT 578:4-24, 2420:182421:2.

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[10] Based on a declaration she filed in this action, Monasterio apparently made other requests, which the City has prioritized for construction the next fiscal year following trial. RT 2420:5-2420:17.

Initially, the City determined that curb ramps could not be constructed at this location because of a sub-sidewalk basement. RT 2005:2-2006:4; 2421:3-8. The City later identified a significantly more expensive design "bulb-out" solution that extends the sidewalk out into the street, thereby avoiding the sub-sidewalk basement. RT 2006:5-18; 2421:9-22, 2421:20-25. At the time of trial, curb ramps for this location were in the design phase. RT 2006:19-25; 2422:1-6. Approximately twenty new bi-directional curb ramps have been installed in O'Neil's neighborhood, some at her request. RT 594:15-18.

E. EXPERT TESTIMONY

171. Kirola offered expert testimony from Peter Margen ("Margen"), Dr. Edward Steinfeld ("Steinfeld"), Jeffrey Scott Mastin ("Mastin"), Gary Waters ("Waters") and David Seaman ("Seaman").

172. Mastin is a licensed architect and was received by the Court as an expert in architecture, construction, disability access, program access for mobility disabled persons, ADA transition plans, and barrier removal. RT 927:6-931:23.

173. Steinfeld is a professor of architecture, the Director of the Center for Inclusive Design and Environmental Access ("IDEA Center"), and an advocate for improved disability access standards, and was received by the Court as an expert in architecture, accessibility design, universal design, program access, and

transition planning for public entities. RT 606:7-607:9, 767:6-13.

174. Margen, a disability access specialist, was received as an expert on disability access. RT 100:17-101:3.

175. Waters, a licensed architect, certified access specialist, and disability access consultant, was received by the Court as an expert in disability access, program access for persons with mobility disabilities, the preparation and implementation of self-evaluation and transition plans, and policies, procedures and practices regarding disability access barrier removal. RT 1306:23-1310:6.

176. Seaman was qualified as an expert in GIS. RT 489:19-490:5.

177. The City offered expert testimony from Hecker and Larry Wood ("Wood").

178. Hecker, a licensed architect, was received by the Court as an expert in architecture and disability access. RT 2037:7-2038:3.

179. Wood, an architect and accessibility consultant with a nation-wide practice, was received by the Court as an expert in architecture, disability access, self-evaluation plans, transition plans, and Title II program access requirements. RT 2722:25-2723:6.

1. Public Right-of-Way

180. Kirola's experts offered a variety of testimony regarding their evaluation of the City's curb ramps and sidewalks.

181. Mastin opined that 1,358 of the 1,432 curb ramps he inspected were inaccessible or non-compliant. RT 1215:12-1218:7; PTX 4148.

182. Steinfeld found barriers relating to curb ramp accessibility at thirteen of the fourteen site inspections conducted by his team that involved inspection of the public right-of-way. RT 704:9-12.

183. Margen inspected sidewalks and curb-ramps at ten street intersections and/or street segments, and asserted that there were "major barriers to accessibility" which rendered "the system as a whole not accessible." RT 330:21-331:1.

184. The Court finds that the opinions offered by Kirola's experts are unreliable and unpersuasive.

185. As an initial matter, the Court has serious concerns regarding their methodology. For instance, Kirola's experts failed to consider the height of the curbs or widths of the sidewalks they examined, even though both are critical measurements that may impact the design, construction, and accessibility conclusions of the curb ramps at issue. RT 2073:11-16. The record also shows that they failed to take steps to apply a consistent method of measuring slopes, sidewalks, and curb ramps, and improperly applied ADAAG to the

public right-of-way. RT 398:12-399:5, 2055:24-2056:7, 2058:20-2061:6, 800:24-802:21, 2048:9-15.

186. The Court also has concerns regarding the qualifications of the persons conducting the evaluations. Steinfeld conducted his surveys mostly with the help of student interns who were not trained on California accessibility standards and whose work was shown by the City to be unreliable. RT 738:2-739:22, 800:14-801:25, 817:12-819:2, 2065:1-20. Margen is not an architect. According to fellow expert Mastin, only licensed architects are qualified to be experts in disability access standards. RT 1250:19-1251:22.

187. Wood, the City's accessibility expert, whom the Court finds to be credible, was particularly critical of the methodology utilized by Kirola's experts, opining that "there was no common way of measuring anything, such as slopes, sidewalks, [and] curb ramps" and that "they all seemed to have a different approach that was somewhat haphazard." RT 2056:3-7. Notably, the inconsistencies in such measurements led to internal disagreements between Kirola's experts. Steinfeld's colleague, Denise Levine, who supervised the site inspections conducted by Steinfeld's IDEA Center team, viewed her methodology as superior to the methodology employed by Kirola's other access experts and rejected their inspection protocols in favor of her own. RT 800:24-802:21.

188. Also problematic is Kirola's experts' failure to account for dimensional tolerances. Due to variations in workmanship and real-world construction

practices, minor variations in the curb ramp or sidewalk construction may occur. 28 C.F.R. part 36, App. D, § 3.2 ("[a]ll dimensions are subject to conventional building industry tolerances for field conditions"). For instance, there may be slight imperfections in a curb ramp surface, or, at different points along the ramp, the slope or grade may not necessarily be uniform. RT 2061:2-2062:62:13. These variations may be the result of using a hand-trowel during the construction process and the natural settlement of concrete. RT 2061:22-2062:2. According to Wood, a dimensional tolerance is a permissible deviation from standards commonly accepted in the construction industry and does not impact accessibility under ADA guidelines. RT 2057:2-20, 2062:10-2063:2. Mastin, who conducted the majority of the curb ramp assessments, failed to account for such tolerances. In failing to do so, he inappropriately found trivial and insignificant deviations as access barriers, despite the fact that such deviations are permissible under industry standards. RT 955:5-10, 1272:1-12, 1282:4-18, 2055:24-2057:20.

189. In addition, Kirola's experts measured curb ramp slopes without considering the ramp's overall "rise in run" and flatness. RT 2056:10-2057:1. Instead, they recorded the maximum localized variation (i.e., the steepest individual point along the slope of the curb ramp), which skewed their results. RT 2056:10-2057:1, 2058:20-2061:6, 771:11772:8. Steinfeld, for instance, acknowledged that the measurements he made regarding the overall slope of each curb ramp were based on the most extreme variation in the ramp's

grade, misleadingly characterizing that measurement as applying to the ramp as a whole. RT 771:23 ("we use the steepest slope as what we record"). In other cases, the measurements taken were erroneous. Mastin admittedly cited dozens of curb ramps with a slope of less than 8.3 percent as non-compliant-when, in actuality, a slope of 8.3 percent or less comports with the ADAAG. RT 1275:5-21. Wood noted this discrepancy in his testimony. RT 2081:5-10. Wood also pointed out that Kirola's experts routinely cited items such as pot holes or utility grates as access barriers, notwithstanding the fact that there was an ADA compliant (i.e., 48-inch wide) path around the item. RT 2079:102081:10.

190. The Court further discounts the probative value of Kirola's experts' opinions and reports based on their misapplication of ADAAG, which applies specifically to post-January 26, 1992, construction. RT 2172:11-14. The ADAAG's current regulations focus on buildings and facilities, and do not explicitly encompass the public right-of-way (though a public right-of-way section has been reserved). Indeed, on July 26, 2011, the U.S. Access Board published Proposed Accessibility Guidelines for Pedestrian Facilities in the Public Right-of-Way, thus implying that the Board intended the current guidelines to be limited to newly constructed buildings and facilities (and the curb ramps, sidewalks, and loading zones associated with such buildings and facilities). Dkt. 636, Exh. A.

191. Even if the ADAAG were applicable to a public right-of-way, its provisions would apply only to newly constructed or altered elements of the public

right-of-way. *See* 28 C.F.R. § 35.151 Despite this distinction, Kirola's experts indiscriminately applied the ADAAG to each curb ramp assessed without taking in account *when* the curb ramps were constructed or altered. The fact that Kirola's experts inappropriately applied the ADAAG to every curb ramp assessed without first ascertaining when the curb ramp was constructed or altered and whether the ADAAG therefore applied undermines both their credibility and the probative value of their testimony.

192. As for Margen's claim that the "the [City's] system [of curb ramps and sidewalks] as a whole is not accessible," the Court finds his opinion unpersuasive. RT 330:21-331:1. Margen was not certified as an expert on program access under Title II of the ADA nor is he an architect. RT 100:17-101:3. According to Mastin, only licensed architects are qualified to be experts in disability access standards. RT 1250:19-1251:22. Further, Margen's lack of knowledge was apparent from his inconsistent testimony regarding his understanding of Title II's program access requirements. RT 100:17:101:3, 105:20-25, 333:9-11. The Court therefore affords Margen's conclusions regarding program access little weight.

193. The Court also ascribes little weight to the testimony of Kirola's GIS expert, Seaman, who performed an analysis of the data contained within the CRIS database as of January 21, 2011, and prepared maps, which depict corners lacking curb ramps and curb ramps with low condition scores. RT 494:14-500:13. Seaman's geographic representations of the

CRIS data are misleading in that he failed to show data for accessible curb ramps near the purportedly non-accessible curb ramps, despite the fact that such data was available to him. RT 530:3-5. In addition, testimony presented at trial demonstrates that the CRIS database was not up to date and lacked data for curb ramps installed through departments other than DPW. RT 2396:19-2397:7, 2401:14-16, 2403:12-2404:9.

194. In contrast, the Court finds the opinions of Hecker, the City's accessibility expert, to be more credible. The DOJ's "Tool Kit for Title II Entities" advises public entities to create long-range plans to provide curb ramps where needed and to employ a request-based system for installing curb ramps. RT 2811:7-2812:15. Hecker opined that the City's priorities for curb ramp installation, as set forth in the Curb Ramp and Sidewalk Transition Plan, are consistent with the priorities and recommendations established by the DOJ. RT 2785:17-2787:13, 2789:3-2790:18, 2811:7-2812:15.

195. On cross-examination, Kirola asked Hecker about a December 2009 expert report in which he had stated that the City had not yet installed every curb ramp necessary for program access when the network of City sidewalks was viewed in its entirety, but that the City was making progress toward program access. RT 2795:19-2796:8. However, Hecker acknowledged that at the time he issued the 2009 report, he had not actually determined the total number of curb ramps needed to achieve program access for the purposes of that report. RT 2797:15-2798:6. Hecker provided no

updated program access conclusions regarding the City's public right-of-way. In any event, Hecker's observations in the 2009 report do not undermine his opinion that the City's policies and programs for curb ramp installation comport with the ADA. RT 2785:17-2787:13, 2789:3-2790:18, 2795:19-2796:8; PTX 0022 [003798].

196. To summarize, the Court finds that the opinions of Kirola's experts regarding whether the City provides meaningful access to its public-right-of-way are uncompelling, particularly in light of the persuasive testimony provided by Wood, and affords them little weight. The Court finds Hecker, the City's access expert, to be credible, and finds the City's priorities for curb ramp installation, as set forth in the Curb Ramp and Sidewalk Transition Plan, to be consistent with the priorities and recommendations established by the DOJ.

2. Library and RecPark Facilities

197. The Court now addresses the expert testimony regarding whether mobility-impaired individuals have been provided with meaningful access to the City's Library and RecPark facilities. The following section is divided into two parts. The Court first addresses the opinions offered to support Kirola's contention that, to comply with its access obligations, the City must make each of its individual libraries, parks, pools, and recreation centers fully accessible because the City has a program of providing "unique" neighborhood

facilities. *See*, *e.g.*, RT 103:6-104:19. Following those findings, the Court will address the opinions and findings of Kirola's experts that there are significant accessibility barriers that preclude program access with respect to the aforementioned facilities.

a) "Neighborhood" Access Theory

198. According to Margen, each individual park or library constitutes a "unique" program because of its status as a "neighborhood" site. RT 104:1-19, 406:25-407:22. Margen opined that program access, "as it relates to San Francisco," means that all services and activities available at one facility must be made available at every facility. RT 105:2025. He admitted, however, that his opinion was not based on any authoritative publication in his field, but was simply his personal opinion. RT 407:8-22. In addition, Margen, who was not received as a program access expert, later contradicted himself, stating that the services offered at one park need not be duplicated at every park, "but where services are provided, those services need to be accessible." RT 333:9-11. The inconsistencies in and apparent arbitrariness of Margen's opinions raise concerns regarding his actual understanding of the program access requirements. RT 100:17:101:3, 105:20-25, 333:9-11. The Court therefore gives little weight to Margen's opinion.

199. Like Margen, Steinfeld opined that each City park is "unique," and therefore, the City's efforts to offer program access to its park system was not

"workable" in light of the length of time it would take to walk from one park to another. RT 615:17-616:4, 619:18-621:8, 629:12-15. Though admitting that every park need not be made accessible, he opined that the City must provide an "equivalent park" within a "reasonable" distance from every non-accessible park, which he posited to be one-half of a mile. RT 624:11-13, 625:8-626:8. He reasoned that certain "very special parks," such as Mission Dolores Park or Golden Gate Park, have no equivalent, and as such, each of those parks must be fully accessible. RT 629:3-15. Steinfeld also asserted that parks are unique to the particular neighborhood in which they are located and potentially have "neighborhood meaning." RT 618:21-25.

200. Steinfeld presented no foundation for his opinions, and conceded that he had never visited Mission Dolores Park and knew little about it. RT 797:19-23. He also contradicted himself, testifying that only "a small part" of a particular park must be accessible in order to provide the requisite program access. RT 717:10-21. In addition, the suggestion that the name of a park connotes its unique, neighborhood meaning, is both unfounded and illogical. The mere fact that a park is named after the area in which it is located does not establish that the park has "neighborhood meaning" or that the City is obligated to ensure that each and every "neighborhood" park is accessible. Given the lack of any identifiable bases for Steinfeld's opinions, it is readily apparent that his testimony was based on his personal views, rather than a professional understanding of a public entity's Title II obligations. For the

reasons discussed, the Court finds Steinfeld's opinions to be unpersuasive and gives them little weight.

201. The Court also affords little weight to Steinfeld's opinions that Coffman Pool and MLK Pool (which are designated as accessible pools) are not meaningful alternatives to Balboa Pool for persons with mobility disabilities due to their distance from Balboa Pool. RT 673:4-23. Kimbrough, a mother of a class member, testified that Coffman Pool was only two miles from her home while Balboa Pool was one mile from her home. RT 852:18-853:2, 848:18-24. Given the proximity of Coffman Pool to Balboa Pool, the Court is unpersuaded by Steinfeld's suggestion that the Coffman Pool is not a meaningful alternative. Steinfeld's conclusion in this regard detracts further from his credibility and program access conclusions.

202. Mastin opined that the City must make "each and every" one of its "unique" facilities accessible to satisfy its program access requirements under the ADA. RT 1223:22-1224:4. Mastin testified specifically regarding recreation centers, stating that, in his opinion, the City's recreational centers are "localized" and that it is "not equivalent to go to someone else's neighborhood and socialize with people you don't know." RT 1172:22-1174:10. Mastin failed to cite any authority or identify a factual basis in the record for his opinions, and the Court concludes that, like Steinfeld, his opinions are based on his personal, subjective views as a disability access advocate, rather than a professional understanding of a public entity's Title II obligations.

The Court therefore finds Mastin's opinions to be unpersuasive and gives them little weight.

203. Waters opined that the "uniqueness of a particular facility" is a factor to be taken into account when determining whether or not program access has been afforded. RT 1349:4-15. Again, Waters failed to cite any authority or identify any factual basis in the record for his opinions, which are based on his personal opinions as a disability access advocate rather than on a professional understanding of a public entity's Title II obligations. The Court therefore finds Waters' opinions to be unpersuasive and affords them little weight.

204. In sum, although each library, park, pool, and recreational center arguably may have some "unique" features, that does not, in turn, support the conclusion that each individual library, park, pool, and recreational center must be fully accessible in each neighborhood. The opinions of Kirola's experts are not grounded on any industry standards or understanding. Instead, they are based on their personal beliefs as disability access advocates. For these reasons and those discussed above, the Court finds the conclusions of Kirola's experts regarding the neighborhood theory of access to be suspect and lacking in credibility.

b) Accessibility

205. Aside from offering opinions regarding Kirola's neighborhood theory of accessibility, her experts also discussed purported accessibility barriers in relation to the City's Library and RecPark facilities.

These experts testified, to varying degrees, that they encountered multiple access barriers at the libraries, pools, parks, and recreation centers which they inspected.

206. Kirola's experts inspected eighteen of the City's twenty-eight libraries, including the Main Library. RT 164:5-165:21, 384:14-385:13, 651:14-653:1; PTX 4148. Margen, Steinfeld and Mastin opined that those libraries had narrow aisles, inadequate turnaround space at the end of aisles, inaccessible restrooms, inaccessible seating, and excessive door pressure. RT 293:5-295:3, 296:6-298:5, 334:8-16, 378:23-379:5, 741:20743:18 1213:12-22. Margen opined that the City's libraries suffered from accessibility issues that must be addressed in order to make the library system, on the whole, accessible. RT 334:8-16.

207. Kirola's experts inspected seven of the City's nine pools. Three of the pools they inspected, i.e., Garfield, Balboa, and Rossi Pools, are designated as "limited access"—meaning that they are not intended to provide program access. RT 164:4-165:11, 408:1114, 651:14-652:6, 1312:1-1313:2, 1813:10-23; PTX 4147; PTX 4149; DTX F16. Steinfeld, in particular, claimed to have found numerous access barriers at the pools, including inaccessible paths of travel, inaccessible parking, inadequate signage, missing handrails, inaccessible handrails, heavy doors, drinking fountains lacking inadequate knee clearance, and non-detachable shower heads. RT 657:15-657:24, 664:5-664:24, 670:10-670:19, 672:7-19, 748:22-749:8, 812:19-813:14, 728:20-729:13, 736:8-22, 743:25-744:14, 755:19756:19, 813:20-814:24, 694:12-19, 728:20-729:13.

208. With respect to the City's park program, Kirola's experts inspected 13 parks, 7 mini-parks, and 16 playgrounds of the City's network of approximately 220 parks. They also visited multiple sites within Golden Gate Park. RT 164:4-165:21, 651:23-652:6, 1312:17-19; PTX 4149; PTX 4147. Based on their inspections, Kirola's experts identified various access barriers, including an inaccessible entrance ramp at Balboa Park, a cracked sidewalk at Jefferson Square Park, limited accessible paths of travel at Golden Gate Park's Japanese Tea Garden and Rose Garden, inaccessible paths connecting the main facilities at Glen Canyon Park, and placement of flora and fauna signage at Glen Canyon Park too far from accessible trails. RT 670:10-671:12, 712:12-17, 757:5-6, 1316:22-1313:9, 1317:221318:8, 1327:5-1330:15-17, 1331:13-23, 1333:8-21.

209. Finally, the experts conducted site inspections of thirteen of the City's seventy-three recreation centers and clubhouses. PTX 4147; PTX 4149. Mastin cited access barriers at the recreation centers he inspected, such as inadequate signage, an excessive cross-slope leading to accessible features in a restroom, a broken elevator, and an inaccessible tennis court. RT 1121:8-1124:5, 1141:5-1142:5, 1150:21-1152:4, 1155:201158:6, 1158:19-1160:22, 1162:12-1164:15. Mastin concluded that, based on the barriers he observed, four of the eleven recreation centers he inspected were not accessible. RT 1121:11-15, 1141:5-9, 1162:6-10.

210. The Court is unpersuaded by the opinions of Kirola's experts regarding the purported access

barriers they encountered at the City's libraries and RecPark facilities.

211. As an initial matter, Kirola's experts routinely applied inconsistent methodologies and inspection protocols. RT 398:12-399:5, 800:17-801:25, 2055:242056:7. Two experts, in particular, inappropriately focused on minor construction variations and ignored dimensional tolerances, which resulted in otherwise trivial and insignificant deviations being characterized as access barriers-despite the fact that such deviations were permissible under industry accessibility standards. RT 955:5-10, 1273:410, 1342:6-13, 1358:19-1359:3, 2055:24-2057:20, 2065:8-20. For example, at the Kimball Playground, Margen's team used a very short level to measure slopes, notwithstanding Margen's assurance that his team always used a two-foot level. RT 2058:20-25. Use of a short level is problematic because it "gives exaggerated readings because it's so short [that] it picks up minor fluctuations." RT 2059:1-4. Similarly, at St. Mary's Playground, Kirola's inspection team recorded the maximum localized variation as the overall slope of the curb ramp rather than the curb ramp's overall "rise in run" and flatness, which is the appropriate measure of accessibility compliance. RT 2059:9-2061:6.

212. Kirola's experts also repeatedly applied erroneous access requirements. At the time of trial, there were no set standards for parks and playground facilities, though federal guidelines for outdoor facilities had been proposed. RT 2063:19-2064:25. The proposed guidelines recognize that such facilities are located in

topographies that vary, and as such, set different and more forgiving slope requirements than compared to those applicable to a building. *Id.* Yet, Kirola's experts applied the more stringent but inapplicable ADAAG standard to park and playground facilities. *Id.*

213. With regard to buildings, they inappropriately failed to differentiate between new construction and alteration standards, applying the latest version of the California Building Code as opposed to the version in effect when the structure was built. RT 2046:15-2047:5, 2052:7-2053:20.[11] Kirola's experts similarly failed to take into account the existence of conflicts between state and federal law relating to the placement of items such as the location of toilet paper and grab bars and door pressure, requiring the City to decide which standard is more restrictive. RT 2048:16-2049:8. Moreover, no showing was made that these minor variations fell outside accepted construction variances or otherwise rendered the particular facility inaccessible or unusable. RT 2045:6-19.

214. With regard to libraries, Kirola's experts opined that they had narrow aisles and inadequate turnaround space at the end of aisles. RT 293:5-295:3, 296:6-298:5, 334:816, 378:23-379:5, 741:20-743:18 1213:12-22. Under both state and federal law, end aisles at library stacks may be 36" wide. RT 2091:15-18. The 48"

[11] The City is subject to both federal ADA requirements and California requirements, which generally are set forth in the California Building Code. Though the parties' experts discussed both standards, the parties primarily devote their argument to the City's compliance with ADA.

width requirement cited by Kirola's experts applies only to restricted U-turn areas. RT 2091:13-2093:8, 2094:10-17, 2194:14-2197:11, 2202:7-08; Cal. Bldg. Code § 1133B.6.2; ADAAG 4.3.3; PTX 4153, 204. Margen and Mastin also cited excessive door pressures at some of the libraries they inspected. RT 373:5-12, 377:15-378:14, 1272:14-16. However, for safety reasons, many of those doors had a greater opening pressure because fire doors are permitted to have a greater amount of pressure. RT 2098:11-16. Mastin also admitted that door pressures may vary daily due to wind or other factors. RT 1272:14-16.

215. Another flaw in Kirola's experts' analyses is their citation to barriers that, in fact, did not impede meaningful access. RT 2057:21-2058:9, 2081:8-10. The survey prepared by Kirola's experts frequently cited issues such as a door being difficult to open when there was an automatic door opener, thereby obviating the need to manually open the door. RT 2057:24-2058:12. In another instance, the report cited the lack of handrails for stairs when a new elevator system providing full access had been installed. *Id.* The experts criticized the lack of an ambulatory stall (which can be used by persons with crutches or a walker) in a library bathroom, when, in fact, the City had provided two accessible stalls, providing greater access than required by law. RT 2098:18-2099:13. Steinfeld criticized the Richmond Branch Library as having an inaccessible ramp, despite the fact that there was a second accessible ramp leading to the same front entrance which complies with ADAAG. RT 738:16-18, 755:7-10. Instead of

focusing on overall accessibility, Kirola's experts dwelled on minor variations that were no longer required, while overlooking "obvious features of a significant expense" undertaken to make the facility accessible. RT 2058:6-12. These are but a few examples of the flaws that permeate Kirola's experts' testimony.

216. In contrast to the unreliable testimony offered by Plaintiff, the Court is persuaded by Wood's independent findings regarding the City's libraries, pools, and recreation centers that he inspected as part of his work on this case. Wood and his staff reviewed a total of sixty-nine facilities comprised of libraries, pools, recreation centers, and playgrounds. RT 2041:20-25. Wood's team reviewed each alleged barrier listed in the reports prepared by Kirola's experts, inspected each of the sites visited, and categorized Kirola's experts' findings into four categories: (1) "technically correct" and "affects usability"; (2) "technically correct" but with "little or no effect on usability"; (3) "maintenance of accessible feature"; and (4) "misinterpretation or error in use of ADAAG or Code." RT 2038:15-2039:22, 2159:3-22. To ensure the veracity of his team's findings, Wood held daily meetings to discuss methodology and equipment. RT 2039:1922.

217. With respect to the City's libraries, Wood and his team reviewed each of the libraries evaluated by Kirola's access experts, with the exception of the Visitation Valley Branch Library (which was under construction for accessibility improvements at the time of his evaluations) and the Ocean View Branch Library. RT 2132:23-2134:10. Wood opined that each of

the sixteen "blue dot" libraries he visited has the features necessary to facilitate accessibility, including: (1) an accessible route from the entrance to the public sidewalk; (2) an accessible entrance; (3) automatic door openers; (4) elevators within multi-story buildings; (5) access to all library levels; (6) accessible check-out counters; (7) accessible tables; (8) accessible doors along all accessible routes; (9) accessible copy machines; (10) accessible toilet rooms for men and women; (11) accessible drinking fountains; and (12) accessible book stacks. RT 2132:23-2135:19.

218. Wood and his team also visited the three "blue dot" pools evaluated by Kirola's access experts, along with the two additional "blue dot" pools not visited by Kirola's experts (i.e., Sava Pool and North Beach Pool). Of the five pools he evaluated, Wood opined that each has the features necessary to facilitate accessibility, including: (1) an accessible route from the property line to the building; (2) an accessible entry; (3) an accessible check-in counter; (4) accessible signage; (5) accessible ramps or curb ramps where necessary; (6) accessible toilets; (7) accessible showers; (8) accessible locker rooms; and (9) transfer lifts to assist individuals with mobility impairments in getting into and out of the pool. RT 2136:7-2137:5.

219. Wood and his team also reviewed the recreation centers evaluated by Kirola's access experts. Wood opined that each of the newly renovated recreation centers evaluated has all the features necessary to facilitate accessibility, including: (1) an accessible route from the property line to the building; (2) an

accessible entry; (3) accessible community rooms; (4) accessible ramps or curb ramps where necessary; (5) accessible elevators within multi-story buildings; (6) an accessible gym with accessible bleacher facilities (with the exception of the Golden Gate Senior Center, which lacked a gym); (7) an accessible weight room in facilities where a weight room was provided; (8) accessible doors; (9) an attendant for special requests; (10) accessible bathrooms for men and women; and (11) accessible drinking fountains. RT 2138:4-2140:12.

220. Based on Wood's thorough analysis of Kirola's experts' findings, combined with his own independent analysis, MOD advised the Library of approximately three or four access barriers that it believed should be addressed, along with a few maintenance issues that it concluded should be attended to as part of its regular facility maintenance. RT 1652:16-1653:4. At the time of trial, the City had made or was in the process of completing the requested repairs. RT 2255:8-2256:6, 2257:17-2258:10.

221. MOD also recommended that RecPark remediate roughly 400 access barriers identified, some of which were minor and could therefore be handled by operations staff, and others of which required funding from the department's capital division. RT 2321:112322:22, 1652:16-1653:20. At the time of trial, RecPark had no deadline or schedule for completing the list of barriers received from MOD. RT 2333:23-25, 2334:5-16. RecPark had, however, worked with MOD to prioritize the listed recommendations and was in the process of addressing them. RT 2321:16-2322:22.

222. Wood found that only 1.6 percent of the access barriers cited by Kirola's experts at City libraries and recreation facilities actually needed modification. RT 2038:152039:22, 2044:9-2046:12, 1649:10-25, 1625:7-10.

223. The Court finds Wood to be well-qualified and credible, and credits his opinions regarding the existence of the alleged accessibility problems with the City's libraries and RecPark facilities over those of Kirola's experts.

224. The Court is likewise persuaded by Hecker, who provided testimony regarding program access to the City's library program and RecPark programs. As of December 2009, nineteen of the City's libraries were designated as "blue dot" accessible. Hecker opined that the number and distribution of accessible libraries across San Francisco was sufficient to provide program access to the City's library system, considering the City's "compact" size (forty-nine square miles) and effective public transportation and paratransit systems. RT 2763:21-2765:5; DTX I32.

225. Hecker credibly opined that: (1) six of the City's nine swimming pools were designated as "blue dot" accessible, and the number and distribution of accessible pools across San Francisco was sufficient to provide program access to the City's aquatic program, RT 2767:8-2769:17; DTX F16; (2) forty-three of the City's seventy-three recreation centers and clubhouses were designated as "blue dot" accessible, and the number and distribution of accessible recreation centers

and clubhouses across San Francisco was sufficient to provide program access to the RecPark programs offered at those locations, RT 2771:3-2772:12; DTX F40; and (3) twenty of the City's forty-five athletic fields were designated as "blue dot" accessible, and the number and distribution of accessible athletic fields across San Francisco was sufficient to provide program access to the City's athletic field program. RT 2769:18-2771:2; DTX F34.

226. In forming his program access opinions, Hecker relied exclusively on the determinations of Scott (i.e., MOD's Deputy Director of Physical Access) as to which facilities offered accessible programs and services, i.e., the "blue dot" designations. RT 2768:4-23. Scott is a licensed architect with more than twenty years of experience working on architectural access issues and a former member of the U.S. Access Board's Recreation Access Advisory Committee and Places of Amusement Committee. RT 1771:21-1773:22, 1775:9-11. Hecker stated that he had a high degree of confidence in the reliability of Scott's designations as a result of Scott's knowledge of accessibility issues and the process employed by the City to ensure the design and construction of accessible City facilities. RT 2762:17-2763:12, 2769:2-15.

227. Furthermore, as of December 2009, 77 of the City's 133 children's playgrounds (58 percent) were designated as "blue dot" accessible, and an additional 15 playgrounds were slated for renovation pursuant to funded RecPark capital projects. RT 1815:9-20; PTX 0148A. As Kirola has made no showing to the contrary,

the Court finds the number and distribution of accessible playgrounds to be sufficient to provide program access to the City's network of children's playgrounds. PTX 0148A.

228. Notably, Kirola failed to provide a program access analysis that refutes the conclusion that the City offers program access through its "blue dot" libraries, pools, recreation centers, clubhouses, athletic fields, and playgrounds. Specifically, Kirola has not shown that each of the designated "blue dot" facilities (designations on which Hecker's program access conclusions rely) fails to fulfill the City's program access intent. *See*, *e.g.*, RT 726:5-727:11, 1344:7-1345:13, 1357:15-15. Kirola's experts instead emphasized that not all of the "blue dot" facilities were 100 percent compliant with disability access regulations. The flaw in that conclusion is that it misapprehends the significance of the "blue dot" designations. Trial testimony establishes that such designation is intended to represent that the site is fulfilling the City's obligations under UPhAS, not that every element of the facility was "completely accessible" pursuant to applicable access regulations. RT 1463:8-1464:23.

3. Grievance Procedure

229. On behalf of the City, Hecker credibly opined that the City's grievance procedure is consistent with the requirements of ADA regulations. RT 2727:5-19. In particular, he found significant that the grievance procedure allows members of the public to

submit complaints in any manner they wished to communicate and requires the City to issue a response within thirty days. RT 2727:5-19. The Court affords significant weight to his opinion regarding the sufficiency of the City's grievance procedure.

230. The Court is unpersuaded by Margen's opinion that the City's grievance procedure is flawed due to its failure to specify a definitive timeline for resolution of each access complaint received. RT 219:23-220:18. The DOJ's model grievance policy does not mandate a specific deadline for resolving each access complaint. *See* ADA Best Practices Tool Kit for State and Local Gov'ts, Ch. 2, p. 10-11. The Court therefore affords little weight to Margen's opinion regarding the adequacy of the City's grievance procedure.

IV. *CONCLUSIONS OF LAW*

A. LEGAL OVERVIEW

1. Claims

1. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. Under the ADA's implementing regulations, "no qualified individual with a disability shall, because a public entity's facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a

public entity, or be subjected to discrimination by any public entity." 28 C.F.R. § 35.149.

2. Section 504 of the Rehabilitation Act prohibits discrimination on the basis of handicap in any program or activity receiving Federal financial assistance. 29 U.S.C. § 794. A "program" or "activity" means, in part, "all of the operations" of a state or local agency. *Id.* § 794(b). "There is no significant difference in the analysis of the rights and obligations created by the ADA and Rehabilitation Act." *Zukle v. Regents of the Univ. of Cal.*, 166 F.3d 1041, 1045 n. 11 (9th Cir.1999); *accord Armstrong v. Davis*, 275 F.3d 849, 862 (9th Cir.2001), *abrogated on other grounds by Johnson v. Cal.*, 543 U.S. 499, 504-505, 125 S.Ct. 1141, 160 L.Ed.2d 949 (2005).

3. Title 42, United States Code, section 1983, "provides a cause of action for the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States." *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990) (quoting 42 U.S.C. § 1983). Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights conferred elsewhere. *Graham v. Connor*, 490 U.S. 386, 393-94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

4. The Unruh Act provides that persons with disabilities have equal access to streets, highways, public places, public conveyances, places of public accommodation, and housing. Cal. Civ. Code §§ 51, 54(a).

A violation of the ADA constitutes a violation of the Unruh Act. *Id.* § 51(f).

5. The CDPA provides that "individuals with disabilities shall be entitled to full and equal access . . . to . . . places of public accommodation." Cal. Civ. Code § 54.1. "A violation of the right of an individual under the [ADA] also constitutes a violation [of the CDPA]." *Id.* § 54.1(d).

6. California Government Code § 11135 provides that no person in the State of California shall, on the basis of disability, "be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." Cal. Gov't Code § 11135.

7. Aside from the ADA and Section 11135 claims, the parties do not specifically discuss or analyze any of the other claims, all of which rely on the City's alleged violation of the ADA. Accordingly, the Court's analysis of Kirola's ADA claim applies with equal force to the Rehabilitation Act, Unruh Act and CDPA claims.

8. The decision of whether to grant or deny permanent injunctive relief under Title II of the ADA is a matter of the district court's discretion. *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 851 (9th Cir.2001) (affirming denial of permanent injunction where the plaintiff failed to "present facts showing a threat of immediate, irreparable harm").

2. Standing

9. The City contends that Kirola, the sole class representative, lacks standing to sue for the alleged denial of meaningful access with respect to the City's programs, services and activities, or to challenge any of the various policies which allegedly show that her injury is likely to recur. Dkt. 666. The defense of lack of subject matter jurisdiction may be raised at any time, and the court is under a continuing duty to examine its jurisdiction. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983).

10. "[T]hose who seek to invoke the jurisdiction of the federal courts must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). To satisfy the "case or controversy" requirement, a plaintiff must establish standing under Article III. *Human Life of Wash., Inc. v. Brumsickle*, 624 F.3d 990, 1000 (9th Cir.2010).

11. "[I]n order to have Article III standing, a plaintiff must adequately establish: (1) an *injury in fact* (i.e., a concrete and particularized invasion of a legally protected interest); (2) *causation* (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) *redressability* (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)." *Sprint Commc'n Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 273-74, 128 S.Ct.

2531, 171 L.Ed.2d 424 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)) (emphasis added). "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-104, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998).

12. Where, as here, a plaintiff seeks only declaratory and injunctive relief, she must additionally show "a very significant possibility of future harm." *Montana Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 979 (9th Cir.2013); *Clapper v. Amnesty Int'l USA*, ___ U.S. ___, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (noting that standing may be based on threatened injury only if it is "certainly impending to constitute injury in fact, and that allegations of possible future injury are not sufficient.") (citations, internal quotation marks, and brackets omitted). "To have standing to assert a claim for prospective injunctive relief, a plaintiff must demonstrate 'that he is realistically threatened by a repetition of [the injury].' " *Melendres v. Arpaio*, 695 F.3d 990, 997 (9th Cir.2012) (quoting *City of L.A. v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)).

13. The standing requirement applies to class representatives, who must, in addition to being a member of the class they purport to represent, establish the existence of a case or controversy. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974). "A plaintiff must demonstrate standing for each claim

he or she seeks to press and for each form of relief sought." *Wash. Envtl. Council v. Bellon*, 732 F.3d 1131, 1139 (9th Cir.2013) (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006)).

B. PRELIMINARY ISSUES

14. Before reaching the question of whether Kirola has Article III standing, the Court addresses four preliminary contentions concerning the constellation of evidence which may be considered in analyzing her standing: (1) whether standing may be established by evidence that was not presented at trial; (2) whether Kirola's experience with barriers in her neighborhood is sufficient to confer standing to sue for barriers she did not encounter; (3) whether standing may be established based on the experiences of class members; and (4) whether Kirola has standing to challenge the City's alleged "overarching policy" of discrimination.

1. Scope of the Evidence

15. The City contends that Kirola's standing is to be evaluated based solely on the evidence presented at trial; namely, her in-court testimony. In contrast, Kirola argues that the Court is not limited to the trial record, and that the Court should consider evidence obtained or produced during discovery—irrespective of whether such evidence was previously presented to the Court. For the reasons that follow, the Court finds that

Kirola's standing is to be determined based on the trial record.

16. Standing is a core component of Article III's case or controversy requirement, and as such, it must be established "through all stages of federal proceedings." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130. For instance, general factual allegations of injury resulting from a defendant's conduct may suffice at the pleading stage; but in response to a motion for summary judgment, a plaintiff cannot rely on "'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' . . . which for purposes of the summary judgment motion will be taken to be true." *Id.* (citing Fed. R. Civ. P. 56(e)). "At the final stage, those facts (if controverted) must be 'supported adequately by the evidence adduced at trial.'" *Id.* (citing *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 n. 31, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)).

17. An assessment of standing based on the trial record is both permissible and appropriate, particularly where, as here, the plaintiff's standing is disputed. *See Maine People's Alliance And Natural Res. Def. Council v. Mallinckrodt, Inc.*, 471 F.3d 277, 283 (1st

Cir.2006) ("When, as now, standing is reviewed after trial, the facts establishing standing 'must be supported adequately by the evidence adduced at trial.' ") (citing *Lujan*, 504 U.S. at 561, 112 S.Ct. 2130); *Perry v. Vill. of Arlington Heights*, 186 F.3d 826, 829 (7th Cir.1999) (" '[W]here standing is challenged as a factual matter, the plaintiff bears the burden of supporting the allegations necessary for standing with "competent proof." . . . "Competent proof" requires a showing by a preponderance of the evidence that standing exists.' ") (citations omitted); *Biopolymer Eng'g, Inc. v. Immudyne, Inc.*, No. 05-2972 (JNE/JJG), 2009 WL 2916847, *3 (D.Minn. Sept. 4, 2009) ("Plaintiffs bear the burden of establishing their standing. The Court will determine whether they have satisfied that burden based on the evidence received at trial."); *see also Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983) ("The defense of lack of subject matter jurisdiction cannot be waived, and the court is under a continuing duty to dismiss an action whenever it appears that the court lacks jurisdiction.").

18. Here, Kirola has long been on notice that the City disputes whether she has standing and that such determination would be adjudicated at trial. Although the City chose not to pursue the standing issue in connection with Plaintiff's class certification motion, the Court's order on that motion expressly stated that Kirola's standing "[would] be made following trial based upon the evidence presented and the relief requested." Dkt. 285, 3:23-24. Despite this awareness, Kirola offered only minimal testimony at trial to

establish that *she* suffered an injury in fact. Specifically, Class Counsel only elicited testimony from Kirola regarding: (1) three stretches of sidewalk containing "bumps"; (2) one corner that lacked curb ramps; (3) one corner that provided only a single curb ramp; (4) errant step stools at three of the City's libraries; (5) three inaccessible pools; and (6) steep paths at one park. RT 1384:13-21, 1382:4-18, 1387:2-4, 1385:3-1386:8, 1386:1519, 1388:5-7.

19. Apparently recognizing the insufficiency of her trial testimony, Kirola now argues in her post-trial briefing that the Court must also consider evidence that was not presented at trial. Dkt. 672, 13:22-14:3, 17:16-18:4, 18:15-26, 19:12-25. More specifically, Kirola points to certain portions of her deposition testimony and the declaration she submitted in support of her motion for class certification to establish that she encountered barriers in addition to those to which she testified at trial. Kirola's post hoc effort to supplement the trial record is unavailing. The Supreme Court has made it clear that when standing is disputed at "the final stage" of a case, standing must be established by "evidence adduced *at trial.*" *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *Maine People's Alliance*, 471 F.3d at 283; *Perry*, 186 F.3d at 829.

20. Limiting the evidence of Kirola's standing to the trial record is necessary and appropriate as a matter of due process. Both Kirola's deposition testimony and her declaration constitute inadmissible hearsay. Fed. R. Evid. 801(c); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 779 (9th Cir.2002) ("Deposition testimony,

irrespective of its contents, is ordinarily hearsay when submitted at trial"); *but see* Fed. R. Civ. P. 32(a)(4) (providing an exception to the hearsay rule for deposition testimony where the witness is unavailable). Namely, both documents consist of out-of-court statements offered to establish the truth of the matter asserted—to wit, that Kirola did, in fact, encounter access barriers as described and consequently suffered an injury in fact. Kirola has not shown that these statements are subject to any hearsay exception, and otherwise provides no authority suggesting that it would be fair or appropriate for the Court to consider her out-of-court statements, which were not subject to cross-examination by the City at trial.[12]

21. In sum, the Court finds that Kirola's standing must be evaluated based on the trial record. Consequently, Kirola cannot rely on her deposition testimony or statements presented in a declaration previously filed in support of her class certification motion to bolster the trial record for the purpose of establishing her standing. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *cf. Simon v. Shearson Lehman Bros.*, 895 F.2d 1304, 1323 (11th Cir.1990) (when a party chooses not to present

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[12] The vast majority of the deposition testimony Kirola now wishes the Court to consider was never previously presented to the Court. Although the first volume of Kirola's deposition was submitted to the Court in connection with the motion for class certification, the second volume of her deposition, as Class Counsel now admits, was never previously provided to the Court. Dkt. 673, 1:13-17; *see also* Dkt. 189-2, Exh. 15. All but one alleged access barrier which Kirola now wishes the Court to consider was discussed in the second volume. Dkt. 673.

evidence at trial for strategic or tactical reasons, it is not an abuse of discretion to deny the party's request to re-open the record before entry of judgment).

2. Neighborhood Access

22. Kirola avers that she suffered an actual injury as a result of encountering access barriers in and around her neighborhood. While recognizing that accessible programs, services and facilities may be available elsewhere in the City, Kirola contends that the City is obligated to ensure that its programs and services are accessible on a neighborhood basis. *E.g.*, Dkt. 604, 20:8-9, 25:2-4. By extension, Kirola contends that she has standing to sue for access barriers in other areas of San Francisco that she did not actually encounter.

23. As support for her position, Kirola relies principally on *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 943 (9th Cir.2011) (en banc) ("*Chapman I*"). In that case, a mobility-impaired individual brought an individual Title III public accommodations action against a retailer, Pier 1, claiming that he encountered barriers at a particular location of a national retailer that impeded his access. The court held that when a plaintiff "has suffered an injury in fact by encountering a barrier that deprives him of full and equal enjoyment of the facility due to his particular disability," he has standing to sue for injunctive relief, "either by demonstrating deterrence, or by demonstrating injury-in-fact coupled with an intent to return to a noncompliant

facility." *Chapman I*, 631 F.3d at 944. Additionally, the court held that "an ADA plaintiff who establishes standing as to encountered barriers may also sue for injunctive relief as to unencountered barriers related to his disability." *Id.*

24. Kirola argues that like the plaintiff in *Chapman I*, it is unnecessary for purposes of standing that she actually encountered the barriers which she seeks to address, and that standing may be established based solely on her experience with facilities in her neighborhood. *Chapman I*, however, is distinguishable in at least two critical respects. First, *Chapman I* was an individual lawsuit and thus did not address the standards for evaluating standing in a class action. Second, the claims in *Chapman I* were premised on Title III of the ADA, as opposed to Title II, which does not require that each individual site at which a public service is offered be accessible, so long as the program, activity or service, "when viewed in its entirety," is readily accessible. *See* 28 C.F.R. § 35.150(a) & (a)(1) ("This paragraph does not . . . [n]ecessarily require a public entity to make each of its existing facilities accessible to and usable by individuals with disabilities."). "In contrast, Title III of the ADA, which governs places of public accommodation, imposes ***more stringent*** *requirements* aimed at ensuring that ***every facility is equally accessible*** to disabled persons." *Cohen*, 754 F.3d at 695 n. 4 (citing *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 882 (9th Cir.2004)) (emphasis added); *see also* Cary LaCheen, Using Title II of the Americans with Disability Act on

Behalf of Clients in TANF Programs, 8 GEO. J. ON POVERTY L. & POL'Y 1, 119-20 (2001) ("Given . . . the fact that the unit of analysis for determining accessibility is different under Title II and Title III, Title III will often be a more stringent access standard for a particular program site than Title II.").[13]

25. Because the proper unit of analysis under Title II of the ADA is ***programs and services***—not the ***individual sites*** at which they are offered—it is possible for a program, when viewed in its entirety, to be in compliance with the ADA, even if some aspects of facilities where the programs are offered are inaccessible. *E.g.*, *Daubert*, 760 F.3d at 987-988 (holding that the mere fact that some of the bleachers in the football stadium were not accessible did not result in the denial of program access to the school district's football program); *Bird v. Lewis & Clark College*, 303 F.3d 1015, 1022 (9th Cir.2002) ("Accessibility is not location-dependent; rather, as we have explained, the essential inquiry is whether the program overall is accessible"). Accordingly, a Title II plaintiff cannot establish standing

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[13] In addition, unlike Title III, ADA Title II regulations also allow public entities to utilize a variety of methods to render existing facilities "readily accessible," including the "reassignment of services to accessible buildings" and the "delivery of services at alternate accessible sites," among others. 28 C.F.R. § 35.150(b); *see also Tenn. v. Lane*, 541 U.S. 509, 511, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004) ("Title II does not require States to employ any and all means to make . . . services accessible or to compromise essential eligibility criteria for public programs. It requires only `reasonable modifications' that would not fundamentally alter the nature of the service provided, and only when the individual seeking modifications is otherwise eligible for the service.").

by merely pointing to a few isolated access barriers in her neighborhood. Rather, to establish standing, a Title II plaintiff must show that the barriers she encountered amounted to a wholesale denial of "meaningful access" to the challenged program, service, or activity, when viewed in its entirety. *See Armstrong*, 275 F.3d at 861 (citing *Alexander v. Choate*, 469 U.S. 287, 295, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985)).

26. The two out-of-circuit district court cases cited by Kirola are likewise unavailling. *See Kerrigan v. Philadelphia Bd. of Elections*, No. 07-687, 2008 WL 3562521, *17-18 (E.D.Pa.2008); *Westchester Disabled on the Move, Inc. v. Cnty. of Westchester*, 346 F.Supp.2d 473, 478 (S.D.N.Y. 2004). Both of those cases involved the provision of accessible polling places on a neighborhood basis, and presented issues including the threat of voter disenfranchisement and the fact that registered voters are specifically assigned to polling places near their registered addresses so as to encourage and facilitate voting. *See*, *e.g.*, *Kerrigan*, 2008 WL 3562521, *1 (noting that the Philadelphia Board of Elections and the Commissioners of the City of Philadelphia "assign each registered voter to a specific division near his or her home" and estimating there to be between 1,000 and 1,200 polling places in the City of Philadelphia). The issues relating to the location of polling places and whether voters have access to a public entity's "program of voting" are separate and distinct from whether disabled persons have program access to the City's facilities and public right-of-way. Accordingly, the Court finds these cases to be inapposite.

27. In sum, the Court finds no merit to Kirola's contention that she need only establish that she encountered barriers within her neighborhood in order to have standing to seek injunctive relief with respect to the City's programs, services and activities at issue. She must instead prove that she was denied access to the foregoing in their entirety.[14]

3. Testimony of Class Members

28. Kirola argues that she may satisfy her burden of demonstrating standing based on the experiences of persons other than herself; to wit, class members. Dkt. 672, 13:22-14:3. This contention also lacks merit. "[I]n class actions, the named representatives must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Pence v. Andrus*, 586 F.2d 733, 736-37 (9th Cir.1978) (internal citations omitted); *see also Sierra Club v. Morton*, 405 U.S. 727, 734-35, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972) (holding that "the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."). As such, "if none of the named plaintiffs purporting to represent a

[14] Furthermore, as set forth above, the Court finds that the testimony proffered by Kirola's experts in support of Kirola's neighborhood theory lacks credibility. Not only do such experts' conclusions conflict with the law, they are unsupported by any discussion of professional or industry understandings of Title II's program access requirements.

class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea*, 414 U.S. at 494, 94 S.Ct. 669; *Cornett v. Donovan*, 51 F.3d 894, 897 n. 2 (9th Cir.1995) ("if the representative parties do not have standing, the class does not have standing.").

29. Kirola cites *Armstrong* for the proposition that the experiences of other class members may be considered in assessing whether she has standing. Dkt. 672, 13:28. In *Armstrong*, a class of disabled prisoners and parolees brought a class action alleging that policies and practices related to parole and parole revocation hearings violated the ADA. 275 F.3d at 854-55. The Ninth Circuit held that when prospective injunctive relief is sought, the plaintiff must show not only that he suffered an actual injury, but also that he is "realistically threatened" with a repetition of the violation which led to that injury. *Id.* at 861-62. A likelihood of recurrence may be shown where the injury stems from a written policy or the harm is part of a pattern of officially sanctioned conduct. *Id.* at 861. In discussing the latter theory of recurrence, the court explained that "[w]hen a named plaintiff asserts injuries that have been inflicted upon a class of plaintiffs, [the court] may consider those injuries in the context of the harm asserted by the class as a whole, to determine whether a credible threat that the named plaintiff's injury will recur has been established." *Id.*

30. Kirola's analysis of *Armstrong* mixes apples with oranges. *Armstrong* discusses two separate components to standing: First, the named plaintiff's ***actual injury***; and second, the realistic ***threat of repetition***, i.e., whether the plaintiff's injury is likely to recur, which applies where injunctive relief is sought. *Id.* at 860-61. The court found that in connection with the latter, injuries suffered by class members may be pertinent. *Id.* at 861. Significantly, nowhere in its opinion did the *Armstrong* court state that the threshold inquiry of whether the named plaintiff suffered an injury in fact may be analyzed based on evidence of harm sustained by the class. *Armstrong* thus provides no support for Kirola's claim that the Court must consider the experiences of class members in determining whether the named plaintiff suffered an actual injury. The Court therefore declines to consider the testimony of other class members in assessing whether Kirola satisfied her burden of establishing that she "personally" has been injured as a result of the policies and practices at issue in this case. *See Pence*, 586 F.2d at 736-37 (holding that a named class representative's standing must be based on the injury he sustained, as opposed to those suffered by class members).

4. "Overarching Policy"

38. Finally, Kirola argues that she need not demonstrate her standing to challenge each of the eleven policies and procedures she identified in post-trial briefing. Rather, Kirola now asserts that the City has an "overarching policy of leaving disability access

barriers in place," and that she has standing to challenge this "official" policy. Dkt. 672, 1:16-28, 5:6-20:4, 25:18-19. She denies that this is a newly-asserted theory of liability, and claims that the Court characterized the case in this manner in its order granting her motion for class certification. Dkt. 681, 2:24-3:4.

39. As an initial matter, Kirola's contention directly contradicts her prior representation to the Court that she is specifically challenging the eleven policies and practices identified in her prior post-trial briefing. Dkt. 662, 13:12-14:17. That aside, Kirola's "overarching policy" argument makes no sense. The mere fact that an access barrier is left "in place" does not automatically demonstrate a violation of Title II of the ADA. Title II emphasizes "program access," which entails reviewing the program or service in its entirety, as opposed to whether every element of a facility through which a program or service is presented is fully accessible. *See Daubert*, 760 F.3d at 986. Consequently, a barrier may be left in place without necessarily violating Title II.

40. Kirola cites *Arreola v. Godinez*, 546 F.3d 788, 795 (7th Cir. 2008), for the proposition that this Court, in determining standing, must look at the "case as a whole, rather than picking apart its various components to separate the claims for which the plaintiff will be entitled to relief from those for which he will not." Dkt. 672, 3:9-12. *Arreola* involved an interlocutory review of a class certification order, and as such, the court focused on the allegations in the plaintiff's complaint to determine if he had satisfied his burden to establish

standing at the pleading stage. 546 F.3d at 795. *Arreola* is inapposite, where, as here, the issue of standing is being evaluated based on evidence presented at trial. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130.

41. Irrespective of whether Kirola frames her challenge as one to an "overarching" policy or to eleven specific policies and practices, Kirola lacks standing in either instance. As will be established in the sections that follow, Kirola has not shown that she has suffered an injury in fact resulting from any access barrier she testified to having encountered. Having failed to make this showing, she cannot, by extension, demonstrate any injury resulting from any allegedly impermissible policy or practice.

5. Summary

42. Kirola must demonstrate that she has standing based upon *her* personal experience as set forth in her trial testimony, and not upon the experiences of class members or any extra record evidence. In addition, Kirola must establish that she was personally denied meaningful access to the challenged programs, services and activities in their entirety, as opposed to specific facilities. The Court now addresses whether Kirola has met her burden of establish standing within the meaning of Article III.

C. ARTICLE III STANDING

43. The City challenges Kirola's standing, arguing that she has failed to demonstrate that she suffered an injury in fact or demonstrated that her injuries will be redressed by a favorable decision in this action.[15] In addition, the City argues that Kirola has not established a likelihood of recurrence—an additional standing requirement in cases where prospective injunctive relief is sought.

44. The Court agrees that Kirola has failed to carry her burden of establishing standing by a preponderance of evidence with respect to the challenged programs, services and activities. *See Lujan*, 504 U.S. at 561, 112 S.Ct. 2130; *Perry*, 186 F.3d at 829.

1. Injury in Fact

45. To establish injury in fact under the ADA, a plaintiff must show that she has been deprived of "meaningful access" to a challenged service, program, or activity in its entirety. *Armstrong*, 275 F.3d at 861 (citing *Choate*, 469 U.S. at 295, 105 S.Ct. 712); *Fortyune*

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[15] Though the City mentions causation, it does not specifically address that element. Nonetheless, the Court notes that the "'fairly traceable' and 'redressability" components for standing overlap and are 'two facets of a single causation requirement.'" *Wolfson v. Brammer*, 616 F.3d 1045, 1056 (9th Cir.2010) (citing *Allen v. Wright*, 468 U.S. 737, 753 n. 19, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984)). The fairly traceable or causation requirement examines the connection between the alleged misconduct and injury, whereas redressability analyzes the connection between the alleged injury and the requested relief. *Id.*

v. City of Lomita, 766 F.3d 1098, 1102 (9th Cir.2014) (holding that program access requires that "the city's system of sidewalks and pedestrian walkways," when viewed in their entirety, "be 'readily accessible to and useable by individuals with disabilities.' "); 28 C.F.R. § 150(a). Whether program access is being provided "is necessarily fact specific." *Pierce v. Orange Cnty.*, 526 F.3d 1190, 1222 (9th Cir.2008).

46. Kirola alleges that she encountered "numerous access barriers that denied, limited or interfered with her ability to access the City's pedestrian right of way." Dkt. 672, 17:4-5. However, Kirola, who testified only briefly, offered minimal testimony at trial to establish that she suffered an injury in fact. Specifically, Kirola only briefly discussed: (1) three stretches of sidewalk containing "bumps," (2) a sidewalk where her wheelchair became stuck in a tree well; (3) one street corner that lacked curb ramps, (4) one street corner that provided only a single curb ramp, (5) errant step stools at three of the City's libraries, (6) three inaccessible pools, and (7) steep paths at one park. *See* RT 1384:13-21, 1382:4-18, 1387:2-4, 1385:3-1386:8, 1386:15-19, 1388:5-7.

47. Starting first with the City's system of sidewalks and pedestrian walkways, the Court finds that Kirola has failed to show that it is inaccessible and unusable in its entirety. The City's public right-of-way consists of approximately 2,000 miles of sidewalks, 27,585 street corners, and 7,200 intersections. RT 2391:23-25, 2447:6-18. Yet, Kirola only testified regarding accessibility issues she experienced with three sidewalks, a

tree well, and a single street corner lacking curb ramps. RT 1381:14-21, 1384:13, 1386:221387:18. Even then, little, if any, testimony was offered or elicited as to the nature and extent of the uneven sidewalks from which the Court could ascertain whether the purported defect constitutes an access barrier within the purview of the ADA.[16]

48. Although Kirola testified that, on occasion, she "had to make a conscious effort to take a different route" due to uneven sidewalks or missing curb ramps, RT 1384:810, 1382:8-9, the probative value of such testimony is undermined by the complete lack of any facts or details regarding any alternate route that she was required to take. *See Cohen*, 754 F.3d at 697 ("The ADA allowed [the city of] Carlsbad to compel disabled persons to travel a 'marginally longer route' under some 'limited circumstances,' as long as its programs were still accessible as a whole. The mere fact that some city sidewalks did not have curb ramps was therefore insufficient to create a triable issue as to whether Carlsbad violated Title II.") (citing *Schonfeld v. City of Carlsbad*, 978 F.Supp. 1329, 1341 (S.D.Cal.1997)); ADA

[16] As an ancillary matter, Kirola complains that the City's historic curb ramp design standards in effect from 1994 to 2004 resulted in the design and installation of curb ramps that included a half-inch lip in violation of ADA regulations. Dkt. 662, 13:20-22. Although the City's current curb ramp design standards have since eliminated use of the half-inch lip, Kirola apparently takes issue with the fact that not all of the lips have been removed. Nonetheless, no evidence was adduced at trial that Kirola encountered a curb ramp having a half-inch lip, let alone experienced any difficulty navigating a half-inch lip while using a motorized wheelchair.

Title II Technical Assistance Manual, II-5.3000 Curb Ramps ("Alternative routes . . . may be acceptable under the concept of program accessibility in the limited circumstances where individuals with disabilities need only travel a marginally longer route."); *c.f. Frame v. City of Arlington*, 657 F.3d 215, 236 (5th Cir.2011) (noting that standing was shown at the pleading stage where "the plaintiffs have alleged *in detail* how specific inaccessible sidewalks negatively affect their day-to-day lives by forcing them to take longer and more dangerous routes to their destinations.") (emphasis added).

49. With regard to the City's RecPark program, which consists of approximately 220 parks spanning 4,200 acres of park space and 400 structures (i.e., clubhouses, recreation centers, etc.), Kirola complained of accessibility issues at only one park: Alamo Square Park. RT 2264:13-17, 2302:12-16, 1385:3-16, 1394:2-4. Kirola testified only that the entrance "is steep to use" and that she was unable to enter the children's play area, ostensibly attributable to steep paths. RT 1385:3-16, 1394:2-4. The fact that Kirola was unable to access one area of the park does not establish an ADA injury. Indeed, one of her experts (Steiner) testified that "even just [access to] a small part of the park would be sufficient to provide program access." RT 717:10-21. In any event, Kirola offered no specific information regarding measurements, dimensions, or slopes of the paths at Alamo Square Park, which she admits is located on a steep hill. RT 1394:2-3. Although Kirola is not expected or permitted to offer expert testimony regarding

whether the entrance and paths at Alamo Square Park are ADA-compliant, her testimony is too general to persuade the Court that she was denied meaningful access to the park, let alone meaningful access to the City's RecPark program in its entirety.

50. Equally uncompelling is Kirola's testimony regarding her experiences at Balboa Pool, Garfield Pool and Rossi Pool. She alleges that Balboa Pool is inaccessible due to its steep entrance ramp and inadequate locker rooms, and that Garfield Pool lacks sufficient clearance in the locker room and restrooms. Though Kirola has not used Rossi Pool, she was deterred from going there based on the comments of others. RT 1388:5-6, 388:7-17, 1386:12-19. The fact that Kirola may have experienced accessibility issues with these three pools is insufficient to demonstrate that she suffered an actual injury resulting from the denial of meaningful access to the City's aquatic program. None of these three pools has been designated as a fully-accessible pool, and the City does not rely on them to provide program access. DTX F16.[17] In contrast, the Court is persuaded that the City's aquatic program, when viewed in its entirety, provides program access. Kirola's ability to meaningfully access the City's aquatic program is underscored by the fact that she regularly uses Hamilton and MLK Pools, which were previously

[17] With regard to Sava Pool, Kirola noted that the sidewalk is cracked near the facility but that the pool itself is accessible. RT 1386:22-1387:13

renovated and designated by the City as accessible. RT 1392:17-1393:23.

51. Finally, Kirola has not shown an injury in fact resulting from the lack of program access to the City's library program. The only "barriers" she encountered were the occasionally misplaced step stools at three libraries (the Main Library and the Western Addition and Parkside Branch Libraries) which impeded her aisle access. RT 1386:1-2. However, the ADA applies to architectural barriers, not temporary or removable obstructions. *See Sharp v. Island Restaurant-Carlsbad*, 900 F.Supp.2d 1114, 1126-27 (S.D.Cal.2012) (misplaced chairs blocking the path of travel to a restroom were not architectural barriers under the ADA); *see also Cal. Council of the Blind v. Cnty. of Alameda*, 985 F.Supp.2d 1229, 1240 (N.D.Cal.2013) (noting that 28 C.F.R. § 35.133 does not prohibit isolated or temporary interruptions in service or access due to maintenance or repairs). Whether a barrier is temporary or removable presents a question of fact. *See Cal. Council of the Blind*, 985 F.Supp.2d at 1240 (noting that "the duration of, frequency of, and reason for the failure of accessible voting machines to operate properly is a question of fact.").

52. Based on the record developed at trial, the Court is persuaded that the misplaced step stools encountered by Kirola are not architectural barriers. On a daily basis, the City requires its library staff to use a Daily Facility Checklist to inspect for any obstructions and to maintain the accessibility of each library facility. RT 2235:222237:13, 2252:10-2253:21; DTX A45.

Thus, even if library staff only checked for misplaced stools once a day—which Kirola has not shown—such "barrier" would temporarily exist for no more than twenty four hours. Moreover, Kirola testified that she did not encounter misplaced stools the majority of times she used these three libraries, RT 1386:6-12, and there is no evidence that she experienced any inability or difficulty in utilizing the services at these particular libraries, or with respect to the City's library program in its entirety.

53. Citing *Chapman v. Pier 1 Imports*, 870 F.Supp.2d 995 (E.D.Cal.2012) ("*Chapman II*"), Kirola argues that misplaced stools, in fact, may qualify as an accessibility barrier under the ADA. In *Chapman II*, the plaintiff brought an action against a retail store known as Pier 1 Imports ("Pier 1"), claiming, inter alia, that the store aisles were blocked by merchandise, which, in turn, impeded his access in violation of Title III of the ADA. In its summary judgment motion, Pier 1 argued that the obstructions were "only temporary," and that regulations promulgated under the Title III of ADA do not impose liability for "isolated or temporary" interruptions to accessibility. *Id.* (citing 28 C.F.R. § 36.211(b)).[18] In addressing this argument, the court explained that a "temporary" maintenance barrier is "an object that is unavoidably placed in the aisle, but with the intention of removing it as soon as possible." *Id.* The court denied defendant's motion for summary judgment, finding that there was a factual dispute

[18] Section 36.211 is the Title III analogue to 28 C.F.R. § 35.133, which applies in Title II cases.

regarding whether the blockages were isolated or temporary, and that the plaintiff had presented evidence that the barriers were recurring and prevented him from accessing store merchandise. *Id.* at 1009.

54. Kirola argues that, like the merchandise in *Chapman II*, the stools are not merely "temporary" barriers because library staff only conduct a full inspection of facilities once per day, and therefore, the stools are not removed "as soon as possible." *Chapman II* is distinguishable. Whereas the merchandise in the Pier 1 store aisles was intentionally placed there by store employees, there is no evidence that the step stools were placed in the stacks as a routine matter by library staff. To the contrary, the limited testimony presented by Kirola on this issue suggests that the stools were placed in the aisle by other library patrons. In addition, unlike the plaintiff in *Chapman II* Kirola has made no showing that the occasional misplaced stools interfered with her ability to access library services at a particular library, let alone precluded her access to the City's network of libraries in its entirety. 28 C.F.R. § 35.150(a).

55. In sum, the Court finds that Kirola has failed to show, by a preponderance of the evidence, that she has constitutional standing to bring any of the claims alleged in her FAC. Accordingly, she lacks standing to pursue this action individually or on behalf of the class she was appointed to represent.

2. Redressability

56. Even if Kirola had suffered an actual ADA injury, she has not shown redressability, as required under *Lujan.* In order to demonstrate redressability, a plaintiff must show that plaintiff "personally would benefit in a tangible way from the court's intervention." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 n. 5, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (citing *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). Furthermore, any "remedy must of course be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Lewis v. Casey*, 518 U.S. 343, 357, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

57. Kirola seeks a broad permanent injunction relating to virtually every aspect of the City's operation and management of its facilities, programs and services. Dkt. 635. However, the nexus between Kirola's injury and the relief sought is lacking.

58. With regard to curb ramps, Kirola seeks an injunction requiring the City to, within ten years of judgment, construct an accessible curb ramp at every existing or potential curb ramp location, except for those locations where the City is able to document that a curb ramp is not required. Dkt. 632, 2:24-3:10.[19] But

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[19] Kirola asserts that she selected the ten-year time frame to allow the City to plan barrier removal in harmony with its existing ten-year capital planning process. Dkt. 672, 14:28-15:3. Trial testimony shows, however, that the City's ten-year capital plan is a mere planning tool, not a set schedule or budget, and that the

curb ramp saturation—which is not required under the ADA—is already part of the Curb Ramp and Sidewalk Transition Plan. Although the City's curb ramp transition plan does not contain a specific deadline for completion, the City anticipates achieving curb ramp saturation within approximately twelve years. Dkt. 657, 4:12-13. There is no evidence that the marginally expedited deadline (ten vs. twelve years) proposed by Kirola would redress any supposed injury she suffered due to missing curb ramps. In fact, Kirola's sole curb ramp request (for the corner of McAllister and Fillmore) was fulfilled in less than two years and would not have been constructed any sooner under her proposed injunction. RT 1383:19-1884:8, 1391:18-1392:2. As such, Kirola's proposed remedy would not have resulted in a more expeditious response to her request.[20]

59. Redressability also is absent with respect to Kirola's accessibility complaints pertaining to the

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City prepares a new ten-year plan each year. RT 1511:4-14, 1534:19-25.

[20] Kirola also complains that the City's Paving Guidelines inappropriately allow the City to defer curb ramp installation in connection with a street paving project for up to twenty-four months when a pre-planned project would require demolition of a newly constructed curb ramp. DTX N23 [000003]. She proposes an injunction eliminating this deferment. Dkt. 635, 5:5-20. However, Kirola acknowledges that, despite having lived in San Francisco for almost twenty years, she has "not yet encountered an inaccessible corner or curb ramp" as a result of the Paving Guidelines or shown that she is likely to do so in the future. Dkt. 672, 18:17-18. Further, no evidence was presented at trial showing that the City has actually deferred installation of a curb ramp under this policy.

City's sidewalks. Kirola proposes an injunction requiring the City to inspect and repair all sidewalk-related barriers along its 2,000 miles of sidewalk in 10 years, and thereafter implement a 15-year inspection cycle—rather than the current 25-year cycle under SIRP (the City's current sidewalk inspection plan). Dkt. 635, 5:1-5. She also insists that, within ninety days of judgment, the City identify alternative, accessible routes wherever the City contends that removal of a sidewalk barrier is unnecessary for program access. Dkt. 635, 4:6-27.

60. Underlying Kirola's proposal for a shorter inspection cycle is her failure to recognize that SIRP operates in tandem with ASAP (i.e., Accelerated Sidewalk Abatement Program). Whereas the SIRP is a "proactive" program in which the City seeks out sidewalks in need of repair, the ASAP is a "reactive" program in which the City repairs sidewalks in response to public complaints. RT 2453:18-2454:12. Accessibility complaints regarding sidewalks are given high priority and responded to immediately, and are typically resolved in ninety days. RT 2454:1-12. Here, Kirola never complained to the City about the three stretches of sidewalk she testified about. Had she done so, the trial record establishes that her complaints would likely have been addressed within a matter of months. The Court is thus unpersuaded that the remedy of requiring the repair of all sidewalks within ten years is necessary or would redress the harm allegedly caused by the three sidewalks about which Kirola testified.

61. With regard to the City's RecPark facilities and pools, Kirola seeks an injunction directing the City to: (1) conduct a survey of every pool, park and recreational facility in the City within nine months of judgment, identifying every facility containing a barrier under ADAAG; (2) prepare a program access plan within eighteen months; and (3) remove all barriers necessary to ensure program access in ten years. Dkt. 632, 7:12-28. Kirola has not established how this proposed remedy would redress any alleged injury.

62. Kirola complained about barriers at Balboa Pool, Garfield Pool and Rossi Pool. The law is clear that the City has no obligation under Title II of the ADA to ensure that each facility through which it offers its aquatics program is fully accessible. Nevertheless, at the time of trial, the City had already embarked on a barrier removal project at Garfield Pool, RT 1813:13-1814:4, and Rossi Pool and Balboa Pool have since been scheduled for barrier removal, Dkt. 658-1. As such, Kirola would not personally benefit in a tangible way from the Court's intervention, since the few barriers she encountered are already being addressed by the City on a more expeditious schedule as compared to her proposed remedy.

63. The same lack of redressability is evident in terms of Kirola's experience using City parks. The only park at which Kirola claimed to have encountered accessibility barriers was Alamo Square Park. RT 1385:5-15. Even if Kirola's vague testimony was sufficient to demonstrate that she was denied meaningful access to Alamo Square Park—which it is not—no showing has

been made that her proposed remedy would correct those purported defects. In addition, a survey of Alamo Square Park to ascertain its compliance with ADAAG would not benefit Kirola because ADAAG's dimensional requirements do not apply to outdoor recreational facilities or open spaces. RT 2048:9-15; 2064:21-25.

64. Finally, with regard to the City's libraries, Kirola seeks an injunction requiring the City to: (1) complete work on both the Bayview Branch Library and the North Beach Branch Library within 2 years; and (2) rectify all alleged barriers identified by Kirola's experts within 120 days. Dkt. 632, 8:27-9:3. However, Kirola presented no evidence that she encountered any accessibility barriers at either of these libraries, or that she has ever attempted, let alone desires, to use either facility. Nor does her proposed injunction bear any relation to the injury she allegedly sustained as a result of having encountered misplaced step stools at three other libraries. As for the second aspect of the proposed remedy, i.e., to rectify barriers identified by her experts, none of them cited the presence of step stools in library aisles. As such, Kirola's proposed remedy regarding the library system would not address her alleged injury, i.e., encountering stools in the stacks at three other libraries.

65. The Court concludes that Kirola has failed to satisfy her burden of demonstrating that any of her injuries resulting from the alleged denial of meaningful access will be remedied by the relief she seeks in this action. *Sprint Commc'n Co.*, 554 U.S. at 274-75, 128

S.Ct. 2531. Thus, independent of her failure to demonstrate that she suffered an injury in fact, Kirola lacks standing based on her failure to prove redressability.

3. Likelihood of Recurrence

66. Even if Kirola had satisfied the *Lujan* test for constitutional standing, she has failed to meet the further requirement applicable in cases where prospective injunctive relief is being sought; that is, that injury is likely to recur. "Likelihood of recurrence is established when the plaintiff shows that 'the defendant had, at the time of the injury, a written policy, and that the injury '***stems from***' that policy.'" *Taylor v. Westly*, 488 F.3d 1197, 1199 (9th Cir. 2007) (emphasis added, citation omitted).

67. There must be "a very significant possibility" that future harm will ensue. *Nelsen v. King Cnty.*, 895 F.2d 1248, 1250 (9th Cir.1990). In the absence of an immediate threat, federal courts must exercise restraint in interfering with government operations. *Midgett v. Tri-Cnty. Metro. Transp. Dist. of Or.*, 254 F.3d 846, 850 (9th Cir.2001) ("This 'well-established rule' bars federal courts from interfering with non-federal government operations in the absence of facts showing an immediate threat of substantial injury." (quoting *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1042-43 (9th Cir.1999)).

68. Here, Kirola contends that her injuries are likely to recur because they arise from eleven City

policies which allegedly violate the ADA. Dkt. 662, 13:15-11. Thus, to show a likelihood of recurrence, Kirola must demonstrate an injury that "stems from" each policy. *See Taylor*, 488 F.3d at 1199. Each policy is discussed below.

a) Curb Ramp and Sidewalk Transition Plan

70. The Curb Ramp and Sidewalk Transition Plan affirms the City's previously existing policy of achieving curb ramp saturation; that is, the practice of installing a curb ramp at every pedestrian crossing in the City. DTX G18. According to Kirola, the City's transition plan "does not comply with the three-year implementation period and the January 26, 1995 deadline established by Title II of the ADA (28 C.F.R. § 35.150(c)) for the completion of any barrier removal necessary for program access." Dkt. 662, 13:15-18.

71. Kirola has failed to demonstrate that she suffered any injury that stems from the Curb Ramp and Sidewalk Transition Plan. Program access does not require curb ramp saturation. *See Cohen*, 754 F.3d at 696 (holding that Title II regulations do "not require the City to build curb ramps at every corner during its transition to compliance with the ADA."). As such, the fact that Kirola encountered a missing curb ramp at one corner and bi-directional curb ramps at another is not attributable to any deficiency in the Curb Ramp and Sidewalk Transition Plan, which actually provides more access than is required by Title II. In addition, the evidence presented at trial shows that Kirola

routinely and independently travels across the City, using the City's public right-of-way, public transportation systems, and paratransit service, which undermines her claim that she has been injured by the denial of program access resulting from the occasional missing curb ramp. RT 1380:12-22, 1392:17-23, 1393:12-23; *see also* Findings of Fact ¶ 142.

b) Historic Curb Ramp Design Standards

72. Next, Kirola complains that the City's historic curb ramp design standards in effect from 1994 to 2004 resulted in the design and installation of curb ramps that included a half-inch lip in violation of ADA regulations. Dkt. 662, 13:20-22. However, no evidence was presented at trial demonstrating that Kirola encountered a curb ramp with a half-inch lip. Accordingly, she cannot legitimately claim that she suffered an injury that stems from the City's historic curb ramp standards or any curb ramp lip that has not yet been removed under the City's current curb ramp design standards. DTX H04; RT 1981:9-1985:6, 1986:23-1991:24.

c) Sidewalk Inspection Repair Plan

73. Kirola next complains that the SIRP "only inspects and repairs access barriers on a 25 year cycle, and . . . fails to comply with the January 26, 1995 deadline for program access." Dkt. 662, 13:18-20. That argument ignores that SIRP operates in tandem with ASAP, a program which ensures that accessibility complaints regarding sidewalks are addressed and

rectified, typically within ninety days. Given that there are 2,000 miles of sidewalks in the City, it is inevitable that Kirola will occasionally experience challenges resulting from cracked or uneven pavement. The fact that defects can and do arise—attributable, for example, to expanding tree roots or occasional ground movement—does not ipso facto demonstrate that there is a defect in any written policy that caused injury to Kirola.

d) Paving Guidelines

74. The City's Paving Guidelines permit the City to defer curb ramp installation for a period of up to twenty-four months in cases where there is a preplanned project that would require demolition of the newly constructed curb ramp. DTX N23. While acknowledging that she has not been negatively impacted by this policy, Kirola nonetheless contends that she faces a "real threat of injury" given her daily use of sidewalks throughout the City. *Id.* at 19:1-8. However, no evidence was presented at trial showing that the City has actually deferred installation of a curb ramp under the Paving Guidelines. The mere possibility that the City will delay construction of a curb ramp and that Kirola may be injured as a result is simply "'too speculative to support standing.'" *Ervine v. Desert View Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir.2014) (quoting *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693). As the Ninth Circuit has explained, a plaintiff "cannot manufacture standing through bald assertion, contradicted by the record." *Id.* (finding that

the plaintiff had not shown a real or immediate threat of future injury in regard to the claims asserted). The Court thus finds that Kirola has not established that there is a substantial probability that she will be harmed in the future as a result of the City's Paving Guidelines.

e) UPhAS

76. Kirola complains that the City's facilities transition plan, i.e., UPhAS, fails to require the removal of barriers that deny program access until the particular facility is scheduled for renovation. Dkt. 662, 13:27-14:4. Yet, no evidence has been presented that Kirola has been deprived of meaningful access to any program, service or activity because of the lack of access improvements at an existing facility. Though Kirola complained of purported barriers at a few libraries and pools, there is no evidence that she was denied meaningful access to other facilities within San Francisco or the City's programs and services in their entirety. Moreover, every library Kirola uses regularly was completely renovated prior to trial, and the three pools about which she complained have since been renovated or are scheduled for renovation. The Court thus finds that Kirola's has not shown that she suffered any injury that stems from UPhAS.

f) The RecPark Website

77. Kirola challenges "the City's policy as stated on its [RecPark] website that an 'accessible' park need

only provide an 'accessible entrance' and 'at least one recreational opportunity[.]'" Dkt. 662, 13:4-27. Kirola asserts that the RecPark website's definition of "accessible" constitutes a City policy "of general application" relating to program access and argues that the policy is discriminatory because it does not require the City to provide mobility disabled individuals with meaningful and equal access to recreation opportunities. Dkt. 672, 16:6-12.

78. The flaw in Kirola's claim is that it fundamentally mischaracterizes the nature of the information provided on the RecPark website. Despite Kirola's claim to the contrary, the website does *not* purport to articulate a general policy of what the City considers to qualify as program access. Rather, the information is posted on the website simply to provide the public with information about sites they may wish to visit, and the website invites further inquiry for more detailed information. PTX 3875 [075767].

79. Even if the website defined the meaning of "accessible" as a matter of general policy, Kirola has failed to establish that she suffered any injury as a result of the policy. Of the City's 220 parks, Kirola complained only that the accessible entrance at Alamo Square Park was steep—not that it was inaccessible. RT 1385:5-8. Perhaps more fundamentally, Kirola cannot legitimately allege that she suffered any harm stemming from a website which she never used.

g) New Construction and Alterations

80. Kirola contends that "the City's policies and procedures regarding new construction and alterations . . . do not require a close-out inspection for compliance with federal disability access design standards or specific sign-off from the relevant City official that a project is in full compliance with those standards as built." Dkt. 662, 9:3-10.

81. At trial, Kirola offered no testimony regarding any architectural barriers at any newly-constructed or renovated library, swimming pool or other RecPark facility. In the absence of such evidence, Kirola cannot show that she suffered an injury in fact or that such injury stems from any City policy governing new construction and alterations.

h) Maintenance Policies

82. Kirola complains that the City's maintenance policies and procedures "do not set specific and prompt deadlines for the identification and repair of items that are broken, non-operational, or in need of repair." Dkt. 662, 14:9-11.

83. Under 28 C.F.R. § 35.133, public entities "shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities[.]" 28 C.F.R. § 35.133(a). The section, however, "does not prohibit isolated or temporary interruptions in service or access due to maintenance or

repairs." 28 C.F.R. § 35.133(b); *see also* U.S. Dep't of Justice Technical Assistance Manual, II-3.10000 Maintenance of Accessible Features ("Where a public entity must provide an accessible route, the route must remain accessible and not blocked by obstacles such as furniture, filing cabinets, or potted plants. An isolated instance of placement of an object on an accessible route, however, would not be a violation, if the object is promptly removed.").

84. At trial, Kirola failed to identify a single barrier that she encountered as a result of something being "broken, non-operational, or in need of repair," much less an ADA barrier that existed because of any maintenance policy. Dkt. 662, 14:9-11. The errant stools Kirola encountered on occasion at three libraries have not been shown to be broken, non-operational or in need of repair, nor did they render the particular library—or the library system in general—inaccessible. She also failed to identify any maintenance issue as to any RecPark facility.[21] Accordingly, the Court finds that because Kirola has not shown that she suffered any injury stemming from the City's maintenance policies, she cannot show any injury resulting from those policies.

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[21] The uneven sidewalk surfaces identified by Kirola could be considered a maintenance issue, and are addressed in the section discussing the SIRP and ASAP.

i) Grievance Procedures

85. Kirola alleges that the City's ADA grievance procedures violate Title II's program access requirements on the ground that the City's "written complaint policies and forms make no requirement that disability access barriers be removed within any particular time period, but instead permit the City to take up to two years to remove barriers[.]" Dkt. 662, 14:4-6; Dkt. 672, 25:6-9.

86. Kirola lacks standing to challenge the City's grievance procedure.[22] At trial, Kirola testified to having made a single request for the removal of an access barrier; namely, her July 2006 request that the City install curb ramps at the corner of Hayes and Fillmore. RT 1383:19-1384:8, 1391:18-1392:2. The requested curb ramps were installed in April 2008, less than two years after the requests were made. RT 1384:7-8. There also is no evidence in the trial record that Kirola was unable to traverse the intersection or that she was compelled to take a substantially longer alternative route. To the extent that Kirola is complaining about the length of time it took for the City to install the curb ramps, she has presented no evidence to substantiate any injury resulting from such delay or that such delay is attributable to an ineffective grievance procedure.

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[22] As will be discussed below, even if Kirola had standing, there is no private right of action to challenge an ADA grievance procedure.

j) Safety Hazards Policy

87. Kirola complains that the City has failed to adopt an overarching "written policy or procedure regarding the identification and removal of safety hazards to persons with mobility disabilities." Dkt. 662, 14:15-17.

88. At trial, Kirola failed to offer any testimony demonstrating that she encountered any "safety hazards" at any library or RecPark facility. Though Kirola complained of steep paths at Alamo Square Park, the probative value of such testimony is undermined by the lack of any objective data (such as actual measurements of those paths) to quantify her claim. Additionally, there is no evidence that those conditions denied her program access.

89. The Court is likewise unpersuaded by Kirola's testimony regarding her one-time experience in which her wheelchair was caught in an exposed tree well. The record presented at trial shows that, in fact, there was an unobstructed 48-inch-wide accessible path of travel around the tree well. RT 1383:3-12, 431:3-10; PTX 4140Y. The Court therefore finds that Kirola has failed to establish any actual and concrete injury in fact in regard to the City's policies related to removal of safety hazards. *See Lujan*, 504 U.S. at 560-61, 112 S.Ct. 2130.

k) Self-Evaluation/Transition Plan

90. Kirola asserts that the City has not adopted or implemented a self-evaluation or transition plan in

violation of California Government Code § 11135. Dkt. 662, 14:13-25.

91 Section 11135 provides, in pertinent part, that:

> No person in the State of California shall, on the basis of . . . disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.

Cal. Gov. Code § 11135(a). Regulations promulgated to implement Section 11135 insofar as discrimination based on physical or mental disabilities is concerned, state that a transition and self-evaluation plan "should be required" by the "responsible State agency." Cal. Code Regs., tit. 22, §§ 98251(a), 98258.

92. The City argues that Kirola lacks standing to challenge any alleged noncompliance with California Government Code § 11135 or its regulations based on her failure to demonstrate that she (1) was deprived program access to any state-funded program or activity or (2) encountered any access barriers to a state-funded program or activity because of the alleged absence of a self-evaluation or transition plan. Dkt. 666, 20:20-24. The Court agrees. At best, Kirola has presented only bare and conclusory allegations of injury resulting from the City's failure to develop and

implement a self-evaluation or transition plan. Moreover, there is no evidence that each of the specific programs to which she was allegedly denied access is state-funded or otherwise receives financial assistance from the state. *See* Cal. Gov't Code § 11135. As such, Kirola has not shown that she suffered any injury that stems from the City's alleged failure to comply with Section 11135 or its regulations.

l) Conclusion

93. Kirola has failed to establish that she sustained any injury which stems from any written policy. A fortiori, she has not shown a likelihood of recurrence, which is necessary for standing where prospective, injunctive relief is sought. *Taylor*, 488 F.3d at 1199. Thus, separate and apart from the *Lujan* requirements for Article III standing, the Court finds that Kirola lacks standing to seek the relief she seeks in this action.

4. Substitution of Class Representative

94. Kirola argues that any deficiencies in her standing as a class representative can be rectified by allowing class members who testified at trial to be substituted in her stead. Dkt. 662, 15:4-16:12. As support, Kirola cites several cases where courts permitted such a substitution where the class representative's claims became moot. *E.g.*, *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 415 n. 8, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) ("If the named plaintiff's own claim becomes moot after certification, the court can

re-examine his ability to represent the interests of class members. Should it be found wanting, the court may seek a substitute representative or even decertify the class."); *Wade v. Kirkland*, 118 F.3d 667, 669 (9th Cir.1977) ("We reverse and remand for a ruling on the outstanding class certification motion, including a determination [of] whether Wade may remain as the class representative despite the mootness of his individual claim or whether putative class members with live claims should be allowed to intervene.").

95. The issue here is not mootness, however, but the lack of standing. As a result, substitution is not an appropriate solution to Kirola's lack of standing. *See Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir.2003) (finding that the class representative's lack of standing could not be cured by substituting in another class member as the named party, vacating the class certification, and remanding the case to the district court with instructions to dismiss). "[I]f a case has only one class representative and that party does not have standing, then the court lacks jurisdiction over the case and it must be dismissed; if the case only had this one class representative from the out-set, then there is no opportunity for a substitute class representative to take the named plaintiff's place because this means that the court never had jurisdiction over the matter." Newberg on Class Actions § 2:8 (5th ed.2013).

96. In view of the above, the Court concludes that Kirola cannot rectify her lack of standing by substituting additional class members as class representatives.

In addition, permitting a substitution at this late stage of the proceeding would be prejudicial to the City and otherwise futile for the reasons discussed below.

D. FINDINGS ON THE MERITS

97. The City contends, in the alternative, that even if Kirola had satisfied her burden of demonstrating Article III standing, she would not prevail on the merits. The Court agrees, and finds that Kirola has failed to establish that she is entitled to relief on any of the claims alleged in the FAC.[23]

98. Plaintiff bears the burden of proving, by a preponderance of the evidence, that the City has violated the ADA. *See In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir.2001) ("The standard of proof generally applied in federal civil cases is preponderance of evidence.").

99. The City's programs and services at issue consist of its public-right-of-way system along with its

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[23] Kirola claims that she was not able to address the merit-based arguments in the City's Motion for Judgment given the applicable page limitations. Dkt. 672, 2:1-2. The Court, however, did not impose page limitations beyond those proscribed by Civil Local Rule 7-2(b) and, in fact, specifically invited the parties to file a request for enlarged page limitations via either a joint stipulation or an individual motion. Dkt. 663, 8:5-9. It is also noteworthy that both parties have submitted *substantial* post-trial briefing addressing the merits of this case, which the Court has considered in drafting this Order. *E.g.*, Dkt. 614, 616, 617, 618, 632, 634, 635, 636, 646, 662, 666, 672, 675, 681, 683. Therefore, the Court finds no merit to Kirola's contention that she lacked an adequate opportunity to address the issues in this case.

library, aquatic and RecPark programs. *See*, *e.g.*, *Cohen*, 754 F.3d at 695. The Court therefore considers whether Kirola has shown that each of these services or programs is inaccessible in its entirety. In addition, the Court considers her challenges to certain of the City's policies and procedures, where pertinent.

1. Program Access

100. "Under Title II of the ADA, the standard for compliance is 'program access,' that is, when viewed in its entirety, the city's [programs, services and activities] must be 'readily accessible to and useable by individuals with disabilities.'" *Carter v. City of Los Angeles*, 224 Cal. App.4th 808, 821, 169 Cal.Rptr.3d 131 (2014) (citing 28 C.F.R. § 35.159(a), 45 C.F.R. § 84.22(a), andCal. Gov. Code § 11135(b)). ADA regulations authorize a public entity to enlist a number of alternative methods to satisfy its program access obligations:

> A public entity may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, ***delivery of services at alternate accessible sites***, alteration of existing facilities and construction of new facilities, use of accessible rolling stock or other conveyances, or any other methods that result in making its services, programs, or activities readily accessible to and usable by individuals with disabilities. ***A public entity is not required to make structural***

> ***changes in existing facilities where other methods are effective in achieving compliance*** with this section.

Id. § 35.150(b)(1) (emphasis supplied). Program access does not require that each particular facility through which a program is offered be fully accessible. *See Daubert*, 760 F.3d at 987. Rather, the Court must construe the particular program or service "in its entirety" to determine whether it is accessible. *Id.*

a) Public Right-of-Way

101. Based on the record presented at trial, the Court finds that Plaintiff has failed to establish a lack of program access with regard to the City's public right-of-way, i.e., its system of sidewalks, curb ramps and crosswalks.

102. As an initial matter, Kirola offered no evidence or testimony regarding any accessibility issues with the City's cross-walks. She did, however, identify three sidewalks which she claims were problematic due to cracks or bumps in the concrete, one instance where her wheelchair became stuck in a tree well (the area around the base of the tree), and one corner lacking curb ramps. As discussed above, however, the Court finds that Kirola's minimal testimony regarding accessibility issues with the City's right-of-way in its entirety, coupled with her vague testimony, is insufficient to demonstrate that she was denied meaningful access to the City's right-of-way or that the barriers she

encountered violated either federal or state accessibility laws.

103. The testimony of class members and Plaintiff's experts fares no better. Like Kirola, various class members and mothers of class members testified to having encountered cracked pavement, potholes, uneven sidewalks, and missing or difficult-to-use curb ramps. RT 541:9-543:21, 1002:11-22, 1031:20-1033:17, 1232:10-1233:4. The probative value of such testimony is undermined by the non-specific, generalized nature of the testimony offered.

104. Kimbrough, the mother of a minor class member, claimed that street corners lacking curb ramps were prevalent in her neighborhood. 823:16-829:22. When asked by Class Counsel which locations she encountered problems, Kimbrough answered, "All of them really," RT 823:19-20, and later adding that, "They are quite prevalent," RT 825:9-11. Yet, the only specific example discussed was the intersection at Paris Street and Avalon Avenue. RT 826:8-24, 829:1-2. Upon cross-examination, Kimbrough conceded that some of the street corners at this intersection, in fact, had curb ramps, and she had difficulty ascertaining which corners did and which ones did not. RT 824:13-825:11, 844:11-847:4.

105. Similarly, Grant had difficulty providing specific locations near the Embarcadero BART station where he encountered problems. RT 878:16-888:13. O'Neil complained about "many bad curb ramps," yet provided few specifics. RT 541:9-543:21. Cherry

complained about cracked and uneven sidewalks in her neighborhood, but did not specify where she experienced these problems. RT 1031:20-1033:17.

106. Notably, none of the problem areas cited by class members or their parents were confirmed by Plaintiff's experts as failing to comply with federal or state access laws. Although Kirola's experts identified alleged access issues at ***other*** locations, the Court finds their opinions unpersuasive for the reasons set forth above. *See* Findings of Fact ¶¶ 180-196. The above notwithstanding, the fact that Kirola and some class members may have experienced difficulty accessing the City's public-right-of-way, while understandably frustrating, does not prove that the City has failed provide program access as required by the ADA.

107. Based on the record presented at trial, the Court is satisfied that the City's public right of way system, when viewed in its entirety, affords program access to mobility-impaired individuals. The lack of curb ramps at some street corners does not amount to a lack of program access. *See Bird*, 303 F.3d at 1021 ("Compliance under the [ADA and Rehabilitation Act] does not depend on the number of locations that are wheelchair-accessible; the central inquiry is whether the program, 'when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.'") (citations omitted). Indeed, Title II of the ADA does not require the installation of curb ramps at each and every street corner. *See Cohen*, 754 F.3d at 696; *accord Carter*, 224 Cal. App.4th at 821, 169 Cal.Rptr.3d

131; *see also* ADA Title II Technical Assistance Manual, II-5.3000 Curb Ramps ("To promote both efficiency and accessibility, public entities may choose to construct curb ramps at every point where a pedestrian walkway intersects a curb. However, public entities are not necessarily required to construct a curb ramp at every such intersection."). Despite this, the City endeavors to achieve curb ramp saturation; that is, a curb ramp at every corner. To that end, the City installs approximately 1,200 new curb ramps each year. RT 2785:172787:13, 2789:3-2790:18; PTX 0022 [003798]. Consistent with DOJ guidelines, the City prioritizes installation of these curb ramps by taking into account citizen requests and whether the proposed ramps are in high utilization areas, including governmental offices, public facilities, public transportation, public accommodations, and commercial districts. RT 1441:11-1442:15, 1617:2-1619:13, 1956:6-1958:16, 2416:19-22; PTX 0022; DTX G18; *see also* 28 C.F.R. § 35.150(d)(2) (providing that public entities should give "priority to walkways serving entities covered by the Act, including State and local government offices and facilities, transportation, places of public accommodation, and employers, followed by walkways serving other areas").

108. Moreover, the City's curb ramp design standards in effect since 2004 require bi-directional curb ramps and the use of smooth transitions. Each curb ramp is uniquely designed for its designated location, and each design is cross-checked for ADA compliance pursuant to the Quality Assurance Checklist. The

City utilizes a curb ramp grading system, paving guidelines, an inspection program and a priority matrix (part of the Curb Ramp and Sidewalk Transition Plan) to ensure that sidewalks remain accessible and curb ramps are installed and/or repaired where they are needed the most. Critical data regarding the City's progress is stored in the CRIS database, from which the City is able to ascertain where curb ramps are to be installed. The transition plan sets a timeframe for completing curb ramp saturation and identifies funding sources. These measures support the conclusion that the City is in compliance with its Title II obligations. *E.g.*, *Schonfeld*, 978 F.Supp. at 1341 (finding that where a city "has constructed curb ramps where necessary to provide access along highly-trafficked routes, has allocated funding and established a schedule for future curb ramp construction, and is addressing the particular intersections identified by plaintiffs as well as other intersections in accordance with ADA priorities," it is in compliance with its Title II obligations).[24]

109. In passing, Kirola attempts to make much of Hecker's 2009 expert report in which he found that the City had not yet installed every curb ramp necessary for program access. Dkt. 604, 6:20-22; *see also* RT 2795:19-2796:2. The trial record, however, does not establish the basis for his opinion or whether the opinion

[24] As indicated above, the City installed curb ramps at all the locations identified in the pleadings, RT 1392:3-16, effectively rendering Plaintiff's complaints regarding the curb ramps moot. *See Oliver v. Ralphs Grocery Co.*, 654 F.3d 903, 905 (9th Cir.2011) ("a defendant's voluntary removal of alleged barriers prior to trial can have the effect of mooting a plaintiff's ADA claim.").

was still valid based on the conditions existing at the time of trial. In view of the evidence presented at trial showing the City's continuing progress toward program access, the Court finds that Hecker's 2009 program access conclusions, without more, fail to satisfy Kirola's burden of ***demonstrating*** that the City failed to provide program access to its public right-of-way.

110. With regard to sidewalks, Kirola's complaints present an issue of maintenance, as opposed to construction. In particular, she complains that the City only proactively inspects its 2,000 miles of sidewalks on a 25-year cycle, which she claims is too long. This contention lacks merit. The City inspects approximately 200 blocks per year, with the areas of the greatest pedestrian traffic given the highest priority. RT 2453:6-17. In view of the City's financial and staffing constraints, the Court finds nothing objectively unreasonable with this approach. It is also important to note that the City's inspection policy operates in conjunction with the SIRP, which as discussed more fully above, ensures that complaints regarding sidewalk accessibility are given high priority and remediated, whenever possible, within ninety days. RT 2454:13-2455:22. The City's proactive and reactive approach to ensuring sidewalk accessibility is reasonable, appropriate and supports a finding that the City affords program access to its sidewalks. *See Schonfeld*, 978 F.Supp. at 1341.

111. Program access to the City's public right-of-way also is enhanced by paratransit services and public transportation. RT 1636:4-12. The City operates

and subsidizes a paratransit system that offers van and taxi service for persons with disabilities who are unable to use public transportation. RT 1634:18-1635:1, 1635:21-1636:3. Kirola testified that she regularly uses public transportation and paratransit, sometimes up to five or six times per week. RT 1391:9-17. However, she argues that paratransit is not an effective substitute because not all mobility-impaired persons are able to use its services, and it is not always reliable. Dkt. 618, 13:1-5. But the City does not rely exclusively on paratransit or its public transportation system to provide access for mobility-impaired persons. Those services are simply additional means utilized by the City to enhance access for mobility-impaired and other disabled persons. *See* 28 C.F.R. § 35.150(b)(1). That the system may not operate perfectly at all times does not show that the City has failed to provide program access to its public-right-of-way system.

112. Kirola also complains that the City has failed to establish a definition of "program access" with respect to the public right-of-way, and that the City has failed to show that each allegedly non-complaint curb ramp identified at trial is the result of site constraints. Dkt. 604, 9:22-23; Dkt. 618, 5:7-10. The flaw in this argument is that it impermissibly attempts to shift the burden to the City, when the burden rests with Kirola. *See Pierce*, 526 F.3d at 1217; *see also McGary v. City of Portland*, 386 F.3d 1259, 1265 (9th Cir. 2004) (noting the elements necessary to state a claim of disability discrimination under Title II).

113. In sum, the Court finds no merit to Kirola's claim that she or any class member has been deprived of program access to the City's public right-of-way.

b) Library Program

114. The City's library program is presented through its network of libraries, which consists of a Main Library and twenty-seven branch libraries. RT 2222:13-15. At the time of trial, the City's Main Library and seventeen branch libraries had been made fully accessible, pursuant to the BLIP (Branch Library Improvement Program). Renovations of the three remaining libraries will be completed by 2014. RT 2227:7-21; 2132:23-2135:19; 1797:5-19. The three branch libraries that were not renovated under the BLIP program had access barriers removed in the 1990's, and since 2004, were the subject of additional access improvements, including automatic door openers. RT 1796:25-1797:4. Hecker, the City's expert, credibly testified that the number, distribution and features of the City's accessible libraries are sufficient to provide meaningful access to its library program. RT 2763:25-2764:9.

115. Kirola has failed to carry her burden of proving that the City's library program, when considered in its entirety, fails to provide program access for mobility-impaired persons. Neither Kirola nor any class member testified to having encountered any architectural barriers at any of the City's twenty-eight libraries. Although Kirola occasionally encountered misplaced stools at three libraries, no evidence was

presented that the stools were anything other than a temporary obstruction, or that they impeded her or any class members' ability to utilize any service at those individual libraries or the City's library program in its entirety. Likewise, none of Kirola's experts offered any opinions or findings specifically regarding the errant library stools or any testimony to support her claim that the City's library program fails to afford program access.

116. In sum, the Court finds no merit to Kirola's claim that she or any class member has been deprived of program access to the City's library program.

c) Aquatic Program

117. The City operates nine public swimming pools as part of its aquatic program. RT 2763:21-2765:5. As of 2009, six of the nine pools were made accessible. RT 2767:82769:17. At trial, Hecker credibly testified that the number and distribution of accessible pools located throughout San Francisco is sufficient to provide meaningful access to the City's aquatic program. RT 2768:4-11.

118. Neither Kirola nor class members presented any compelling evidence to establish a denial of program access to the City's aquatics program. The three pools Kirola complained about were not designated as accessible at the time of trial. However, program access does not require the City to make *every* pool accessible. Rather, the City ensures program access to it aquatics program through its other pools.

Notably, Kirola acknowledged that she regularly uses Hamilton and MLK Pools—the latter of which is her "favorite"—without difficulty. RT 1392:17-1393:23.

119. The testimony of class members likewise fails to demonstrate a lack of program access. Kimbrough complained that the ramp at Balboa Pool is too steep for her younger disabled daughter to access the pool area and watch her sister take swim lessons. RT 848:18-24, 838:12-839:19. Although Coffman Pool is only one mile further away and fully accessible, Kimbrough stated that she does not want to take her family there because her eldest daughter's swimming instructor teaches at Balboa Pool, and she feels that Coffman Pool is not located in a safe neighborhood. RT 849:10-17, 852:19-853:2.

120. The Court finds that Kimbrough's testimony fails to demonstrate a denial of program access. Watching a sibling take swim lessons is not a program, activity, or service provided by the City. *See Daubert*, 760 F.3d at 987 ("experiences that are merely incidental to normal government functions are not fairly characterized as government programs under 28 C.F.R. § 35.150."). But even if Balboa Pool were inaccessible, the fact remains that there are a variety of other pools which are fully accessible and available to her, including Coffman pool, which is only a mile further away.[25] That Kimbrough may personally dislike

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[25] Plaintiff's expert Steinfeld opined that Coffman Pool and Martin Luther King Jr. Pool (two accessible pools) are too far from Balboa Pool to be considered meaningful alternatives. RT

Coffman Pool, without more, has no bearing on whether the City is in compliance with its obligation to render its aquatic program accessible to mobility-impaired persons on a program access basis. *See Daubert*, 760 F.3d at 988.

121. Monasterio, also a mother of a class member, testified that the closest swimming pool to her is Garfield Pool, which lacks "a safe space for her to sit and shower." RT 1233:21-24. Although Monasterio thought Garfield Pool was designated as accessible, it is, in fact, designated as having only limited accessibility. RT 1234:10-12; DTX F16. In any event, Monasterio's negative experience with one of the City's nine pools does not demonstrate a denial of program access to the City's aquatic program.

122. Cherry testified that she once attempted to take a swimming class at MLK Pool but that she had been forced to discontinue the class as a result of the pool's lift being consistently broken over a one-month period. RT 1043:15-1045:19. The inoperability of the lift presents a maintenance, as opposed to a barrier, issue. Nonetheless, the temporary inaccessibility to a swim class at a particular pool does not demonstrate a lack of program access, since the City is not required to provide identical services at each pool. *See Pierce*, 526 F.3d at 1222 ("We also emphasize that the district court should look at the offerings as a whole and in their entirety and thus the court is not required to

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673:4-23. Kimbrough, however, testified that Coffman Pool is only two miles from her home. RT 852:18-853:2, 848:18-24.

ensure that each individual program or service offered at Theo Lacy and Musick is offered in complete parity with an offering at the Central Jail.").[26]

123. In sum, the Court finds no merit to Kirola's claim that she or any class member has been deprived of program access to the City's aquatic program.

d) RecPark Program

124. Kirola's evidence regarding the City's RecPark program similarly fails to show a denial of program access. Of the City's 220 parks, Kirola only complained about the steep entrance and paths at Alamo Square Park, which she acknowledged is located on a steep hill. RT 1385:3-16, 1394:2-4. Although Kirola testified that she could not access the playground there, she did not claim that the park was otherwise inaccessible to her. RT 717:10-21. Nor did she offer any testimony regarding any inability to access the multitude of other parks operated by the City.

125. Cherry, Kimbrough and Monasterio testified regarding accessibility issues at a handful of the

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[26] As an ancillary matter, Kirola complains that, in violation to 35 C.F.R. § 35.163(b) the City fails to provide signage at parks and swimming pools directing disabled persons to other accessible areas of a park or other accessible pools. Dkt. 604, 18, 21. Section 35.163(b), provides, in pertinent part, that "[a] public entity shall provide signage at all inaccessible entrances to each of its facilities, directing users to an accessible entrance or to a location at which they can obtain information about accessible facilities." There is no mention of providing signage regarding other accessible facilities.

City's 220 parks. Much of the testimony was sparse and non-specific. For example, Cherry claimed that all of the parks in her area "need help" and "haven't been maintained the way they should," but she did not elaborate further. RT 1041:1-5. Monasterio stated that her daughter could not enter the Tea Garden, but did not explain why. RT 1237:23-1238:1. Other accessibility complaints pertained to issues inherent in the terrain. Monasterio stated that the paths at Glen Canyon Park are uneven or unpaved. RT 1234:16-1237:2. Yet, she acknowledged that the park is located in a "Eucalyptus forest" that is "very wild." RT 1234:16-1237:2. Similarly, Kimbrough complained about steep pathways leading to the playground at Holly Park, which is located at the "top of a hill." RT 837:19-838:5. The testimony of class members, at best, shows that they occasionally encountered barriers at certain parks; however, it does not establish that they were denied access to RecPark programs, services and activities in their entirety. Title II of the ADA mandates meaningful access on a program access level, not on a neighborhood or facility-specific basis.

126. In contrast, the City presented compelling evidence to demonstrate its compliance with Title II of the ADA. The athletic fields, play areas and recreation centers (along with open space that is provided at virtually every park), represent core features that together provide the range of services, programs and activities available at the City's parks. Across San Francisco, the City provides twenty accessible athletic fields, and eight additional athletic field facilities that

were, at the time of trial, in the planning phase and either fully funded or in design or construction. RT 1818:3-18; DTX F34. Notably, Hecker credibly opined, based on his review of the "blue dot" designations determined Scott, as well as his training, knowledge and experience, that the number and distribution of these twenty accessible athletic fields is sufficient to provide program access to the City's athletic programs. RT 2769:18-2771:2.

127. The City provides forty-three accessible Recreation Centers and Clubhouses, which have either been renovated since 2000, or received a specific barrier removal since 1992. Additional facilities are "in the pipeline" for renovation. RT 1816:5-1817:1; DTX F40. Focusing solely on Recreation Centers, which are larger than Cluhouses and include a gymnasium, fifteen out of twenty-three facilities are accessible, and five additional Recreation Centers have received funding for access renovations, or are already in design or construction. DTX 40. The number and distribution of accessible Recreation Centers and Clubhouses are sufficient to provide program access to the programs housed in these facilities. RT 2771:3-2772:12. Likewise, the City provides an equitable distribution of accessible children's play areas throughout San Francisco. RT 1815:9-20; PTX 148A.

128. Kirola contends that the Community Garden Program is not accessible. The Community Garden is a program intended for people who do not have backyards, and serves organized community clubs that operate each community garden. RT 2281:102283:15.

Only group members are eligible to participate in the "program" offered at the community garden sites. *Id.* RecPark makes access improvements each time it performs construction work at a community garden. *Id.* In addition, it accommodates each individual access request it receives from club members who actually use the garden. *Id.* Neither Kirola, nor any class member who testified at trial, belongs to any community club that operates a community garden, nor has Kirola ever attempted to visit a community garden as a member of the public. Kirola's claims based on the community gardens fail for lack of standing, and for lack of proof.

129. Kirola, through her experts, also asserts that the City fails to provide program access in its parks, because some "unique" park facilities are not "fully accessible" and "ADAAG-compliant." This assertion is uncompelling for a number of reasons. First, this contention erroneously focuses on a "unique facility," without identifying any unique program that is only offered at that facility. Second, because ADAAG does not apply to playgrounds or to outdoor developed recreational areas, Kirola has applied an inapplicable standard. In any event, as Kirola's experts readily acknowledged, program access is a much more subjective standard than ADAAG-compliance, RT 1366:3-13, and only a small portion of a particular park must be accessible in order to provide the requisite program access, RT 717:10-21.

130. Kirola argues that Golden Gate Park is unique and therefore must be fully accessible. Assuming arguendo that Golden Gate Park should be analyzed in

isolation, the Court finds that the City provides meaningful access thereto. Golden Gate Park has an extensive network of accessible paths, with accessible parking and accessible restrooms disbursed throughout the park, providing ample opportunity for class members with mobility disabilities to enjoy Golden Gate Park's varied landscapes. RT 1819:2-1821:20, 1824:14-1825:6; DTX F37. The popular destinations in Golden Gate Park—namely, the Conservatory of Flowers, the Arboretum and the Japanese Tea Garden, are also accessible.

131. Even if the Court accepted Kirola's premise that the path of travel through the formal gardens in front of the Conservatory of Flowers interferes with program access, her analysis ignores additional accessible parking on JFK Drive, which offers a shorter route to the Conservatory entrance. RT 2112:24-2114:6; DTX F37. The Arboretum offers an extensive network of accessible trails (evaluated according to the proposed federal standards for outdoor areas), and two sets of accessible restrooms. RT 2114:7-2116:23; DTX F37.5. The Japanese Tea Garden has accessible paths, to the extent practical, without necessitating fundamental alterations to the facility. RT 1360:20-1362:1. In any event, additional improvements for the Japanese Tea Garden were scheduled to be completed shortly after trial, and will further enhance access to the Tea House. RT 2325:4-20.

132. Similarly, Kirola has made an insufficient showing of inaccessibility as to Dolores Park. At the time of trial, RecPark was commencing a complete $16

million renovation of Dolores Park that will render the park completely accessible. RT 2278:32279:12. RecPark is also planning renovations at Glen Canyon Park and estimates the cost at $20-$40 million. The 2008 Bond provides $5.8 million for Glen Canyon Park, and RecPark will prioritize work there based on community input. RT 2279:13-2280:14.

133. Next, Kirola argues that all elements of the "blue dot" facilities are not entirely compliant with facility access regulations. As discussed earlier, MOD uses color-coded spreadsheets and maps to track the status of each of the approximately 700 facilities surveyed by Hopper and illustrate the distribution of accessible facilities across the City. Blue dots are placed on those maps to indicate where a capital improvement project has taken place since 2000. *See* Findings of Fact ¶ 77.

134. Not every aspect of a facility where a program is offered must necessarily be fully accessible. *See Daubert*, 760 F.3d at 987. Nor does Title II of the ADA require complete parity of services at each of the facilities through which the City offers its programs. *See Pierce*, 526 F.3d at 1222; *see also* RT 717:10-21 (testimony by Plaintiff's expert that only a "small part of a park" must be accessible to provide program access). That aside, Kirola overlooks the fact that the City's "blue dot" designation is not intended to signify that every element of the facility was 100 percent compliant with all applicable facilities access regulations; rather, it signifies that the facility was fulfilling the City's program access intent under UPhAS. RT 1464:14-23. In

other words, a blue dot indicates only that the facility offers some accessible program, not that every physical element of the facility is compliant with disability access regulations. In addition, Kirola's arguments regarding the "blue dot" facilities are unpersuasive given that her experts admittedly did not inspect each of the City's "blue dot" libraries, pools, and parks; as to those "blue dot" facilities which they did visit, their site assessments were shown by the City to be unreliable.

135. In sum, the Court finds no merit to Kirola's claim that she or any class member has been deprived of program access to the City's RecPark program.

2. New Construction and Alterations

136. Pursuant to 35 C.F.R. § 35.151, the City has elected to use ADAAG as its standard for newly constructed or altered facilities. RT 1919:20-24. According to Kirola, the City's policies and practice are insufficient to ensure "strict compliance" with ADAAG as to City facilities newly constructed or altered after January 26, 1992. Dkt. 604, 22:1124:5. In particular, Kirola contends that her experts' inspections of the City's libraries and parks revealed disability access barriers in violation of ADAAG or the California Building Code. *Id.*

137. The Court has found the opinions of Kirola's experts, including those relating to the City's compliance with ADAAG and the California Building Code, to be unreliable. *E.g.*, Findings of Fact ¶ 205-228. Among other things, Kirola's experts relied on unqualified

individuals to conduct their inspections, and applied faulty and inconsistent methodologies and inapplicable access requirements. They also failed to properly take into account dimensional tolerances and their impact on the variation. *Cherry v. City Coll. of San Francisco*, C 04-04981 WHA, 2006 WL 6602454, *6 (N.D.Cal. Jan. 12, 2006) ("[T]he burden is on plaintiffs to prove that the variance exceeds the allowed tolerance. It is not enough to simply show that a particular bathroom stall, for example, is less than the required width. The approximate extent of any shortfall must be proven. And, the dimensional tolerance at the time of construction must be proven.").

138. In any event, the few isolated departures from ADAAG's dimensional requirements in newly constructed or renovated facilities identified by Kirola's experts do not establish any systemic deficiency in the City's policies or practices for the design and construction of publicly funded construction projects. RT 2040:1-2046:12 (noting that only 1.6% of the items identified by Kirola's experts' "needed to be changed"). No facility or building is perfect. RT 2044:9-2046:12; 2733:14-2734:6. A typical building has thousands of access measurements; a single set of restrooms has hundreds of access measurements. RT 1357:2-9. Indeed, Plaintiff's expert Gary Waters confirmed that an architect's professional standard of care is to deliver a building that "generally conforms" to access requirements, and that is the standard he used as court appointed expert monitoring settlement

compliance in another ADA action previously pending in this District. RT 1353:19-1357:1.

139. In sum, the Court finds that the few variations from ADAAG or the California Building Code with respect to new construction or alterations are insufficient to show that Plaintiff or class members were denied meaningful access to the City's programs, services or activities or that they are entitled to relief on a class-wide basis.

3. Grievance Procedure

140. Title 28, Code of Federal Regulations, section 35.107(b), provides that: "A public entity that employs 50 or more persons shall adopt and publish grievance procedures providing for prompt and equitable resolution of complaints alleging any action that would be prohibited by this part." 28 C.F.R. § 35.107(b). Kirola argues that the City's complaint process is deficient because it fails to provide for "prompt and equitable" resolution, as specified in § 35.107(b). Dkt. 604, 15:22-16:8.

141. The City argues that there is no private right of action to enforce 28 C.F.R. § 35.107(b). Dkt. 666, 17:27-18:6. Although there is no controlling authority on this specific issue, the Ninth Circuit's reasoning in *Lonberg* supports that conclusion.[27] *Lonberg*

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[27] While both *Armstrong*, 275 F.3d at 859, 862, and *Pierce*, 761 F.Supp.2d at 953-54, 957, discussed the ADA's grievance procedure requirement, neither court specifically addressed the

held that there is no private right of action to enforce federal regulations requiring public entities to develop transition plans under 28 C.F.R. § 35.150(d). 571 F.3d at 852. In reaching its decision, the court reasoned that "a public entity may be fully compliant with [Title II of the ADA] without ever having drafted a transition plan, in which case, a lawsuit forcing the public entity to draft such a plan would afford the plaintiff no meaningful remedy." *Id.* at 851; *see also Ability Ctr. of Toledo v. City of Sandusky*, 385 F.3d 901, 914 (6th Cir.2004) (same); *Cherry v. City Coll. of San Francisco*, No. C 04-4981 WHA, 2005 WL 2620560, *4 (N.D. Cal., Oct. 14, 2005) ("there is no indication that a public entity's failure to develop a transition plan harms disabled individuals, let alone in a way that Title II aims to prevent or redress. Indeed, it is conceivable that a public entity could fully satisfy its obligations to accommodate the disabled while at the same time fail to put forth a suitable transition plan.").

142. The rationale underlying *Lonberg* applies equally to the question of whether the grievance procedure regulation is subject to private enforcement. Like ADA transition plans, the existence or non-existence of a grievance policy does not, in itself, deny a disabled person access to a city's services. A public entity may be fully compliant with Title II without having drafted a grievance policy, let alone a grievance policy that mandates specific deadlines for reaching a resolution on all complaints. *See Lonberg*, 571 F.3d at 851; *see*

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question of whether there is a private right of action to enforce 28 C.F.R. § 35.107.

also Duffy v. Freed, No. 09-2978 (JBS/JS), 2010 WL 3740659, *4 (D.N.J. Sept. 17, 2010), *aff'd*, 452 Fed.Appx. 200 (3rd Cir.2011) ("Although Plaintiff asserts that public entities have a legal obligation under the ADA to launch an investigation into any complaint of a violation of Title II, Plaintiff cites no language of the ADA and the Court finds no support for this proposition in the statute. The public entity's obligation is to not discriminate. Such entities make additional efforts to resolve any potential discrimination by implementing proactive internal procedures according to the DOJ regulations, but the adequacy of these procedures is not itself an ADA concern.").

143. Other circuit and district courts have uniformly concluded that no private right of action exists to enforce 35 C.F.R. § 35.107(b). *See Duffy*, 452 Fed.Appx. 200, 202 ("[T]here is no private right of action to enforce regulations regarding public entities' ADA grievance procedures[.]"); *Giustiniani v. Fla. Dep't of Fin. Servs.*, No. 3:11-cv-792-J-37 MCR, 2012 WL 2127733, *2 (M.D.Fla. June 12, 2012) (holding that 28 C.F.R. § 35.107(b) does not create a private right of action); *DeLeon v. City of Alvin Police Dep't*, No. H-09-1022, 2010 WL 4942648, *4 n. 10 (S.D.Tex. Nov. 30, 2010) (quoting *Duffy v. Freed*, No. 09-2978 (JBS/JS), 2010 WL 3740659 (D.N.J. Sept. 17, 2010)) ("'The failure of a Title II public entity to adequately implement or abide by internal complaint procedures does not itself state an ADA claim, because the statute does not require these procedures.'"); *see also Brennan v. Reg'l Sch. Dist. No. 1 Bd. of Educ.*, 531 F.Supp.2d 245, 278

(D.Conn. 2007) (regulation implementing section 504 of the Rehabilitation Act, which required establishment of grievance procedures, was not privately enforceable); *Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 119-20 (2d Cir.2011) (regulation requiring creation of mechanism for ongoing public participation in development and assessment of services for disabled individuals not privately enforceable).

144. Attempting to sidestep the issue of whether there is a private right of action to enforce 28 C.F.R. § 35.107(b), Kirola argues that she does "not challenge the City's grievance procedure standing on its own" but rather "challenge[s] the sufficiency of the grievance procedure as a means of providing program access." Dkt. 618, 12:2-3; *see also* Dkt. 672, 24:28-25:1 (arguing that the City's "access upon request" policy of addressing access barriers is not a lawful method for providing program access). The evidence does not support Kirola's position. While the record establishes that the grievance procedure is an important aspect of the City's efforts to ensure accessibility for disabled persons, it also firmly establishes that the grievance procedure merely supplements the City's proactive efforts to provide accessibility. *See*, *e.g.*, RT 64:1-17, 1617:2-1618:3, 2863:14-2867:25. In other words, the City endeavors to provide program access through both proactive and reactive measures—i.e., undertaking significant accessibility planning across numerous City departments and proactively seeking input from the disabled community in the course of such planning, while also responding to requests and complaints from the public.

The City's efforts therefore do not constitute an "access upon request" approach to accessibility. *C.f. Putnam v. Oakland Unified Sch. Dist.*, 1995 WL 873734, *10 (N.D.Cal.1995) ("The approach of taking no action to render programs accessible until a student or parent identifies an accessibility problem does not make a program 'readily' accessible."); *Huezo*, 672 F.Supp.2d at 1063 ("The District concedes that to receive an accommodation of any kind—including basic services such as accessible furniture and transportation to otherwise inaccessible parts of campus—each disabled student must fill out certain forms prior to the beginning of each semester.").

145. Even if the Court were to find a private right of action exists to challenge the City's grievance procedure's compliance with 28 C.F.R. § 35.107(b), the evidence does not support the conclusion that any violation of this regulation has transpired.

146. MOD oversees the City's grievance procedure for handling public complaints regarding disabled access to its facilities, programs and services. A complaint form is posted on MOD's website. RT 1579:23-1580:12-1581:22; DTX A35 [000105-109]. Upon receipt of a complaint, MOD sends the complaint to the ADA Coordinator for the appropriate department, which, in turn, investigates the matter. Upon review and approval by MOD, the ADA Coordinator and department head respond to the complaint within thirty days. DTX A35 [000105]; RT 1866:19-25. Because each complaint is unique, resolution of the grievance may, in some

instances, require more than thirty days to finally resolve. RT 2001:2-7; 2385:14-2386:22; DTX A15.

147. Fraguli is in charge of the grievance procedure. Only 20 percent of the grievances she received related to physical access—the majority of which were curb ramp requests. RT 1868:9-1869:5. Fraguli has never received a complaint from Kirola, O'Neil, Kimbrough, Grant, DeChadenedes or Monasterio. RT 1870:14-1871:9. Nevertheless, the City learned, through other channels, that Kirola submitted a single curb ramp request, and that Monasterio and O'Neil submitted multiple requests. RT 1383:21-1392:16, 568:6583:22, 1226:23-24, 1128:23-1230:6, 1246:2-1249:16. The trial record shows that upon becoming aware of these requests, the City installed almost all of the requested ramps within one to two years, while the remaining curb ramps were slated for installation within a year of trial. RT 1228:18-1229:6, 1384:6-10, 1391:18-1392:16, 2001:8-2002:5, 2419:132420:4, 2422:22-2424:5. Moreover, upon reviewing the evidence presented and relevant legal authorities, the Court concurs with Hecker's opinion that the City's grievance procedure is consistent with the requirements and provisions of the ADA regulations. RT 2727:5-19

148. For the reasons stated above, the Court finds that Kirola's challenge to the City's grievance procedure is legally without merit.

4. Maintenance Policies

149. Kirola alleges that the City's policies and practices for the maintenance of accessible features are inadequate because they "do not set specific and prompt deadlines for the identification and repair of items that are broken, non-operational, or in need of repair." Dkt. 662, 14:9-11. A public entity's maintenance obligation is set forth in 28 C.F.R. § 35.133, which provides that public entities "shall maintain in operable working condition those features of facilities and equipment that are required to be readily accessible to and usable by persons with disabilities[.]" 28 C.F.R. § 35.133(a).

150. Under Title II, a public entity's maintenance obligation applies only "to the maximum extent feasible," and service interruptions are inappropriate only if they "persist beyond a reasonable period of time." 28 C.F.R. Part 35 App. A; *e.g.*, *Cupolo v. Bay Area Rapid Transit*, 5 F.Supp.2d 1078, 1083-84 (N.D.Cal.1997) (finding that a plaintiff can succeed on a challenge regarding a public entity's maintenance obligations only if she establishes that the maintenance issues are "recurrent" and constitute a "pattern," as opposed to being "isolated or temporary"); *Cherry*, 2006 WL 6602454, *7, *10 (noting that while obstructions "due to chairs, trash cans, potted plants, filing cabinets and other furniture intruding upon the required clearance" may constitute accessibility violations "unless the obstruction is temporary or isolated," the plaintiffs failed to meet their burden of demonstrating that the blockages were "persistent"); *Martin v. Metro. Atlanta Rapid*

Transit Auth., 225 F.Supp.2d 1362, 1380 (N.D.Ga.2002) ("Although Plaintiffs have documented a number of cases where they encountered inoperable elevators in MARTA stations, their evidence is insufficient to demonstrate a systemic problem that would rise to the level of an ADA violation. It is simply a fact of life that elevators will break down on occasion.").

151. Both libraries and RecPark facilities are subject to rigorous inspection and maintenance policies. At the City's libraries, staff utilize a Daily Facility checklist in connection with their facilities inspections each morning. To ensure access, staff move furniture or other objects that may impede the path of travel, and report any access problems that cannot be safely or readily corrected. RT 2235:22-2237:13, 2252:102253:21; DTX A45. Kirola does not challenge the efficacy of the checklist per se, but complains that other patrons occasionally leave a step stool in the aisles of the library, obstructing her path. RT 1385:22-1386:11. She contends that the current Library policy, which requires staff to conduct a single daily inspection of library facilities, should be replaced by one requiring full inspections throughout the day. Dkt. 672, 24:20-23. But even multiple daily inspections would not guarantee that a mobility-impaired library patron would never encounter misplaced step stools left by other library patrons. Ultimately, however, Kirola has not persuasively demonstrated that misplaced step stools are architectural barriers or that they denied her program access to the City's library program in its entirety.

152. Kirola has likewise failed to show that RecPark's maintenance policies are inadequate under the ADA. RecPark has implemented written policies that prioritize maintenance requests relating to disabled access to parks and facilities, and strives to resolve these requests within forty-eight hours whenever possible. RT 2306:3-2309:14; DTX A10. RecPark also uses an Employee Daily Facility Preparation Quick-Sheet that requires daily inspections of its buildings and facilities for safety hazards or other issues that might impact disabled access before they are opened to the public, RT 2315:152317:18; DTX Z60, and a Semi-Annual Facility Accessibility Survey, which includes a detailed inspection checklist and correction of items that may affect physical access to the facility, RT 2318:2-2319:18; DTX Z61. Further, RecPark staff conduct regular inspections of outdoor facilities which focus on the path of travel, including pathways' surface quality, gates and latches, and barriers such as low hanging tree limbs. RT 2320:2-2321:6.

153. Lastly, the Court rejects Kirola's claim that the City's policies governing sidewalk repair are not in compliance with the ADA. As discussed more extensively above, the City's sidewalk maintenance policies, which are embodied in the SIRP and ASAP, adequately address sidewalk access issues. *See* Findings of Fact ¶¶ 62-65. Similarly, for reasons already discussed, the Court discounts the opinions from Kirola's experts regarding sidewalk maintenance issues. *See id.*

154. In sum, the Court finds that Kirola has failed to demonstrate that the City has violated its

maintenance obligations, as set forth in 28 C.F.R. § 35.133(a).

5. Safety Hazards

155. Kirola alleges that the City is in violation of the ADA due to the lack of a general policy for addressing safety hazards. She alleges that "it is well-settled that public entities have a duty to remove disability access barriers that constitute safety hazards to persons with mobility disabilities" and that "the City has no written policies or practices in place to either identify safety hazards, or ensure their prompt removal from the City's pedestrian right of way and the other facilities at issue herein." Dkt. 604; 20:19-21:7. There is no authority holding that a public entity must adopt a written policy or procedure relating specifically to safety hazards. But even if there were, Kirola has failed to present any evidence establishing that the lack of such a policy resulted in the denial of program access to any particular program, service or activity.

156. Kirola argues that if the City had adopted and implemented "effective policies for the identification and prompt removal of safety hazards, it is likely that [she] would not have encountered steep paths of travel and entrances, sidewalks with excessive cross slopes and broken pavement, and uncovered tree wells[.]" Dkt. 673, 17:1-4. This contention is entirely speculative and unsupported by the record established at trial. Further, irrespective of whether the City has a written policy specific to the removal of safety hazards,

the trial record shows that the City's existing policies and procedures adequately address these types of concerns. Both the library and RecPark programs use daily inspection protocols that address issues deemed to constitute safety hazards, such as wet spots or broken equipment. DTX A45; DTX Z60; DTX Z61. RecPark further prioritizes the resolution of potential safety hazards by categorizing each complaint received into one of three categories: emergencies (which are to be addressed immediately); health, safety, and accessibility issues (which are to be addressed within 48 hours); and routine issues. RT 2306:3-2308:21.

157. The trial record also establishes that DPW prioritizes resolution of potential safety hazards in the City's public right-of-way via its curb ramp grading system, which grades curb ramps with excessive running slopes—along with curb ramps with both excessive running slopes and excessive gutter slopes—lower than other curb ramps, thereby prioritizing them for replacement. RT 2453:18-2454:12. The City worked with members of the City's disabled community in creating the curb ramp grading system, ensuring that the system assigned the lowest scores to curb ramp conditions which the disabled community felt to be the most problematic or dangerous. RT 1607:17-22.

158. In sum, the Court finds that Kirola has failed to demonstrate that the City's lack of a specific policy for hazard removal violates Title II of the ADA.

6. RecPark Website

159. Kirola complains that the RecPark website improperly defines an "accessible park" as one that has an "accessible entrance" and "at least one recreational opportunity." Dkt. 662, 13:4-27. As explained above, the City does not rely on this statement as its standard for establishing program access to it programs, services and activities. The information on the website is intended simply to inform the public about sites they may wish to visit, and visitors are expressly invited to inquire further for more detailed information. RT 1502:13-16; PTX 3875 [075767]. There is no evidence that the City's definition of "accessible" for the purpose of its RecPark website is in any way connected to City policy regarding its program access obligations.

160. In sum, the Court finds that Kirola has failed to demonstrate that the City's RecPark website demonstrates the City's failure to provide program access to its park system.

7. Self-Evaluation and Transition Plans

161. Kirola alleges that the City has failed to formulate and implement "an adequate self-evaluation plan" or transition plan, and seeks to compel the City to do so under the ADA, California Government Code section 11135, and their respective regulations. Dkt. 294, 14:6-7, 19:21-24.[28] The record shows that the City

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[28] Curiously, the proposed permanent injunction submitted by Kirola post-trial seeks no such remedy. Dkt. 635.

has, in fact, drafted the transition plans for both its public right-of-way and facilities. While it is unclear whether the City has drafted a self-evaluation plan, the authorities are clear that Plaintiff has no legal basis to sue based on the lack of such a plan.

a) ADA

162. ADA regulations direct public entities to adopt transition and self-evaluation plans. *See* 28 C.F.R. § 35.150(d)(1) ("a public entity . . . shall develop, within six months of January 26, 1992, a transition plan setting forth the steps necessary to complete [structural changes to facilities to achieve program access]"); 35.105(a) ("A public entity shall . . . evaluate its current services, policies, and practices, and the effects thereof"). Neither regulation expressly creates a private right of action to enforce its provisions.

163. "In determining whether a particular regulation is enforceable through a statute's private right of action, [courts] must look to the statute itself and determine whether it displays Congress's intent to create the private right purportedly contained in the regulation." *Lonberg*, 571 F.3d at 850. "Only those regulations effectuating the statute's clear prohibitions or requirements are enforceable through the statute's private right of action; regulations that do not encapsulate the statutory right and corresponding remedy are not privately enforceable." *Id.* at 851.

164. Section 202 of the ADA, 42 U.S.C. § 12132, prohibits public entities from denying qualified disabled

individuals from "meaningful access" to their services and programs. *Lonberg*, 571 F.3d at 851. In view of this prohibition, the Ninth Circuit held in *Lonberg* that the failure to prepare a transition plan is not subject to private enforcement. *Id.* The court explained that the statute "says nothing about a public entity's obligation to draft a detailed plan and schedule for achieving such meaningful access." *Id.* More fundamentally, "[t]he existence or non-existence of a transition plan does not, by itself, deny a disabled person access to a public entity's services, nor does it remedy the denial of access." *Id.* Citing *Lonberg*, this Court has likewise ruled that there is no private of action to enforce ADA regulations requiring the creation and implementation of a self-evaluation plan. *Skaff v. City of Corte Madera*, No. C 08-5407 SBA, 2009 WL 2058242, *3 (N.D.Cal. Jul. 13, 2009). Given these authorities, the Court finds that Kirola cannot seek to compel the City to prepare and implement a transition or self-evaluation plan under ADA regulations.

b) California Law

165. For much the same reasons, the Court rejects Kirola's companion claim predicated upon California Government Code section 11135 and two of its implementing regulations, Cal. Code Regs., title 22, sections 98251 (Self-Evaluation) and 98258 (Transition Plan). The state regulations governing the creation and implementation of transition and self-evaluation plans are patterned after the aforementioned federal regulations and are worded largely the same, except

that the state regulations are stated in permissive (i.e., "should"), as opposed to mandatory (i.e., "shall") terms. As such, it would be anomalous to conclude, as Kirola suggests, that California regulations impose a mandatory duty upon public entities to develop transition and self-evaluation plans when no such obligation exists in the federal regulations upon which they are patterned. *See Darensburg v. Metropolitan Transp. Com'n*, 636 F.3d 511, 519 (9th Cir.2011) (applying federal law to claim brought under California Government Code section 11135); *Kamen v. Lindly*, 94 Cal.App.4th 197, 203, 114 Cal.Rptr.2d 127 (2001) ("Where, as here, California law is modeled on federal laws, federal decisions interpreting substantially identical statutes are unusually strong persuasive precedent on construction of our own laws.").

166. The Court is aware that it previously intimated that Kirola could pursue claims predicated on California's self-evaluation and transition plan regulations. *See Kirola v. City and Cnty. of San Francisco*, No. C 07-3685 SBA, 2010 WL 1459725, *1 (N.D.Cal. Apr. 12, 2010). In opposing Plaintiff's motion for leave to file an amended complaint, the City argued, inter alia, that permitting the proposed amendment was futile because the regulations did not impose any mandatory duty to develop or implement either a transition or self-evaluation plan. Dkt. 205, 12:21-15:2. The Court rejected the City's argument, concluding that it could not be logically reconciled with California Government Code § 11139, which expressly provides a private right of action to enforce rights conferred under Section

11135 and its implementing regulations. *Kirola*, 2010 WL 1459725, *1. After further consideration of this matter, however, the Court reconsiders that conclusion. *See United States v. Smith*, 389 F.3d 944, 949 (9th Cir.2004) (holding that a district court may sua sponte reconsider a prior, interlocutory ruling over which it has continuing jurisdiction).

167. When Section 11135 was originally enacted in 1977, it did not include an express private right of action. *Donovan v. Poway Unified Sch. Dist.*, 167 Cal.App.4th 567, 594, 84 Cal.Rptr.3d 285 (2008). In *Arriaga v. Loma Linda University*, 10 Cal.App.4th 1556, 13 Cal.Rptr.2d 619 (1992), the California Court of Appeal subsequently declined to find an implied right of action. "In response to *Arriaga*, the Legislature, in Assembly Bill No. 1670 amended Government Code section 11139 to expressly provide for a private right of action, but expressly limited enforcement to a 'civil action for equitable relief.' " *Donavan*, 167 Cal.App.4th at 594, 84 Cal. Rptr.3d 285. Section 11139 provides, in relevant part, as follows: "This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies." Cal. Gov. Code § 11139.

168. Although Section 11139 created a private right of action to enforce rights conferred under Section 11135 and its regulations, it does not automatically follow that all regulations promulgated under Section 11135 necessarily create a mandatory duty, and hence, a private right of action based on the failure

to prepare and implement either a transition plan or self-evaluation plan. Section 11135 is a general anti-discrimination statute, pursuant to which a broad range of regulations have been adopted to implement its provisions. Cal. Code Regs. tit. 22, §§ 98000-98413. Regulatory language is to be construed in "its plain, commonsense meaning," giving meaning, where possible, "to every word and phrase in the regulation . . . as a whole so that all of the parts are given effect." *Butts v. Bd. of Trs. of the Cal. State Univ.*, 225 Cal.App.4th 825, 835, 170 Cal.Rptr.3d 604 (2014). Regulations are to be harmonized together, *see Hoitt v. Dept. of Rehabilitation*, 207 Cal.App.4th 513, 524, 143 Cal.Rptr.3d 461 (2012), and construed in the context with the statutes which they implement, *see Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329, 1349, 122 Cal.Rptr.3d 781 (2011).

169. The regulations implementing Section 11135 expressly differentiate between those regulations that are mandatory and those that are advisory. Cal. Code Regs. tit. 22, § 98010. Specifically, the regulations provide that: " 'Should' means ***advisory***" while " 'Shall' means ***mandatory***." *Id.* (emphasis added); *Comunidad En Accion v. Los Angeles City Council*, 219 Cal.App.4th 1116, 1125, 162 Cal.Rptr.3d 423 (2013) (holding that the definitions section forth in the California Code of Regulations, title 22, section 98010, apply to California Government Code section 11135). Here, the transition and self-evaluation plan regulations at issue use the term "should," as opposed to "shall." *Id.* §§ 98251(b), 98258. In view of the fact that

the promulgating agency expressly differentiated between "should" and "shall" and ascribed different significance to each term, it would be incongruous to construe Section 11139 as creating a mandatory duty or conferring a private right of action to enforce the transition and self-evaluation plan regulations, which are merely advisory in nature. *See Wollmer*, 193 Cal.App.4th at 1349, 122 Cal.Rptr.3d 781. Thus, the Court finds that although Section 11139 created a private right of action to enforce rights conferred under Section 11135 and its regulations, it does not transmute the advisory nature of the self-evaluation and transition plan into a mandatory duty.

170. Even if the regulations at issue imposed a mandatory duty, Kirola has failed to show that Section 11135 is applicable here. Section 11135 applies only to a program or activity operated by the state or "[is] funded directly by the state, or receives any financial assistance from the state." Cal. Gov. Code § 11135(a). No such showing has been made. That notwithstanding, any obligation created by the state's transition and self-evaluation plan regulations runs to the applicable state agency, as opposed to the City. Both of the applicable regulations include the language "should be required ***by the responsible State agency***," suggesting that any alleged duty under each regulation falls on state agencies rather than on the recipient of state funds. *See* 22 Cal. Code Reg's §§ 98251(a)(1), 98258 (emphasis added). Finally, Kirola has failed to demonstrate that she or class members were denied meaningful access to the City's programs, services and

activities, but for its failure to adopt and implement "a transition plan for the removal of access barriers as required by California Government Code § 11135." Dkt. 672, 25:26-28.

171. For the reasons discussed above, the Court finds that Kirola's claim based on the City's alleged failure to develop, adopt and implement a transition plan or self-evaluation plan fails both procedurally and substantively.

V. *CONCLUSION*

The Court is sensitive to the plight of mobility-impaired and other disabled individuals. The testimony of Kirola, class members, and mothers of class members effectively established the daily challenges confronting disabled individuals. Both federal and state law afford disabled individuals, including Kirola and members of the class, the right to meaningfully access the programs, activities and services provided by a public entity. At the same time, Article III of the United States Constitution requires that Kirola prove that she has standing to pursue claims on behalf of the class—which she has failed to do. Nevertheless, even if Kirola had satisfied that threshold burden, the record does not support her contention that the City has failed to comply with its obligations under Title II of the ADA and related federal and state statutes. To the contrary, the trial record establishes that the City is complying with its obligation to provide meaningful access, including program access, to its public right-of-way,

libraries, swimming pools, and parks and recreational facilities. Accordingly,

IT IS HEREBY ORDERED THAT in accordance with this Order, final judgment shall be entered in favor of the City. The Clerk shall close the file and terminate any pending matters.

IT IS SO ORDERED.

2010 WL 11488931
Only the Westlaw citation is currently available.
United States District Court, N.D. California,
Oakland Division.

Ivana KIROLA, et al., Plaintiffs,
v.
The CITY AND COUNTY OF SAN FRANCISCO
("the City"), et al., Defendants.

No. 4:07-CV-03685 SBA (EMC)
|
Signed 06/04/2010
|
Filed 06/07/2010

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ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

HON. SAUNDRA B. ARMSTRONG, UNITED STATES DISTRICT JUDGE

This matter came on for hearing on May 18, 2010 on Plaintiffs' Motion for Class Certification pursuant to Fed. R. Civ. P. 23. Guy B. Wallace, Mark T. Johnson and Amanda Hugh of Schneider Wallace Cottrell Brayton Konecky appeared for plaintiffs. Deputy City Attorneys James M. Emery and Elaine O'Neil appeared for Defendants City and County of San Francisco and its elected officials (collectively, "the City"). Having considered the papers and pleadings in the file and argument of counsel, and having found that the requirements of Rule 23 of the Federal Rules of Civil Procedure have been satisfied, IT IS HEREBY ORDERED that Plaintiffs' motion for class certification is GRANTED, as follows:

1. In their motion for class certification, Plaintiffs seek certification of the following class of persons with mobility disabilities:

> All persons with mobility disabilities who are allegedly being denied access under Title II of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, California Government Code Section 11135, et seq., California Civil Code § 51 et seq., and California Civil Code § 54 et seq. due to disability access barriers to the following programs, services, activities and facilities owned, operated and/or maintained by the

> City and County of San Francisco: parks, libraries, swimming pools, the Palace of Fine Arts, the Academy of Science, de Young Museum, War Memorial Opera House, Davies Symphony Hall, 101 Grove Street and curb ramps, sidewalks, cross-walks, curb ramps [sic], and any other outdoor designated pedestrian walkways in the City and County of San Francisco.

2. In addition, Plaintiffs seek an order appointing Plaintiff Ivana Kirola as the class representative and Schneider Wallace Cottrell Brayton Konecky LLP and The Sturdevant Law Firm as class counsel in this case.

3. The Court has considered and evaluated each of the required elements of class certification based upon the evidence in the record and finds as follows:

Numerosity

4. The City has not challenged the numerosity requirement of Rule 23(a)(1). The Court therefore finds that plaintiffs have satisfied Rule 23(a)(1)'s numerosity requirement. The evidence shows that there are approximately 21,000 persons with mobility disabilities who live in the City and County of San Francisco. Thus, the membership of the proposed class is sufficiently numerous that joinder would be impracticable.

Commonality

5. Plaintiffs allege that the City has engaged in a pattern and practice of discrimination against them and other persons with mobility disabilities, in violation of the Americans with Disabilities Act and related federal and state laws, by failing to eliminate physical barriers to access in its pedestrian right-of-way, parks, libraries, pools and other specified facilities. They further assert that such discrimination is systemic and the result of the City's failure to adopt adequate policies and practices for ensuring access to its programs, services and activities, as required by the applicable statutes and regulations. The adequacy of the City's policies and practices for ensuring compliance with disability access laws is an overarching issue that is common to the claims of the class as a whole and is, therefore, sufficient to find that commonality is satisfied. *See, Dukes v. Wal-Mart Stores, Inc.* 603 F.3d 571, 587 (9th Cir. 2010), *citing Armstrong v. Davis*, 275 F.3d 849, 868 (9th Cir. 2001) ("commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members," because such a system implicates common factual questions). In that regard, Plaintiffs here have demonstrated numerous questions of law or fact that are common to the class under the permissive standards of Rule 23(a)(2). *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Accordingly, the Court finds that Rule 23(a)(2)'s commonality requirement is satisfied. *See, Californians for Disability Rights, Inc. v.*

California Department of Transportation, 249 F.R.D. 334, 344-346.

Typicality

6. The Court next finds that Plaintiffs have satisfied the typicality prong of Rule 23(a)(3) because the proposed class representative Ivana Kirola is a member of the classes she seeks to represent and has claims that are reasonably coextensive with the claims of the class. *Hanlon*, at 1020. She alleges that she has suffered the same type of harm as alleged on behalf of the class, caused by the same alleged system-wide failures by the City, under the same legal theories. Accordingly, the Court finds that the typicality requirement has been met. *Californians for Disability Rights v. California Department of Transportation*, 249 F.R.D. 334, 346 (N.D. Cal. 2009).

Adequacy

7. The Court also finds that the proposed class representative, Ivana Kirola, is an adequate representative of the class because she is committed to prosecuting the case on behalf of the class and does not have any conflicts of interest with the class.

8. The City has challenged Ms. Kirola's ability to fairly and adequately protect the interests of the class in two respects. First it objects that she is an inadequate class representative because she is a member of the proposed settlement class in the *King* state court

action and therefore may be subject to a potential res judicata defense in this case, to which some members of the class in this case (*i.e.* those who do not use wheelchairs or scooters for mobility and who, therefore, do not belong to the *King* settlement class) are not subject. In view of the present uncertainty regarding final approval of the settlement agreement in *King et al. v. City and County of San Francisco*, San Francisco Superior Court Case No. 459-278, as well as the present uncertainty as to when the state court settlement, if approved, will become a final judgment for purposes of res judicata, the Court rejects San Francisco's adequacy challenge to Ms. Kirola as class representative.

9. At the hearing on the motion the City withdrew its second objection to Ms. Kirola's adequacy as a class representative based upon its contention that she lacks standing to seek relief regarding barriers that she has not herself encountered. Accordingly, the Court does not consider it here and makes no finding as to the type or scope of relief Plaintiff might seek or obtain on behalf of the class in this case. Such determinations will be made following trial based upon the evidence presented and the relief requested. The Court finds that Rule 23(a)(4)'s adequacy requirement is satisfied with respect to Ms. Kirola's representation of the class.

10. The City has not challenged the adequacy of proposed class counsel. The Court also finds that Plaintiff Ivana Kirola has retained competent counsel to represent her and the class. In particular, the Court has reviewed the declarations of Guy B. Wallace, Mark T. Johnson and Monique Olivier and finds that

Plaintiffs' counsel have substantial experience in class actions generally and as class counsel in class action cases very similar to this one under Title II of the Americans with Disabilities Act. *See*, *e.g. Cherry v City College of San Francisco, et al.* Case No. C 04-04981 WHA (N. D. Cal.); *Lopez v San Francisco Unified School District*, Case No. C-99-3260 SI (N.D. Cal.); *Siddiqi v. Regents of the University of California*, Case No. C 99-0970 SI (N.D. Cal.); *Weissman v. Trustees of the California State University*, Case No. Civ. 97-02326 MMC (MEJ) (N.D. Cal.); *Gustafson v. Regents of the University of California*, Case No. C097-4016 BZ (N.D. Cal.). Thus, the requirements of Rule 23(a)(4) are met. *Id.*

11. The Court rejects the City's objection that the class certification motion is untimely.

Certification Under Rule 23(b)(2)

12. A class action can be certified under Fed. R. Civ. P. 23(b)(2) if "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." "[T]his requirement is almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal v. Casey*, 43 F.3d 48, 58-59 (3d Cir. 1994). Certification under Rule 23(b)(2) is appropriate where the plaintiffs seek meaningful declaratory and injunctive relief. *Molski v. Gleich*, 318 F.3d 949-50 (9th Cir. 2003).

13. The City does not contest that this case satisfies the requirements of Rule 23(b)(2), since the relief plaintiffs seek includes class-wide injunctive relief as to San Francisco's policies and practices regarding access to City facilities and programs for persons with mobility disabilities. Accordingly, certification under Rule 23(b)(2) is warranted. *Californians for Disability Rights v. California Department of Transportation*, 249 F.R.D. at 349.

Definition of the Class

14. The parties dispute the proper class definition in this case. In their motion, plaintiffs sought certification of the following class:

> All persons with mobility disabilities who are allegedly being denied access under Title II of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, California Government Code Section 11135, et seq., California Civil Code § 51 et seq., and California Civil Code § 54 et seq. due to disability access barriers to the following programs, services, activities and facilities owned, operated and/or maintained by the City and County of San Francisco: parks, libraries, swimming pools, the Palace of Fine Arts, the Academy of Science, de Young Museum, War Memorial Opera House, Davies Symphony Hall, 101 Grove Street, curb ramps, sidewalks, cross-walks, curb ramps [sic] and any other outdoor designated

> pedestrian walkways in the City and County of San Francisco.

At the May 18 oral argument, plaintiffs' counsel agreed to remove from their proposed class definition the specific examples of the Academy of Science, deYoung Museum, War Memorial Opera House, Davies Symphony Hall and 101 Grove Street. Transcript of Proceedings, May 18, 2010 ("Transcript"), at 52:14-15, 55:2-57:7. At the close of the May 18 oral argument, plaintiffs' counsel subsequently proposed that the general categories of museums and music facilities be added to the proposed class definition. Transcript, at 73:2-11. In its proposed order submitted on May 24, plaintiffs requested that the additional category of "certain civic center buildings" also be inserted into the class definition.

15. San Francisco objects to such a modification of the class definition for several reasons.

16. First, diverse legal entities are responsible for design, construction and operation of the various cultural facilities in San Francisco that Plaintiffs now wish to include in their class definition. Plaintiffs have not demonstrated that the City's policies and practices regarding disabled access apply to these cultural institutions, which are often designed, constructed and/or operated by various legally distinct 501(c)(3) nonprofit entities. This situation contrasts sharply with City parks, libraries, swimming pools and the pedestrian right of way, the uncontested categories in plaintiffs' proposed class definition. Each park and each

swimming pool is under the management of the City's Recreation and Park Department. Likewise, each library is under the management of the San Francisco Public Library, and the City's Department of Public Works is responsible for the pedestrian right of way. Common policies and practices therefore apply across each of the uncontested categories in plaintiffs' proposed class definition. Because the responsibility for design, construction and/or operation of the City's diverse cultural facilities falls variously to the City and to separate 501(c)(3) non-profit entities, Plaintiffs have not established common issues as to policies and practices regarding access for persons with mobility disabilities to the City's museums, music venues or civic center buildings.

17. Furthermore, the proposed addition would broaden the substantive scope of this case to include cultural institutions that were not within the scope of the class definition plaintiffs proposed with their motion (*i.e.*, museums, music facilities and civic center buildings that were not among the six specifically designated facilities identified by name in plaintiffs' proposed class definition, such as, for example, the Asian Art Museum and the Legion of Honor Museum).

18. Plaintiffs' belated proposal to add new categories to their proposed class definition would essentially undo their agreement at the May 18 hearing to omit the six identified facilities from their class definition. Plaintiffs agreed to omit these facilities specifically in order to address the City's objections.

19. Finally, the legally distinct 501(c)(3) non-profit entities responsible for design, construction and/or operation of individual cultural facilities may be necessary parties pursuant to Fed.R.Civ.P. 19 for adjudication of access violations at those facilities or for the granting of relief regarding any of those facilities, and the time to add such parties is long past.

20. For these reasons, the Court will not permit plaintiffs to add to their class definition the generic categories of museums, music facilities and certain civic center buildings. For the foregoing reasons, the Court makes the following ORDERS:

1. Plaintiffs' motion for certification of the following class is GRANTED:

> All persons with mobility disabilities who are allegedly being denied access under Title II of the Americans with Disabilities Act of 1990, Section 504 of the Rehabilitation Act of 1973, California Government Code Section 11135, et seq., California Civil Code § 51 et seq., and California Civil Code § 54 et seq. due to disability access barriers to the following programs, services, activities and facilities owned, operated and/or maintained by the City and County of San Francisco: parks, libraries, swimming pools, and curb ramps, sidewalks, crosswalks, and any other outdoor designated pedestrian walkways in the City and County of San Francisco.

2. The Court appoints Ivana Kirola as the class representative.

3. The Court appoints the law firms of Schneider Wallace Cottrell Brayton Konecky LLP and The Sturdevant Law Firm as class counsel in this case.

IT IS SO ORDERED.