21-2286

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

G.T., by his parents MICHELLE and JAMIE T., on behalf of himself and all similarly situated individuals; K.M., by his parents DANIELLE M. and STEVEN M., on behalf of themselves and all similarly situated individuals; THE ARC OF WEST VIRGINIA,

Plaintiffs-Appellees,

—v.—

THE BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

Defendant-Appellant,

—and—

KANAWHA COUNTY SCHOOLS; RON DUERRING, Superintendent, Kanawha County Schools, in his official capacity,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA AT CHARLESTON

BRIEF OF *AMICUS CURIAE* CIVIL LAW PROFESSORS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF AMICI CURIAE[1]

Amici are professors of civil procedure, constitutional law, and federal jurisprudence, and provide this brief to offer their unique perspective into how the Rule 23 class action procedure's origins are rooted in concerns about judicial access to address systemic government harm, and how Rule 23 was designed by its framers to facilitate the use of class actions to challenge such harm. Amici share an interest in ensuring that the longstanding availability of the class action procedure for litigation challenging systemic government harm continues, as the drafters of Rule 23 intended.

Amici are listed in the Appendix and file this brief in their individual capacities as scholars. Institutional affiliations are provided solely for purposes of identification.

SUMMARY OF THE ARGUMENT

The plaintiffs in this case seek injunctive and declaratory relief under the Individuals with Disabilities Education Act ("IDEA"), the Americans with Disabilities Act ("ADA"), and Section 504 of the Rehabilitation Act. Plaintiffs allege that defendant, the Board of Education of the County of Kanawha, West

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[1] No counsel for a party authored this brief in whole or in part. No person other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Virginia (the "School Board"), has failed to adopt legally required policies, procedures, and programs for the provision of special education, including required behavioral supports, to children with disabilities. Because the plaintiffs present claims that depend on common questions capable of classwide resolution, the District Court certified a class in this case. The School Board now challenges the District Court's certification order on appeal.

Amici submit this brief in support of the District Court's certification order. The text and history of Rule 23 show that its authors intended for it to apply in cases that challenge systemic governmental deficiencies—i.e., cases just like this one. Federal courts have long applied Rule 23 as its authors intended, and the favorable treatment civil rights class actions have received for decades continues to this day. Rule 23(a)(2) commonality exists in these cases due to a government entity's systemic violations of the law through actions or policy failures that affect all class members. The fact that individual class members may be impacted in different ways by systemic violations does not change the fact that those violations, if proven, can be remedied in ways that are common across the class. In other words, where, as here, a class presents common questions that can "generate common *answers* apt to drive the resolution of the litigation," the commonality requirement is satisfied. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (internal quotations and citation omitted, emphasis in original).

For similar reasons, challenges to class certification based on a government entity's alleged inability to ascertain the identity of individual class members is inconsistent with the rationale for Rule 23. There simply is no basis for such a requirement in a Rule 23(b)(2) class action, as the text and history of Rule 23 makes plain.

ARGUMENT

I. THE TEXT, DRAFTING HISTORY AND ADMINISTRATION OF RULE 23 SUPPORT THE DISTRICT COURT'S CERTIFICATION ORDER

Rule 23's text, its drafting history, and its administration by the federal courts honor a longstanding "general rule encouraging liberal construction of civil rights class actions." *Jones v. Diamond*, 519 F.2d 1090, 1100 (5th Cir. 1975). Rule 23(a)(2)'s drafters made clear that the rule's commonality requirement is about common questions, and the case law makes clear that the rule sets a low bar for commonality in class actions seeking only injunctive and declaratory relief. Rule 23's drafting history also demonstrates that its architects designed it for cases challenging systemic governmental failures, like this case. That history shows that the drafters embraced a concept of commonality that rejects efforts by government entities to avoid class litigation based on claims of differences between and among individual class members. Finally, the District Court's class certification order fits the overall pattern of class certification decision-making after *Wal-Mart*, which

overwhelmingly favors plaintiffs challenging unlawful, programmatic government conduct.

A. Commonality Is Established Where, As Here, the Class's Claims Are Capable of Generating Common Answers

Rule 23(a)(2)'s commonality requirement is less demanding in injunctive relief class actions than the predominance standard that proposed classes seeking money damages must meet. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997). To meet the commonality requirement, a plaintiff must show that "there are questions of law or fact common to the class[,]" Fed. R. Civ. P. 23(a)(2), not that the court will ultimately accept on the merits the plaintiff's preferred answers to these common questions. The Supreme Court confirmed this emphasis in *Wal-Mart*. A plaintiff's claims must "depend upon a common contention . . . of such a nature that it is capable of classwide resolution . . . ." *Wal-Mart*, 564 U.S. at 350. It is the "'capacity of a class-wide proceeding to *generate* common *answers*,'" not the answers themselves, on which commonality turns. *Id.* (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (first emphasis added, second in original).

Rule 23(a)(2)'s emphasis on questions, not answers, addresses a concern that motivated the authors of the modern class action rule. Before the rule's 1966 revisions, the judgment in most class actions bound or benefited only those putative class members who had affirmatively joined as parties. 7AA Charles A. Wright et

al., *Federal Practice and Procedure* § 1752 (3d ed. 2008) ("Wright & Miller"). In some instances, courts allowed members to opt in after ruling for the plaintiffs on the merits. Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 385 & n.113 (1967). This practice created the problem of "one-way" intervention. *Id.* If the plaintiffs prevailed, members could opt in and benefit from the ordered relief. If the plaintiffs lost, class members could stay out and avoid the judgment's preclusive effects. *Id.* at 385. The class certification decision that Rule 23 requires before the adjudication of the merits resolved this asymmetry. Hence, commonality emphasizes the questions plaintiffs' claims pose, not the ultimate answers those questions generate.

Here, one of the common questions is whether the School Board has failed to establish or adequately implement legally-required policies for special education, specifically policies to (i) ensure that students with disabilities who need behavior supports receive them and (ii) avoid unnecessary disciplinary removals and segregation. That question is capable of a "yes" or "no" answer on a classwide basis. Regardless of how that question is ultimately answered, Rule 23(a)(2)'s commonality requirement is satisfied by its existence, and the inquiry should end there.

The School Board's argument against this straightforward result is typical of government entities seeking to avoid challenges to their systemic failures, and relies on a misreading of the Supreme Court's decision in *Wal-Mart*. The School Board focuses on the alleged need for individualized inquiries and emphasizes that individual class members may have different behavior support needs or suffer from different injuries related to their behaviors, and says that commonality is defeated on that basis. Appellant's Br. Point I. This argument distorts what *Wal-Mart* requires, which is only the existence of a *single* common question of law or fact, not that all questions of law or fact be common to all members of the class. *Wal-Mart*, 564 U.S. at 359. This argument also ignores the "significant difference between challenging the inadequacy or complete failure to enact policies and procedures and alleging an erroneous application of a policy to individuals." *D.L. v. D.C.*, 302 F.R.D. 1, 13 (D.D.C. 2013).

Arguments of this sort turn Rule 23(a)(2) on its head, and seek to require plaintiffs to *establish* common answers, rather than simply *pose* a common question as intended by the rule's drafters. *See* Steven Schwartz & Kathryn Rucker, *The Commonality of Difference: A Framework for Obtaining Class Certification in ADA Cases After* Wal-Mart, 71 Syracuse L. Rev. 841, 868-71 (2021). Numerous courts

have rejected this type of argument when government entities make it,[2] and this Court should do the same here. "[D]ifferences between individuals' abilities and disabilities typically have no bearing on a state entity's systemic failures," and "[t]his is particularly true where there is a statutory duty to act, and decision-making regarding the challenged administrative policies and practices is centralized within a public entity[.]" Schwartz & Rucker, *supra*, at 871-72. The IDEA itself has always had a close association with class actions. Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. Tol. L. Rev. 471, 475-77 (2014). Put simply, Rule 23 does not require people with disabilities to prove that they are all identically situated in order to establish the commonality needed for them to assert claims on a classwide basis. "Only where there are *no* common questions of fact or law should certification be denied." Schwartz & Rucker, *supra*, at 871 (citations omitted, emphasis in original). To hold otherwise would undermine the very purpose for which Rule 23 was designed, as explained in the next section.

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[2] *See, e.g.*, *Westchester Indep. Living Ctr. v. State Univ. of N.Y. Purchase Coll.*, 331 F.R.D. 279, 292 (S.D.N.Y. 2019) (certifying class "[e]ven though the putative class members have diverse disabilities and will not all be affected by the alleged [barriers] in the same way") (internal quotations and citation omitted); *Steward v. Janek*, 315 F.R.D. 472, 482 (W.D. Tex. 2016) ("The State may fail individual class members in unique ways, but the harm that the class members allege is the same: denial of specialized services, violation of their right to reasonably prompt care, and unnecessary institutionalization in violation of the ADA and Rehabilitation Act."); *Thorpe v. D.C.*, 303 F.R.D. 120, 124 (D.D.C. 2014) (certifying class of nursing home residents with differing disabilities), *leave to appeal denied*, 792 F.3d 96 (D.C. Cir. 2015).

B. Rule 23's Authors Designed It For Cases, Like This One, Challenging Systemic Failures

Rule 23 was drafted to defeat efforts by government entities to avoid class litigation based on supposed individualized issues. All manner of challenges to unlawful government activity fit within Rule 23's terms. *See generally* Wright & Miller, *supra*, § 1775 (collecting cases). But a specific type of government harm particularly motivated the modern rule's authors. *See generally* David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 Fla. L. Rev. 657, 678-91 (2011). As the Supreme Court has recognized, "the historical models on which the Rule was based" inform Rule 23's interpretation. *Wal-Mart*, 564 U.S. at 361; *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 842-843 (1999).

Rule 23 "build[s] on experience, mainly, but not exclusively, in the civil rights field." *Amchem*, 521 U.S. at 614 (citation omitted). The work to revise Rule 23 coincided with efforts after *Brown v. Board of Education*, 347 U.S. 483 (1954), to desegregate southern schools. By the early 1960s, a number of southern governments had jettisoned crude, explicit policies that simply required segregated schools. Instead, school boards gave children a default school assignment, but allowed them to petition to have that assignment changed. Marcus, *supra*, at 684-85. Whether a board would grant any particular child's petition ostensibly depended on

a host of individual, facially nondiscriminatory factors specific to each one. *See, e.g.*, *Joyner v. McDowell Cnty. Bd. of Educ.*, 92 S.E.2d 795, 798 (N.C. 1956).

As administered, however, these processes left segregated schools almost entirely intact. Boards made default assignments by race, then systematically deployed a set of practices to reject individual petitions. Marcus, *supra*, at 687-88. When challenged in class actions, governments invoked these individualized remedial processes to argue that no two children's claims to attend desegregated schools depended on common questions of law or fact. Such arguments derailed some desegregation class actions, even as schools remained categorically segregated. *See e.g.*, *Brunson v. Bd. of Trs. of Sch. Dist. No. 1 of Clarendon Cnty.*, 30 F.R.D. 369, 370-371 (E.D.S.C. 1962).

This use of individual remedial processes to defeat desegregation class actions "keenly interested" the Federal Civil Rules Advisory Committee members who led the effort to revise Rule 23. Marcus, *supra*, at 703 & n.267 (citing and quoting Letter from Charles Alan Wright to Benjamin Kaplan (Feb. 16, 1963), *microformed on* CIS-7004-34 (Jud. Conf. Records, Cong. Info. Serv.)). An early version of Rule 23(b)(2) would have made injunctive relief class actions only "presumptively maintainable." Marcus, *supra*, at 704 (citing and quoting Memorandum, Modification of Rule 23 on Class Actions EE-10 to EE-11 (Feb. 1963), *microformed on* CIS-6313- 56 (Jud. Conf. Records, Cong. Info. Serv.)). Charles Alan Wright, one

of the committee members, objected. "It is absolutely essential to the progress of integration," Wright wrote the committee reporter Benjamin Kaplan, "that such suits be treated as class actions . . . ." Marcus, *supra*, at 705 (quoting Letter from Charles A. Wright to Benjamin Kaplan (Feb. 6, 1963), *microformed on* CIS-6312-65 (Jud. Conf. Records, Cong. Info. Serv.)).

Wright then sent Kaplan a letter that quoted extensively from *Potts v. Flax*, 313 F.2d 284 (5th Cir. 1963). *See* Marcus, *supra*, at 703 (discussing Wright Letter (Feb. 16, 1963)). There, a school board attempted to defeat a class action on grounds that any particular student's assignment to any particular school required an individualized process. The Fifth Circuit refused to let the illusion of individualized treatment defeat the plaintiffs' challenge. The suit "was directed at the system-wide policy of racial segregation," the Fifth Circuit reasoned, "not to achieve specific assignment of specific children to any specific grade or school." *Potts*, 313 F.2d at 288. After receiving Wright's letter quoting from *Potts*, Kaplan redrafted Rule 23(b)(2) to state that such class suits should simply be "maintained," and he included *Potts* in the Advisory Committee's note on the revised rule as an exemplar of the Rule 23(b)(2) class action. Marcus, *supra*, at 705 (citing and discussing Memorandum, Modification of Rule 23 on Class Actions EE-2 (Feb. 1963), *microformed on* CIS-6313-56 (Jud. Conf. Records, Cong. Info. Serv.)).

This history makes clear that Rule 23 was drafted to thwart efforts by government entities to defeat certification of Rule 23(b)(2) classes based on arguments claiming a lack of commonality arising from the availability of individualized relief for civil rights violations. Yet the School Board revives similar arguments here. *See, e.g.*, Appellant's Br. at 34 (arguing that commonality is lacking due to the alleged need for "case-by-case, student-by-student" judgments). These backward-reaching arguments provide no answer to the fact that classwide litigation will afford a plaintiff class the ability to receive the statutory protections they are due, if they prevail on the merits. This is exactly what Rule 23's drafters meant to accomplish when they recrafted the rule to embrace class certification of cases like this one as the most appropriate way to pursue challenges to allegedly unlawful systemic policies and practices.

C. Rule 23's Administration Shows That Class Certification Is Favored In Cases Like This One

Class certification practice in cases challenging uniform policies or practices has not really changed since *Wal-Mart*. David Marcus, *The Persistence and Uncertain Future of the Public Interest Class Action*, 24 Lewis & Clark L. Rev. 395, 412 (2020). The reason is straightforward. If the government subjects all class members to the same policy, or implements policies in ways that violate statutory duties owed to all class members, a court cannot evaluate such policies for one class

member without doing so for all. Such cases necessarily raise common questions of law and fact.

Acknowledging the history of Rule 23, the Supreme Court in *Wal-Mart* recognized that "'[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." 564 U.S. at 361 (citing *Amchem*, 521 U.S. at 614). Federal courts over the past decade have continued to acknowledge Rule 23's role in civil rights cases. Plaintiffs in these cases have assembled an overwhelming record of success in class actions for equitable relief against government defendants.

Cases against government defendants for equitable relief generated roughly 350 published district court opinions addressing class certification in the eight years after *Wal-Mart*. More than 75% favored plaintiffs. Marcus, *supra*, at 411. Seventeen of the twenty-five circuit court opinions addressing class certification in these cases have favored plaintiffs. *Id.* at 410. These figures reflect the fact that *Wal-Mart* did not alter Rule 23's role in facilitating classwide litigation of civil rights violations.

Unsurprisingly, then, decisions certifying class actions involving disability rights claims have continued apace post-*Wal-Mart*.[3] The District Court's order

[3] *See, e.g.*, *Hizer v. Pulaski Cnty., Ind.*, No. 3:16-CV-885-JD-MGG, 2017 WL 3977004, at *8 (N.D. Ind. Sept. 11, 2017); *McBride v. Mich. Dep't of Corr.*, No. 15-11222, 2017 WL 3085785, at *1 (E.D. Mich. July 20, 2017); *Dunn v. Dunn*, 318 F.R.D. 652, 683-84 (M.D. Ala. 2016); *Steward v. Janek*, 315 F.R.D. 472, 492 (W.D. Tex. 2016); *O.B. v. Norwood*, No 15 C 10463, 2016 WL 2866132, at *5 (N.D. Ill.

certifying the class in this case fits comfortably within this ongoing pattern of class certification decision-making in disability rights cases.

II. ASCERTAINABILITY HAS NO PLACE IN A RULE 23(B)(2) CLASS CERTIFICATION ANALYSIS

Ascertainability is not a Rule 23(b)(2) requirement for a class pursuing injunctive relief. As an initial matter, the word "ascertainability" appears nowhere in Rule 23. *See* Fed. R. Civ. P. 23. Courts have nevertheless sometimes found an "implicit" requirement that members of a proposed class be "readily identifiable" by the time of judgment. *EQT Prod. Co. v. Adair*, 764 F.3d 347, 358 (4th Cir. 2014) (internal citations omitted). Traditionally, this inquiry has been "collapsed" into the assessment of the adequacy of the class definition. *Cherry v. Domestic Corp.*, 986 F.3d 1296, 1302 (11th Cir. 2021) (citing *DeBremaecker v. Short*, 433 F. 2d 733, 734 (5th Cir. 1970)). A proposed class is sufficiently "ascertainable" for certification purposes where the proposed class members are identifiable by objective criteria.

May 17, 2016); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1333 (W.D. Wash. 2015); *Williams v. Conway*, 312 F.R.D. 248, 254 (N.D.N.Y. 2015); *Holmes v. Godinez*, 311 F.R.D. 177, 223 (N.D. Ill. 2015); *Hernandez v. Cnty. Of Monterey*, 305 F.R.D. 132, 164 (N.D. Cal. 2015); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014); *Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 271 (D.N.H. 2013); *Toney-Dick v. Doar*, No. 12 Civ. 9162 (KBF), 2013 WL 5295221, at *13 (S.D.N.Y. Sept. 16, 2013); *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 WL 685808, at *6 (N.D. Cal. Mar. 2, 2012), *order corrected*, 2012 WL 1595102, at (N.D. Cal. May 4, 2012); *Brooklyn Ctr. For Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 420-21 (S.D.N.Y. 2012); *Henderson v. Thomas*, 289 F.R.D. 506, 512 (M.D. Ala. 2012); *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012).

See Krakauer v. Dish Network, L.L.C., 925 F.3d 643, 658 (4th Cir. 2019) (finding that proposed class was ascertainable where classwide data allowed for identification on a "large-scale basis").

In this respect, there is a marked difference between the requirements of Rule 23(b)(2) and those of Rule 23(b)(3). The requirement that members of a proposed class be readily identifiable "generally does not apply to [Rule 23](b)(2) classes that seek only injunctive or declaratory relief." 1 McLaughlin on Class Actions § 4:2 (Oct. 2020 update); *see also Shook v. El Paso Cty.*, 386 F.3d 963, 973 (10th Cir. 2004) ("[W]hile the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2).") (citation omitted). As discussed above, "Rule 23(b)(2) was created to facilitate civil rights class actions." *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 330 n.24 (4th Cir. 2006). And, as the drafters of Rule 23(b)(2) recognized, "actions in the civil-rights field" generally involve classes "whose members are incapable of specific enumeration." Fed. R. Civ. P. 23(b)(2) advisory committee's notes (1966). In this case, plaintiffs' action to obtain injunctive relief for civil rights violations implicates a class of students with disabilities requiring behavior supports, which is precisely the type of shifting population for which Rule 23(b)(2) relief is well-suited to address. *See Shook*, 386 F.3d at 972 (recognizing that "many courts have found Rule 23(b)(2) well suited" where a class "is not readily ascertainable,"

such as a case where the plaintiffs attempt to bring suit on behalf of a shifting population); *see also D.L. v. D.C.*, 860 F.3d 713, 725-26 (D.C. Cir. 2017) (holding that a Rule 23(b)(2) class of all students with disabilities denied a "smooth transition" to preschool was adequately defined).

The School Board does not identify a single case in the Rule 23(b)(2) context where a court has required that members of a proposed class be "ascertainable" or "readily identifiable" when seeking unitary equitable relief. Even if such a requirement did exist, determination of class membership based on "objective criteria" suffices. *See, e.g.*, *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 139 (1st Cir. 2012). Amici cannot discern any basis for the School Board's assertion that plaintiffs' proposed class is not sufficiently "identifiable" or that objective criteria for such identification is lacking. While the School Board asserts that identifying students with disabilities requiring "behavior support" is difficult, this determination is made using objective criteria that the School Board itself identifies. This Court's sister circuits have not struggled to certify similar classes. *See, e.g.*, *D.L.*, 860 F.3d at 725-26; *Marisol A. v. Giuliani*, 126 F.3d 372, 375 (2d Cir. 1997) (upholding certification of class of children currently in the custody of a city agency, those who would be in custody in the future, and even children who should be known to the city agency.).

Unable to find support for its position in the Rule 23(b)(2) caselaw, the School Board relies on cases in the Rule 23(b)(3) context, but the considerations underlying those decisions simply do not apply to proposed classes seeking injunctive relief under Rule 23(b)(2). In *Marcus v. BMW of North America, LLC*, for example, the Third Circuit imposed a requirement to show it would be "administratively feasible" for the court to identify class members who must receive notice of the action and be given the choice to opt out where the proposed class sought monetary damages. 687 F.3d 583, 593 (3d Cir. 2012) (explaining that requiring up-front identification "protects absent class members by facilitating the 'best notice practicable' under Rule 23(c)(2) in a Rule 23(b)(3) action," and "protects defendants by ensuring that those persons who will be bound by the final judgment are clearly identifiable"). That concern does not apply to Rule 23(b)(2) actions for injunctive relief, as there is never a need to identify class members individually in such actions. *See Wal-Mart*, 564 U.S. at 362 ("The procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and the right to opt out—are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary to a (b)(2) class.").

The School Board also invokes *EQT Production Co. v. Adair*, but that decision, too, is about Rule 23(b)(3), and does not support the notion of an ascertainability requirement for class certification under Rule 23(b)(2). 764 F.3d

347, 358 (4th Cir. 2014). The "judicially-created implied requirement of ascertainability—that the members of the class be *capable* of specific enumeration—is inappropriate for (b)(2) classes." *Shelton v. Bledsoe*, 775 F.3d 554, 561 (3d Cir. 2015) (emphasis in original); *see also City Select Auto Sales Inc. v. BMW Bank of No. Am., Inc.*, 867 F.3d 434, 439, n.2 (3d Cir. 2017) ("The ascertainability standard is not applicable to Rule 23(b)(2) classes."). As the Third Circuit has explained, the enforcement of an equitable remedy in the Rule 23(b)(2) context "usually does not require individual identification of class members" and the procedural safeguards, such as the need to facilitate notice to absent class members, "do not exist or are not compelling in (b)(2) classes." *Shelton*, 775 F.3d at 561-62 & n.2 (citations omitted).[4]

This rationale against an ascertainability requirement for a Rule 23(b)(2) class applies with equal force in this case. Plaintiffs in this action seek equitable relief to address an alleged systemic violation of civil rights through changes to policies that

[4] Several circuits reject any "administrative feasibility" threshold requirement entirely. *See, e.g., Cherry v. Domestic Corp.*, 986 F.3d 1296, 1304 (11th Cir. 2021) ("We hold that administrative feasibility is not a requirement for certification under Rule 23."); *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1126 (9th Cir. 2017) ("In sum, the language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification," and "we decline to interpose an additional hurdle into the class certification process delineated in the enacted Rule."); *In re Petrobras Secs.*, 862 F.3d 250, 265 (2d Cir. 2017) (same); *Mullins v. Direct Dig., LLC*, 795 F.3d 654, 658 (7th Cir. 2015) ("Nothing in Rule 23 mentions or implies this heightened requirement under Rule 23(b)(3), which has the effect of skewing the balance that district courts must strike when deciding whether to certify classes.").

would apply to all eligible students. As the injunctive and declaratory relief sought here is for the benefit of the entire proposed class, there will never be any need to identify particular class members for the purpose of facilitating notice or at the time of enforcement. *See Wal-Mart*, 564 U.S. at 362 (explaining that "mandatory notice, and the right to opt-out" are "unnecessary to a (b)(2) class"); *Cole v. City of Memphis*, 839 F.3d 530, 541 (6th Cir. 2016) ("ascertainability is a requirement tied almost exclusively to the practical need to notify absent class members and to allow those members a chance to opt-out"), *cert. denied*, 137 S. Ct. 2220 (2017). This Court should align itself with the weight of authority in this area and hold that Rule 23(b)(2) does not impose an ascertainability (or "identifiability") requirement. *See, e.g.*, *Yaffe v. Powers*, 454 F. 2d 1362, 1366 (1st. Cir. 1972) (holding that, because "notice to the members of a (b)(2) class is not required . . . the actual membership of the class need not be . . . precisely delimited"); *Shelton*, 775 F.3d at 562-63 (noting that "the Court of Appeals for the Second Circuit upheld the certification of a Rule 23(b)(2) class that was probably unascertainable") (citing *Marisol A.*, 126 F.3d at 375); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 328 (3d Cir. 2019) (same); *Cole*, 839 F.3d at 542 ("The advisory committee's notes for Rule 23(b)(2) assure us that ascertainability is inappropriate in the (b)(2) context."); *Shook*, 386 F.3d at 972 (10th Cir. 2004) (same).

CONCLUSION

For all of the foregoing reasons, amici respectfully submit that this Court should affirm the District Court's class certification order.

Dated: March 7, 2022

Respectfully submitted,

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APPENDIX

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

Counsel for the Civil Law Professor Amici hereby certifies that:

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), and Local Rule 32(b), because it contains approximately 4,670 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the type-face requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface in 14-point Times New Roman font using Microsoft Word.

Dated: March 7, 2022

/s/ Noah Brumfield
Noah Brumfield
Counsel for Civil Law Professor Amici

CERTIFICATE OF SERVICE

I, Noah Brumfield, hereby certify that on March 7, 2022, the foregoing Brief of Civil Law Professor Amici was filed with the clerk's office for the United States Court of appeals for the Fourth Circuit and served on counsel of record via the Court's CM/ECF system.

Dated: March 7, 2022

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