No. 23-35

In The Supreme Court of the United States

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,

Petitioners,

vs.

IVANA KIROLA, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit correctly hold that a wheelchair user who had suffered injury-in-fact from encountering accessibility barriers in public facilities that violate the Americans with Disabilities Act Accessibility Guidelines ("ADAAG"), and who is currently deterred from using those facilities because of their ADAAG violations, may seek prospective injunctive relief to remedy those violations on behalf of herself and a class of similarly situated persons with mobility disabilities?

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INTRODUCTION

Petitioners' call for this Court's extraordinary review rests on an inaccurate description of the Ninth Circuit opinions in this case and on misstatements of governing law. In an attempt to manufacture a conflict between the opinion below and this Court's precedents, Petitioners contend that the Ninth Circuit's conclusion that the class was entitled to injunctive relief was based solely on injuries to unnamed class members, not to Respondent Ivana Kirola ("Respondent" or "Ms. Kirola"). To the contrary, in concluding that Ms. Kirola and the class could obtain injunctive relief, the Ninth Circuit relied on its careful analysis in its first opinion in this matter of June 22, 2017 holding that Ms. Kirola, who has cerebral palsy and uses a wheelchair for mobility, suffered injury-in-fact because she had encountered barriers in the City's facilities that prevented her from benefitting from the same degree of access as non-disabled persons and therefore had standing to seek injunctive relief. Pet.App. at 102a-05a.

In addition, the Ninth Circuit found that, as a result of the barriers in the City's facilities, Ms. Kirola has been deterred from using particular City facilities, and is likely to suffer further harm in the future because of the continued presence of such barriers. *Id.* at 104a-05a. Thus, because the Ninth Circuit concluded both that Ms. Kirola did suffer injury and that she will suffer injury in the future, this case does *not* present the question of whether a class may be eligible for injunctive relief if the named plaintiff has not suffered any injury.

Moreover, there is no circuit split here because the Ninth Circuit evaluated Ms. Kirola's standing and entitlement to injunctive relief using the uniformly accepted standards in disability discrimination cases regarding physical access barriers. The Ninth Circuit held—in line with all other circuits—that, since this is a case for prospective injunctive relief, there is no legal requirement under Article III or the Americans with Disabilities Act of 1990 ("ADA") that Ms. Kirola have previously encountered each specific barrier that violates ADAAG before seeking removal of such barriers. Under the legal standards used by all circuits regarding disability access claims under the ADA, a plaintiff who is threatened with imminent injury from encountering ADAAG violations may seek injunctive relief requiring their removal from public facilities without actually encountering the barriers. *See*, *e.g.*, *Frame v. City of Arlington*, 657 F.3d 215, 235-36 & n.104 (5th Cir. 2011) (en banc); *Disabled Am. For Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64-65 & n.7 (1st Cir. 2005). And this Court has repeatedly held over the past one hundred years that a plaintiff is not required to "await the consummation of threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). Thus, the fact-specific analysis of injury conducted by the Ninth Circuit here would have produced the same result in any other circuit.

Petitioners do not cite any authority for their contention that a prior encounter with an ADAAG violation is necessary in order for a plaintiff to satisfy injury and to be eligible for prospective injunctive relief, let

alone establish a circuit split. None of the cases cited by Petitioners arise under the ADA or involve physical access for persons with mobility disabilities. To the contrary, the cases Petitioners cite in support of their supposed circuit split involve inapposite situations in which the named plaintiff's injury is either presumed or not disputed, and Article III standing was not established for lack of causation and/or redressability or because of reliance on the "juridical link" doctrine. In short, Petitioners have cited to no case law holding that a plaintiff who is a wheelchair user and who has encountered and will encounter barriers to accessing a public facility cannot seek injunctive relief on behalf of a class of persons with mobility disabilities who have encountered and will encounter similar barriers.

Petitioners' argument that this Court should grant certiorari in order to address a purported absence of articulated limits on injunctive relief in class actions is also without merit. This Court has already established clear standards regarding injunctive relief in such cases. It is well-settled that the named plaintiff in a class action must have standing and that the scope of injunctive relief in a class action is dictated by the extent of the violation the class established at trial. *See*, *e.g.*, *Lewis v. Casey*, 518 U.S. 343, 359-60 (1996). The Ninth Circuit followed these clearly established rules by first finding that Ms. Kirola has standing and then directing the issuance of only narrowly tailored injunctive relief regarding the ADAAG violations found by the district court. There is thus no absence of clear standards nor a deviation from them.

At bottom, Petitioners' request for certiorari rests on their contention that Ms. Kirola is ineligible to seek injunctive relief on behalf of the class. But Petitioners are both too late and too early with respect to the arguments they advance. First, the Ninth Circuit previously held that Ms. Kirola has standing and that she has suffered injury. If Petitioners wanted this Court to review the Ninth Circuit's standing determination, they should have sought review following that opinion. They did not. Second, to the extent that Petitioners contend that Ms. Kirola does not share the same injury and have the same interest as the class members in seeking the removal of ADAAG violations from the City's newly constructed or altered facilities, they should have appealed the district court's determinations that she satisfies the typicality and adequacy requirements of Fed. R. Civ. Proc. 23(a). Petitioners, however, never did so. Further, Petitioners' contention that Ms. Kirola has not established that she is entitled to relief on her individual claim for injunctive relief is contrary to governing law, and merely constitutes an attempt to dispute the Ninth Circuit's application of prevailing legal standards to the facts of this particular case. *See infra* at § I.A.3.

Finally, while Petitioners now contest the Ninth Circuit's conclusion that injunctive relief is warranted with regard to certain City facilities, their challenge is premature in that the district court has not yet determined the scope of any injunctive relief, and the Ninth Circuit has remanded this matter for further fact-finding proceedings on this very issue. The district court

has not yet assessed the extent of ADAAG violations in at least eleven additional facilities, and the sufficiency of the City's policies and practices regarding ADAAG compliance remains an open issue. As Petitioners concede, "[i]njury to unnamed class members determines the proper scope of relief." Pet. at 18. Because fact-finding proceedings are not yet complete, this case is a poor vehicle for review.

The Petition should be denied.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

On July 17, 2007, Respondent Ivana Kirola and the certified class of over 21,000 persons with mobility disabilities (collectively "Respondents") filed this action alleging that the City has performed new construction and alterations to its pedestrian rights of way, parks, playgrounds, recreational facilities, swimming pools, and libraries that does not comply with the ADAAG, thus violating Title II of the ADA, Section 504 of the Rehabilitation Act of 1973, and parallel California laws. Respondents alleged that they had been, and continue to be, denied full and equal access to these public facilities, and they sought declaratory and injunctive relief to remedy the violations.

At trial, Respondents presented evidence of a City wide policy and practice of not complying with ADAAG in the construction and alteration of pedestrian rights

of way, parks, playgrounds, and recreational facilities, including those used by Ms. Kirola and the class members. Indeed, from the effective date of the ADA on January 26, 1992 until the Ninth Circuit held otherwise in 2017, the City officially took the position that ADAAG did not apply to the construction or alteration of pedestrian rights of way, parks, playgrounds and recreational facilities. The City's Deputy Director for Physical Access and most senior official regarding disability access, Mr. John Paul Scott, and the City's Disability Access Coordinator for the Department of Public Works, Mr. Kevin Jensen, both testified that ADAAG did not apply to parks and playgrounds, and that the City did not use ADAAG for those types of facilities. Trial Tr. Vol. 8, 1496-97, Apr. 21, 2011, ECF No. 705; Trial Tr. Vol. 9, 1820-24, Apr. 22, 2011, ECF No. 706; Trial Tr. Vol. 10, 1946-48, Apr. 28, 2011, ECF No. 707. None of the City's policies or procedures regarding new construction or alterations specified that the pedestrian rights of way, parks, playgrounds or recreational facilities must comply with ADAAG.

Respondents also presented testimony regarding their use of City facilities and the specific barriers to access at those facilities. Ms. Kirola testified that she had lived in San Francisco for over 17 years. During that period, she had used the Main Library and other newly constructed or altered facilities that did not comply with ADAAG. She testified to regularly using, and encountering barriers in, the pedestrian rights of way (Pet.App. at 179a-80a), Alamo Square Park (*id.* at 184a), the Main Library, the Western Addition Branch

Library, the Parkside Branch Library (*id.* at 181a-82a), Sava Pool, Hamilton Pool, and MLK Pool (*id.* at 182a-83a). She testified that struggling with barriers in these facilities made her "feel discriminated against" and "so frustrated" that the City has not complied with the ADA. Trial Tr. Vol 7, 1387-88, Apr. 20, 2011, ECF No. 704.

Class members testified at trial regarding the negative impact that encounters with ADAAG violations have on persons with mobility disabilities. For example, Tim Grant testified that an "accessible" restroom he used at Golden Gate Park lacked a grab bar. Pet.App. at 54a-55a. This made it much harder for him to transfer from his wheelchair to the toilet, something he described as "almost like a leap of faith," and which increases his risk of falling. Trial Tr. Vol. 5, 894, Apr. 11, 2011, ECF No. 702. Similarly, Jill Kimbrough testified that she and her mobility disabled daughter, Millie, were unable to use St. Mary's Playground because of the ADAAG violations described below. "Typically developing children can take a slide that goes straight down to the playground," but Millie cannot get to the playground at all without being lifted and carried. Pet.App. at 43a.

The district court found multiple specific ADAAG violations at trial, including at the Main Library, St. Mary's Playground, and the restroom in Golden Gate Park used by Mr. Grant. The ADAAG violations at the Main Library included violations that would pose barriers for wheelchair users of the library like Ms. Kirola and the class members, such as, *inter alia*, a lack of

required semi-ambulatory stalls in multiple restrooms (Pet.App. at 66a), door pressures greatly exceeding the maximum 5 pounds of force mandated by ADAAG, including pressures up to 17 pounds (*id.* at 67a-68a), a lack of companion seating adjacent to the wheelchair spaces in the Koret Auditorium (*id.* at 70a-72a), and a lack of insulation on lavatory supply and drain lines (*id.* at 65a) that could result in wheelchair users suffering burns or abrasions on their legs from the pipes underneath restroom sinks. As experienced by Ms. Kimbrough and Millie, the newly constructed St. Mary's Playground completely lacks an ADAAG-compliant accessible route. The "designated path to the playground area requires using an elevated, arched bridgeway system" that contains multiple ADAAG violations, including excessive running slopes and widths that are too narrow. The only alternative to the bridge is a service road with 13 to 15 percent slopes, rendering the new playground "highly inaccessible." *Id.* at 43a-45a, 55a.

II. PROCEEDINGS BELOW

On June 7, 2010, pursuant to Federal Rule of Civil Procedure 23(b)(2), the district court certified the following class for declaratory and injunctive relief:

> 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.

Pet.App. at 308a.

The City made four motions to decertify the class on the basis that Ms. Kirola did not satisfy Rule 23's requirements for typicality or adequacy, all of which were denied. Defs.' Mot. for J. or Class Decert., 15-16, Apr. 22, 2011, ECF No. 570; Defs.' Post-Trial Mot. for J., 7, May 27, 2014, ECF No. 666; Defs.' Reply Br. Supporting Post-Trial Mot. for J., 2, 14, July 1, 2014, ECF No. 674; Defs.' Mot. for J., 20, Aug. 16, 2018, ECF No. 751. In their most recent motion to decertify the class, Petitioners argued that Ms. Kirola did not satisfy typicality because she had not previously encountered any ADAAG violations. Defs.' Mot. For J., at 20. Petitioners have never sought appellate review of any of the district court's decisions denying their motions for decertification or the original order certifying the class.

A bench trial was conducted over 14 days between April 4, 2011 and May 5, 2011. Three and a half years later, on November 26, 2014, the district court issued a ruling against Respondents on all claims. That ruling was the product of multiple, serious errors. Among other things, the district court found that: 1) Ms. Kirola

lacked standing; 2) ADAAG did not apply to the City's pedestrian rights of way, parks, playgrounds or other recreational facilities, and that therefore Respondents had not established any ADAAG violations in such facilities; and 3) as to those facilities in which Respondents had shown ADAAG violations and to which ADAAG did apply, the violations were not extensive enough to warrant injunctive relief. Pet.App. at 193a, 203a-04a, 238a, 243a, 278a. On December 23, 2014, Respondents appealed.

On June 22, 2017, the Ninth Circuit issued its first opinion in this case and reversed the district court's judgment regarding Respondents' claims for violations of the City's new construction and alterations duties. The Ninth Circuit held that Ms. Kirola's trial testimony established standing. Pet.App. at 102a-05a. Specifically, Ms. Kirola suffered injury-in-fact by encountering at least one barrier that "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." *Id.* at 104a. Petitioners did not at that time seek this Court's review of the Ninth Circuit's holding that Ms. Kirola has standing to seek injunctive relief on behalf of the class with respect to all facilities falling within the class definition. *Id.* at 107a.

In addition to concluding that Ms. Kirola has standing, the Ninth Circuit found that the City's own witnesses admitted that approximately 400 access barriers in the City's newly constructed and altered facilities required remediation. *Id.* at 99a. The Ninth

Circuit held that the ADAAG applied to pedestrian rights of way and to parks and recreational facilities, and that the district court had erred by not applying the ADAAG to those facilities. As a result of these errors, the Ninth Circuit reversed and remanded with specific instructions to the district court to "apply ADAAG as we have interpreted it, and reevaluate the extent of ADAAG noncompliance . . . at facilities used by Kirola and all other class members." *Id.* at 113a, 126a-27a. Petitioners did not at that time seek this Court's review of the Ninth Circuit's directive that the district court's analysis should encompass facilities used by other class members in addition to those used by Ms. Kirola.

On August 16, 2018, Petitioners filed a Motion for Judgment as a Matter of Law. Defs.' Mot. for J., ECF No. 751. Petitioners argued, contrary to the Ninth Circuit's opinion, that Respondents had not established any ADAAG violations at trial. The district court waited an additional two-and-a-half years, and then without holding any evidentiary hearing, granted Petitioners' Motion on March 12, 2021. The district court again denied all relief, holding that, even though the City had violated ADAAG, the City's violations were mere "imperfections" that did not warrant injunctive relief. In its opinion, the district court did not even address a substantial number of the facilities that were discussed at trial, including the Botanical Gardens and ten recreation centers. Respondents appealed again.

On April 10, 2023, the Ninth Circuit issued its second decision in this case. The Ninth Circuit found that

the "district court's reasoning does not support denying relief entirely" and remanded "for the district court to determine injunctive relief" tailored to the ADAAG violations that it found at the Main Library, St. Mary's Playground, and a restroom in Golden Gate Park. Pet.App. at 2a-3a. In addition, "the district court should also consider whether the evidence at trial established ADAAG violations at the [Botanical Gardens and ten recreation centers] listed in the plaintiffs' opposition to the motion for judgment that the district court did not address." *Id.* at 4a. "If the district court finds any further ADAAG violations, the district court should revisit the question of injunctive relief that is systemwide or tailored to any additional violations found." *Id.* at 8a-9a.

On July 10, 2023, Petitioners filed a Petition for a Writ of Certiorari.

REASONS FOR DENYING THE PETITION

I. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH PRECEDENTS FROM OTHER CIRCUITS.

A. PETITIONERS' ALLEGED CIRCUIT SPLIT IS BASED ON THE ERRONEOUS PREMISE THAT MS. KIROLA DID NOT SUFFER HARM, WHEN IN FACT THE NINTH CIRCUIT HELD THE OPPOSITE.

Petitioners argue that the Ninth Circuit's opinion "conflicts with the decisions of federal appellate courts

that . . . have recognized that harm to unnamed class members alone cannot support relief in a class action." Pet. at 15. But Petitioners' alleged "conflict" is based on the erroneous assertion that Ms. Kirola was not injured and that the Ninth Circuit relied only on injuries to unnamed class members to find standing for injunctive relief. As discussed below, the Ninth Circuit specifically found that Ms. Kirola has satisfied the requirements for injury and standing under governing law, and that she is therefore entitled to seek relief on behalf of herself and the class. Thus, there is no conflict with the other circuit cases cited by Petitioners because this is simply not a case in which relief was ordered based on "harm to unnamed class members alone." Pet. at 15.

1. Ms. Kirola Has Suffered Injury-in-Fact Because She Has Encountered Barriers That Limited Her Access to City Facilities And Deterred Her From Using Them.

Although Petitioners did not seek this Court's review of the Ninth Circuit's first decision establishing that Ms. Kirola suffered injury and has standing to seek injunctive relief, they now try to collaterally attack that holding. The Ninth Circuit correctly held that Ms. Kirola has standing to seek injunctive relief to remedy the City's ADAAG violations because she has used facilities with ADAAG violations in the past, she is deterred from using those facilities again, and she is likely to encounter the ADAAG violations if she

returned to those facilities in the future. Petitioners' contention that Ms. Kirola has not suffered any cognizable injury that gives rise to standing is untrue.

The Ninth Circuit conducted a detailed analysis of Ms. Kirola's standing based on the evidence presented at trial and correctly found that she has suffered "actual" injuries that are "concrete and particularized" in two respects. First, the court concluded that Ms. Kirola suffered injury because she has struggled with barriers that limited her ability to use City facilities. "The barriers she encountered prevented her from benefitting from the same degree of access as a person without a mobility disability." Pet.App. at 104a.

The Ninth Circuit's conclusion that Ms. Kirola has suffered injury because of her encounters with barriers is consistent with the approach that has been adopted by other circuits. Indeed, all of the circuits to have addressed the issue have held that a person with a mobility disability has suffered injury-in-fact if she has visited and entered, or attempted to enter, a facility and encountered one or more barriers therein that limited or interfered with physical accessibility. *See Mosley v. Kohl's Dep't Stores, Inc.*, 942 F.3d 752, 757 (8th Cir. 2019); *Kreisler v. Second Ave. Diner Corp.*, 731 F.3d 184, 187-88 (2d Cir. 2013); *Scherr v. Marriott Int'l, Inc.*, 703 F.3d 1069, 1074 (7th Cir. 2013); *Frame*, 657 F.3d at 235-36; *Chapman v. Pier 1 Imp. (U.S.) Inc.*, 631 F.3d 939, 947-49 (9th Cir. 2011) (en banc); *Disabled Am. For Equal Access*, 405 F.3d at 64-65; *Steger v. Franco, Inc.*, 228 F.3d 889, 893 (8th Cir. 2000).

A plaintiff in an access case under the ADA does not need to prove a prior encounter with a specific ADAAG violation in order to show injury-in-fact. Rather, an encounter with any barrier that limited his or her ability to use the facility is sufficient. *See*, *e.g.*, *Gaylor v. Hamilton Crossing CMBS*, 582 F. App'x 576, 580 (6th Cir. 2014) ("whether [defendant's] slopes actually exceed permissible standards—which is clearly a merits-based inquiry—has no place in our or the district court's standing analysis"). Indeed, this Court has long recognized that whether a plaintiff is able to establish the ultimate merits of her or his claim at trial is wholly irrelevant to whether they have suffered an injury-in-fact that is sufficient to invoke jurisdiction. *See*, *e.g.*, *Davis v. United States*, 564 U.S. 229, 249 n.10 (2011) ("[S]tanding does not depend on the merits of a claim.") (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 624 (1989)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) ("'[j]urisdiction . . . is not defeated . . . by the possibility that the averments [in a complaint] might fail to state a cause of action on which petitioners could actually recover.'") (quoting *Bell v. Hood*, 327 U.S. 678, 682 (1946)); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal"). Petitioners cite no authority for the proposition that a plaintiff must prove a prior encounter with an ADAAG violation in order to show injury.

Second, the Ninth Circuit found that Ms. Kirola has suffered injury because she has been deterred from returning to the facilities she visited as a result of

access barriers. Pet.App. at 104a. Courts have uniformly recognized that being deterred from using a facility because of a prior encounter with one or more access barriers constitutes injury-in-fact. *See Mosley*, 942 F.3d at 757; *Kreisler*, 731 F.3d at 188; *Scherr*, 703 F.3d at 1074-75; *Chapman*, 631 F.3d at 949-50; *Disabled Am. For Equal Access*, 405 F.3d at 64-65; *Steger*, 228 F.3d at 892.

2. Ms. Kirola Is Threatened With Imminent Injury Because She Seeks To Use Facilities That Contain ADAAG Violations.

In addition to finding that Ms. Kirola has suffered injury-in-fact because of past encounters with barriers in the City's facilities, the Ninth Circuit also found that Ms. Kirola is threatened with imminent harm because she is deterred from returning to City facilities due to barriers. Pet.App. at 104a-05a.

It is well-settled that a party may satisfy injury-in-fact, and be eligible for prospective injunctive relief, if she is threatened with imminent injury. Such injury must be "certainly impending." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 414 n.5 (2013). This Court has repeatedly recognized that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Farmer v. Brennan*, 511 U.S. 825, 845 (1994) (quoting *Pennsylvania*, 262 U.S. at 593); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The same rule applies to class

actions. As this Court stated in *Lewis v. Casey*, "it is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, *or will imminently suffer*, actual harm." 518 U.S. at 349 (emphasis added).

Ms. Kirola easily meets this test. She lives in San Francisco and has used its public facilities, including, for example, the Main Library, on a regular basis. Ms. Kirola, however, cannot have equal access to the Main Library because it contains multiple ADAAG violations, including heavy doors, non-compliant lavatories, a lack of accessible seating spaces in the auditorium, and other barriers. Thus, when she returns to the Main Library as she intends, she will suffer harm due to those barriers. Because Ms. Kirola must use a wheelchair for mobility, and because ADAAG violations exist throughout the Library (including the restrooms), it is plain that her injury is "certainly impending" and is not "speculative." As the Ninth Circuit found, "she is likely to suffer harm in the future because Kirola is 'currently deterred from visiting [various public facilities] by accessibility barriers.' " Pet.App. at 104a-05a.

The Ninth Circuit reaffirmed this conclusion in its recent opinion, finding that Ms. Kirola has standing and is eligible for injunctive relief regarding ADAAG violations in the City's facilities because she is threatened with further injury. *Id.* at 3a-4a (citing *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) and *Chapman*, 631 F.3d at 944).

Indeed, all the circuits to have considered the issue have concluded that persons with disabilities are threatened with imminent injury by barriers at a facility even if they have not yet encountered each and every barrier that exists at the facility. Thus, courts have consistently held that once a person with a mobility or vision disability has encountered a barrier at a facility, she is *not* required to return and encounter *other* barriers at the facility in order to obtain injunctive relief to remedy all of the barriers at the facility. *See Mosley*, 942 F.3d at 760; *Kreisler*, 731 F.3d at 188-89; *Scherr*, 703 F.3d at 1074-75; *Frame*, 657 F.3d at 235-36; *Chapman*, 631 F.3d at 950-51; *Disabled Am. For Equal Access*, 405 F.3d at 64-65 & n.7; *Steger*, 228 F.3d at 894.

Finally, the Ninth Circuit correctly found that Ms. Kirola satisfied causation and redressability because her injuries are fairly traceable "to the City because the City is responsible for construction, alteration, and maintenance" of its facilities, and because eliminating the ADAAG violations at the facilities used by Ms. Kirola and the class members would reduce the barriers to access that they face. Pet.App. at 105a. Those holdings are similarly in line with those of other circuits and this Court.

In short, the Ninth Circuit correctly held that Ms. Kirola was injured and has standing to seek injunctive relief to correct the City's violations.

3. Ms. Kirola Established Her Entitlement to Injunctive Relief Under the ADA.

Petitioners have cited no case under the ADA holding that, once a named plaintiff has established injury-in-fact and standing, they need to make an *additional* showing of injury to obtain injunctive relief. To the contrary, to prevail on the merits of a claim for injunctive relief under Title II of the ADA, the plaintiff must show: (1) that she is a qualified individual with a disability; (2) she 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) this exclusion, denial, or discrimination was by reason of her disability. 42 U.S.C. § 12132; *Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). With respect to new construction or alterations, the plaintiff must also show that the public entity constructed a new facility or altered an existing facility after January 26, 1992, and did so without complying with ADAAG. 28 C.F.R. § 35.151.

Here, Ms. Kirola satisfied all of the elements of her claim and established her entitlement to equitable relief. She established that she is a person with a mobility disability who seeks to use the Main Library, that the Library is a newly constructed facility which contains ADAAG violations, and that she is presently deterred from using it because of its inaccessibility. Nothing more is required to establish discrimination under the ADA and to obtain injunctive relief

requiring the removal of ADAAG violations. *See*, *e.g.*, *Frame*, 657 F.3d at 231, 235-36; *Pickern*, 293 F.3d at 1136-37 ("once a plaintiff has actually become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation, the plaintiff has suffered an injury" and is entitled to injunctive relief).[1]

Nothing in the ADA requires prior encounters with ADAAG violations for the plaintiff in an access case to obtain injunctive relief requiring their removal. *See*, *e.g.*, *Frame*, 657 F.3d at 235-36 & n.104; *Chapman*, 631 F.3d at 951; *Disabled Am. For Equal Access, Inc.*, 405 F.3d at 64-65 & n.7.

In sum, the Ninth Circuit's unremarkable application of case law regarding injunctive relief in ADA physical access cases does not create a circuit split and does not warrant review by this Court.

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[1] Even if Ms. Kirola's individual claim for injunctive relief had failed (which it did not), that would have no legal significance to the separate issue of whether the class is entitled to injunctive relief. It is well-settled that the failure of the named plaintiff's claim in a certified class action is irrelevant to whether the class established liability, or to whether the class is entitled to relief. *See*, *e.g.*, *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 406 n.12 (1977); *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747, 752-57 (1976); *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987-88 (9th Cir. 2007) (en banc); *Whitlock v. Johnson*, 153 F.3d 380, 383-84 (7th Cir. 1998); *Harmsen v. Smith*, 693 F.2d 932, 942-43 (9th Cir. 1982); *Sledge v. J.P. Stevens & Co., Inc.*, 585 F.2d 625, 634 (4th Cir. 1978).

B. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS CITED BY PETITIONERS.

The cases that Petitioners cite, two cases from the Sixth Circuit and one from the Seventh Circuit, are inapposite and do not create a circuit split.

First, the Ninth Circuit applied the same standards that the Sixth, Seventh and every other circuit has employed to evaluate Respondent's standing: whether Respondent had suffered a particularized injury, whether those injuries were causally traceable to Petitioners' unlawful conduct, and whether an injunctive order from the court would redress Respondent's injuries. *Compare* (Pet.App. 102a-06a) (using traditional three-part test for standing set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992)) *with Fox v. Saginaw Cnty., Mich.*, 67 F.4th 284, 293 (6th Cir. 2023) (same); *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1093 (6th Cir. 1985) (same); *Hope, Inc. v. Cnty. of DuPage, Ill.*, 738 F.2d 797, 804 (7th Cir. 1984) (same). At bottom, Petitioners simply disagree with the Ninth Circuit's application of these standards to the specific facts of this case.

Second, the cases cited by Petitioners do not support their claim of a circuit split. *Jaimes v. Toledo Metropolitan Housing Authority* and *Hope, Inc. v. County of DuPage, Ill.* were class actions in which low-income plaintiffs and organizations sought to challenge exclusionary housing practices which they alleged

unconstitutionally denied class members the opportunity to live in other, more desirable communities. Neither case is about injury-in-fact. In fact, in *Jaimes*, injury is presumed and the court only discusses causation and redressability.

In both cases, the courts, citing *Warth*, concluded that the plaintiffs lacked standing to pursue their claims because they had not established a causal connection between their injuries and the assertedly illegal conduct they sought to challenge. *Jaimes*, 758 F.2d at 1097; *Hope*, 738 F.2d at 809-10. Both courts also ruled, again citing *Warth*, that the plaintiffs failed to show that their injuries could be redressed by any injunctive relief ordered by a court. *Jaimes*, 758 F.2d at 1097-98; *Hope*, 738 F.2d at 810-11. But, here, Petitioners do not challenge the Ninth Circuit's previous causation and redressability findings or its ultimate conclusion that Ms. Kirola has standing. Thus, the Ninth Circuit's decision below addressed whether a plaintiff who *has standing* could seek injunctive relief on behalf of the class, while the Sixth and Seventh Circuit cases addressed the disanalogous situation of a plaintiff who had been found to *not have standing*.

Fox v. Saginaw Cnty., Mich. is similarly inapposite. There, the Sixth Circuit examined the propriety of the "juridical link" doctrine, which is not and has never been at issue in this case. In *Fox*, the court focused on causation—whether the named plaintiff's injury was "fairly traceable" to the defendant. The named plaintiff in that case filed suit against the county in which he lived over its unlawful treatment of delinquent

taxpayers, but, relying on the juridical link doctrine, he also asserted claims on behalf of taxpayers in 26 other counties. *Fox*, 67 F.4th at 288. The Sixth Circuit rejected the plaintiff's reliance on juridical link and ruled that the named plaintiff did not have standing to sue the other counties because his injury was not traceable to those counties. *Id.*

Here, Ms. Kirola's standing to sue the sole Defendants, the City and County of San Francisco, in the City where she lives and with respect to their conduct as directly applied to her, is not in dispute. Indeed, unlike the plaintiff in *Fox*, who could not be injured by other counties' violations because he owned property and paid taxes in only one county, Ms. Kirola lives in San Francisco and faces imminent injury from ADAAG violations in City facilities that she seeks to use. For that reason, the Ninth Circuit did not need to rely on the juridical link doctrine to support its conclusion that Respondents had standing to sue Petitioners, and this case does not raise any questions whatsoever about the juridical link doctrine.

II. THE NINTH CIRCUIT'S OPINION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENTS.

A. THE NINTH CIRCUIT FOLLOWED THIS COURT'S PRECEDENTS ON STANDING.

Petitioners selectively quote from this Court's opinions in an attempt to show that the Ninth Circuit's decision conflicts with this Court's precedents on

standing. But the cases cited by Petitioners simply stand for the unremarkable proposition that a named plaintiff in a class action must prove injury-in-fact, a requirement that the Ninth Circuit held was satisfied here and that Petitioners do not—and cannot—challenge. In order to manufacture a conflict with this Court's precedents, Petitioners ignore the Ninth Circuit's clear injury-in-fact holding and proceed as though it held that Ms. Kirola need not show injury at all. As a result, none of the cases cited by Petitioners has any relevance to the injury-in-fact analysis at issue here, which is squarely in line with the standards this Court has articulated for evaluating a named plaintiff's standing under Article III. *See*, *e.g.*, *Lujan*, 504 U.S. at 560-61.

The standing analysis in *Warth v. Seldin*, 422 U.S. 490 (1975), is not applicable here because it focused on the lack of causation and redressability—neither of which are at issue in this case. This Court ruled the plaintiffs in *Warth* lacked standing to sue because they had failed to allege that the restrictive zoning covenants at issue caused their injury of being unable to purchase or lease housing in a specific town. *Id.* at 506. Unlike *Warth*, Respondent here has established a clear causal connection between the injuries she has suffered and Petitioners' unlawful conduct, and she has established that her injuries are redressable by injunctive relief. Pet.App. at 105a.

Petitioners' assertion that the Ninth Circuit's opinion conflicts with *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), is also

flawed. In *Simon*, this Court also focused its analysis on causation, holding that it was "purely speculative" whether the plaintiffs' injuries due to being denied care by hospitals could be attributed to the challenged Treasury Department ruling rather than independent decisions by the hospitals. *Id.* at 42-43. Here, in contrast, as the Ninth Circuit found, Ms. Kirola's injuries were caused by Petitioners' violations of the ADA. Pet.App. at 105a.

Petitioners next offer up *Blum v. Yaretsky*, 457 U.S. 991 (1982), as another case with which the Ninth Circuit's decision supposedly conflicts. Once again, Petitioners are wrong. In *Blum*, this Court addressed whether plaintiffs, who were patients in private nursing homes and were threatened with transfers to lower levels of care, had standing to challenge the adequacy of state administrative procedures that could result in transfers to higher or lower levels of care. This Court focused on whether the threats of transfers were sufficiently immediate and real to confer standing on the named plaintiffs. As to the named plaintiffs' challenge to potential transfers to higher levels of care, this Court ruled that the plaintiffs lacked standing for those claims since they had not personally faced this type of transfer. *Id.* at 1001.

With regard to the plaintiffs' challenge to transfers to lower levels of care, however, this Court held that the threat of such transfers was "sufficiently substantial that respondents have standing to challenge their procedural adequacy." *Id.* at 1000. In so ruling, this Court emphasized the well-established rule that

the threat of injury, so long as it is real and immediate, is sufficient to confer standing on a plaintiff challenging unlawful conduct, and that "'[o]ne does not have to await the consummation of threatened injury to obtain preventive relief.'" *Id.* (quoting *Pennsylvania*, 262 U.S. at 593). Petitioners neglect to mention this portion of the opinion. As discussed above, Ms. Kirola's threat of injury from encountering barriers that limit or deny her access to public facilities is very real and imminent, and constitutes an injury to her personally thus establishing her individual standing. *See supra* at § I.A.2.

Petitioners' attempt to conjure up a conflict between the Ninth Circuit's ruling in this case and this Court's opinion in *Lewis v. Casey*, 518 U.S. 343 (1996), is equally infirm. In *Lewis*, the Supreme Court held that prisoners had no right to law library facilities, but only a right to access to courts. Because only one named plaintiff had established an injury at trial and the cause of that injury was that the prison had not provided assistance with his illiteracy sufficient to allow him access to the courts, it was improper for the district court to order injunctive relief requiring wide-ranging reforms of the state's prison system, including the provision of assistance to non-English speakers or prisoners in lockdown. *Lewis*, 518 U.S. at 356-60. In other words, because no named plaintiff experienced or was threatened with the denial of access to the courts due to their inability to speak English or due to their being in lockdown, broad injunctive relief remedying those injuries was improper. In addition, this Court

ruled that because the record contained no evidence that the violations of the prisoners' rights were widespread, the district court should not have ordered injunctive relief as to the entire Arizona prison system; rather the relief should have been limited to the violations that were established at trial. *Id.* at 359-60.

Here, in contrast, the law is clear that all class members have a right to ADAAG-compliant newly constructed or altered facilities owned or maintained by Petitioners. It is equally clear that all 21,000 class members have suffered injury due to the existence of ADAAG violations in Petitioners' facilities, whether they have had their access limited by those barriers in the past or are likely to encounter them in the future, or both. Furthermore, the Ninth Circuit held that injunctive relief should be limited to those facilities as to which Respondents were able to show the existence of ADAAG violations. And, because Ms. Kirola and the class members all suffer the same injury as a result of being threatened by encountering ADAAG violations in the City's new or altered facilities, this case does not present the problem that arose in *Lewis*, where the named plaintiffs did not have the same type of injury as the class members. *Id.* at 358.

Petitioners also incorrectly argue that the Ninth Circuit's reliance on *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California*, 543 U.S. 499 (2005), puts it in conflict with this Court's precedents. First, Petitioners mischaracterize *Armstrong* as holding that a named plaintiff need not have suffered an injury. To the contrary, in

the portion of the opinion entitled "Standing," the court expressly recognized that "[i]n order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining 'some direct injury as a result of the challenged statute or official conduct.'" *Id.* at 860 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

Second, the Ninth Circuit's citation to *Armstrong* in its opinion below is *not* a part of its standing analysis with respect to Ms. Kirola. As the Ninth Circuit noted, it previously held that Ms. Kirola "has standing for claims related to all facilities challenged at trial." Pet.App. at 3a-4a. Instead, the Ninth Circuit's citation to *Armstrong* was in reference to the scope of available relief for a named plaintiff with standing and a properly certified class, as was the case here. Indeed, the Ninth Circuit's citation to *Armstrong* is to that part of the opinion that appears under the heading "Scope of Injunctive Relief" and the subheading "System-Wide Relief." As is evident from the opinion itself, the Ninth Circuit cited *Armstrong* for the proposition that the class may seek relief regarding all facilities that fall within the class definition, not as a basis for finding that Ms. Kirola has standing.

B. THE NINTH CIRCUIT FOLLOWED THIS COURT'S PRECEDENTS REGARDING INJUNCTIVE RELIEF.

As discussed, Ms. Kirola has been deterred from using City facilities because of the presence of ADAAG

violations, and she is highly likely to encounter ADAAG violations in her future use of City facilities. As a result, she has standing to seek prospective injunctive relief requiring the removal of such violations. It is plain that she has the same type of injury as the class, which also seeks the removal of ADAAG violations from the City's facilities. Accordingly, Ms. Kirola is eligible to obtain injunctive relief on behalf of the class to remedy the ADAAG violations. *See*, *e.g.*, *Gratz v. Bollinger*, 539 U.S. 244, 263-65 (2003) (class representative sufficient because his injuries did "not implicate a significantly different set of concerns" from those of the class); *Lewis*, 518 U.S. at 358.

There is no dispute that the class is properly certified pursuant to Fed. R. Civ. Proc. 23(b)(2) for declaratory and injunctive relief. In its Order Granting Plaintiffs' Motion For Class Certification, the district court found that Respondents met all of the requirements for certification pursuant to Rule 23(b)(2), and that Ms. Kirola satisfies typicality and adequacy. Pet.App. at 300a-05a. Thereafter, Petitioners made four challenges to Ms. Kirola's typicality and/or adequacy. The district court rejected each of these challenges and refused to decertify the class. Petitioners did not appeal any of the district court's orders denying decertification. *See supra* at § II (Proceedings Below).

Because Ms. Kirola has standing and the class is properly certified, the class may obtain injunctive relief regarding all ADAAG violations in facilities that are covered by the class definition that were proven by the class at trial. *See*, *e.g.*, *Lewis*, 518 U.S. at 359-60

(scope of injunctive relief determined by examining extent of violation of the rights of the class); *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) ("the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class"); *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 417-20 (1977) (rejecting systemwide injunction against school district and requiring that injunctive relief be limited to discrimination shown by the plaintiff class); *Milliken v. Bradley*, 433 U.S. 267, 280 (1977) ("In the first place, like other equitable remedies, the nature of the desegregation remedy is to be determined by the nature and scope of the constitutional violation."); Pet.App. at 106a-07a. The class may also seek relief regarding any ADAAG violations that are identified in the further proceedings to be conducted by the district court on remand with respect to facilities that have not yet been addressed.

This Court has set forth clear rules regarding injunctive relief in class cases. As discussed, under this Court's precedents, "the scope of injunctive relief is dictated by the extent of the violation established" by the plaintiff class at trial. *Lewis*, 518 U.S. at 359-60; *Califano*, 442 U.S. at 702; *Dayton Bd. of Educ.*, 433 U.S. at 417-20; *Milliken*, 433 U.S. at 280. Indeed, Petitioners concede that, in a class action, once the named plaintiff has established injury, the extent of "[i]njury to unnamed class members determines the proper scope of relief." Pet. at 18.

Here, the Ninth Circuit narrowly tailored its injunction, and ordered only that injunctive relief be

issued regarding the specific ADAAG violations that were identified by the district court in its opinion. Pet.App. at 2a-3a ("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, and a missing grab bar in a restroom in Golden Gate Park. We remand for the district court to determine injunctive relief tailored to these violations.").

Further, the relief ordered by the Ninth Circuit is required under governing law. Since January 26, 1992, public entities have been required to comply with ADAAG whenever they construct new facilities or alter portions of existing facilities. *Tennessee v. Lane*, 541 U.S. 509, 532 (2004); 28 C.F.R. § 35.151. ADAAG is the minimum standard for accessibility in newly constructed or altered facilities. *See*, *e.g.*, *Chapman*, 631 F.3d at 945-46; *Lara v. Cinemark USA, Inc.*, 207 F.3d 783, 786 & n.2 (5th Cir. 2000). The U.S. Department of Justice regulations promulgated pursuant to Title II of the ADA require public entities to remediate any ADAAG violations in order to ensure that their newly constructed and altered facilities are in compliance with the ADA. 28 C.F.R. § 35.151(c)(5)(ii) ("Newly constructed or altered facilities or elements covered by §§ 35.151(a) or (b) that were constructed or altered before March 15, 2012 and that do not comply with the 1991 Standards . . . shall, on or after March 15, 2012, be made accessible in accordance with the 2010 Standards."). It would be absurd to hold that the district

court cannot order the City to comply with the law, particularly where the City admits that its facilities contain ADAAG violations.

Finally, Petitioners' argument that relief should have been denied because of the alleged sufficiency of the City's policies and practices is without merit. First, the district court did not make any factual finding that the City's policies and practices regarding new construction and alterations were sufficient to ensure ADAAG compliance.[2] Second, Petitioners cite no authority for the proposition that the plaintiff must show a legal defect in the defendant's policies or practices in order for any injunctive relief to issue. In fact, this is contrary to this Court's precedents holding that even if there is no widespread or policy-based violation, then the court should order non-systemic relief regarding any violations proven at trial. *See*, *e.g.*, *Lewis*, 518 U.S. at 359-60. Third, there is no language in the ADA or its implementing regulations, or any other authority, that lends any support to Petitioners' contention that "isolated" departures from ADAAG are permissible in newly constructed facilities, or that ADAAG violations are "inevitable."

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[2] The district court found that "the City has implemented a robust, multi-faceted infrastructure to address the needs of the disabled, including the mobility-impaired population." Pet.App. at 84a. The district court, however, made no factual findings regarding whether the City's policies and practices required ADAAG compliance with respect to new construction or alterations in the City's pedestrian rights of way, parks, playgrounds or recreational facilities.

III. THIS CASE IS AN UNSUITABLE VEHICLE FOR REVIEW.

This case simply does not raise the Question Presented that Petitioners assert it does. The Ninth Circuit held that Ms. Kirola suffered injury based on the evidence at trial, and that she is threatened with further injury because of ADAAG violations in the City's facilities. Nor does the Ninth Circuit's run-of-the-mill application of this Court's standing precedents and well-established ADA case law raise any of the important issues regarding standing, class action rules and the limits on class action relief that Petitioners contend it does. Pet. at 21.

Moreover, this case is also a poor vehicle for review of questions regarding the scope of injunctive relief because no injunction has been issued yet, and the district court has not yet determined the scope of any injunction herein. The Ninth Circuit remanded the case for the district court to evaluate evidence of ADAAG violations regarding several facilities discussed at trial, including the Botanical Gardens and ten recreation centers. If additional ADAAG violations are found with respect to these facilities, the district court is to revisit the question of the scope of injunctive relief. Pet.App. at 8a-9a. Further, the issue of whether any additional ADAAG violations in the City's facilities are part of a systemic policy or practice is a question that the Ninth Circuit left open on remand. The resolution of that issue will have significant implications for the scope of any further injunctive relief. Given that no injunction has been issued by the district court, it would be premature for this Court to rule on the scope of the

injunctive relief Ms. Kirola and the class can obtain. For these reasons, it is plain that the record in this case is not yet sufficiently developed or final to permit meaningful review.

CONCLUSION

The Court should deny the Petition for a Writ of Certiorari.

Dated: August 22, 2023

Respectfully submitted,

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No. 23-35

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Petitioners,
vs.
IVANA KIROLA, ET AL.,
Respondents.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the RESPONDENTS' BRIEF IN OPPOSITION in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 8443 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 22nd day of August, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

GENERAL NOTARY-State of Nebraska
RENEE J. GOSS
My Comm. Exp. September 5, 2023

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No. 23-35

THE CITY AND COUNTY OF SAN FRANCISCO, ET AL.,
Petitioners,
vs.
IVANA KIROLA, ET AL., Respondents.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 22nd day of August, 2023, send out from Omaha, NE 1 package(s) containing 3 copies of the RESPONDENTS' BRIEF IN OPPOSITION in the above entitled case. All parties required to be served have been served by third-party commercial carrier for delivery within 3 calendar days. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 22nd day of August, 2023.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

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My Comm. Exp. September 5, 2023

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The City and County of San Francisco, et al, vs. Ivana Kirola, et al.

Case No. 23-35

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I hereby certify that on August 22, 2023 I caused this document to be electronically filed with the Clerk of the Supreme Court of the United States by using the Supreme Court's electronic filing system.

I certify that the same document will be served via email to counsel for Defendants and Petitioners.

Respectfully submitted,

Dated: August 22, 2023

By: */s/ Guy B. Wallace*
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