COMMENTS

CLASS DISMISSED: THE DANGERS OF APPLYING ASCERTAINABILITY REQUIREMENTS TO RULE 23(B)(2) CLASS ACTIONS*

I. INTRODUCTION

Federal Rule of Civil Procedure 23(b)(2) arose during the civil rights movement of the 1960s to improve civil rights protections following formal desegregation.[1] Prior to the inception of Rule 23(b)(2), individual plaintiffs were often left to fend for themselves because civil rights actions were primarily a means to redress individual rights, rather than group harm.[2] Since the passage of Rule 23(b)(2), the rule has been used to challenge racial segregation,[3] disability discrimination,[4] gender discrimination,[5] and many other forms of systemic discrimination.

Today, it remains an important vehicle for protecting civil rights.[6] Rule 23(b)(2) classes are often broad, and the resulting lawsuits provide injunctive relief to an entire class, rather than requiring individual plaintiffs to sue for remedies.[7] Rule 23(b)(2) class actions are under threat, however—from claims that plaintiffs do not meet numerosity

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1. *E.g.*, Suzette M. Malveaux, *The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today*, 66 U. KAN. L. REV. 325, 327 (2017).

2. *See id.* at 329–30.

3. *See id.* at 360–61.

4. For example, students with disabilities' right to receive a free and appropriate public education was established in a series of two Rule 23(b)(2) actions. *See* Mills v. Bd. of Educ., 348 F. Supp. 866, 878–79 (D.D.C. 1972); Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 314 (E.D. Pa. 1972). Moreover, the first case to hold that institutionalization is a violation of civil rights was a class action suit. *See* Halderman v. Pennhurst State Sch. & Hosp., 446 F. Supp. 1295, 1325 (E.D. Pa. 1977), *rev'd*, 612 F.2d 84 (3d Cir. 1979), *rev'd*, 451 U.S. 1 (1981). *See generally* Mark C. Weber, *IDEA Class Actions After* Wal-Mart v. Dukes, 45 U. TOL. L. REV. 471 (2014) (discussing the importance of Rule 23(b)(2) class actions to the enforcement of disability rights).

5. *See, e.g.*, Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969) ("A suit for violation of Title VII is necessarily a class action as the evil sought to be ended is discrimination on the basis of a class characteristic, *i.e.*, race, sex, religion or national origin.").

6. *See* Malveaux, *supra* note 1, at 328.

7. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) (explaining that Rule 23(b)(2) intends to protect plaintiffs in "[c]ivil rights cases against parties charged with unlawful, class-based discrimination").

requirements[8] to the limitations *Wal-Mart Stores, Inc. v. Dukes*.[9] Emerging ascertainability requirements are discussed less frequently in scholarly literature but are no less dangerous to plaintiffs seeking class certification under Rule 23(b)(2).

Courts frequently read an implicit ascertainability requirement into Rule 23.[10] However, circuits are split over the meaning of ascertainability.[11] Ascertainability originally meant that a certifiable class must be defined with reference to objective criteria.[12] Recently, however, courts have increasingly held that putative class members must be identifiable in an administratively feasible way to satisfy ascertainability requirements.[13] Generally, administrative feasibility requirements are applied to only

8. *See, e.g.*, Mielo v. Steak 'n Shake Operations, Inc., 897 F.3d 467, 485–87 (3d Cir. 2018) (holding that plaintiffs suing under the Americans with Disabilities Act did not meet numerosity requirements).

9. 564 U.S. 338 (2011).

10. *See, e.g.*, EQT Prod. Co. v. Adair, 764 F.3d 347, 358 (4th Cir. 2014) (holding that Rule 23 contains an implicit ascertainability requirement)*; see also* 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:2 (5th ed. 2020) [hereinafter 1 RUBENSTEIN 2020] (explaining that ascertainability or "definiteness" "is considered an 'implicit' requirement for class certification").

11. Ascertainability may either require that the class be objectively defined or that there is an administratively feasible way of ascertaining the class. *See* 1 RUBENSTEIN 2020, *supra* note 10, § 3:3. The First, Second, Third, and Fourth Circuits require proof of administrative feasibility to certify classes in Rule 23(b)(3) lawsuits. *See, e.g.*, Brecher v. Republic of Arg., 806 F.3d 22, 24–25 (2d Cir. 2015) ("A class is ascertainable when defined by objective criteria that are administratively feasible and when identifying its members would not require a mini-hearing on the merits of each case." (quoting Charron v. Pinnacle Grp. N.Y. LLC, 269 F.R.D. 221, 229 (S.D.N.Y. 2010))); *In re* Nexium Antitrust Litig., 777 F.3d 9, 19 (1st Cir. 2015) (holding that class certification requires an "administratively feasible" way of identifying class members (quoting Carrera v. Bayer Corp. (*Carrera I*), 727 F.3d 300, 307 (3d Cir. 2013))); *EQT Prod.*, 764 F.3d at 358 (holding that Rule 23 contains an implicit ascertainability requirement); *Carrera I*, 727 F.3d at 308 (holding that "administrative feasibility" is a prerequisite to class certification for Rule 23(b)(3) classes). The Tenth Circuit has yet to define ascertainability at the appellate court level. The Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits require that classes be defined in relation to objective criteria but refuse to adopt the more stringent administrative feasibility standard. *See, e.g.*, Cherry v. Dometic Corp., No. 19-13242, 2021 WL 346121, at *5 (11th Cir. Feb. 2, 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) ("[T]he language of Rule 23 does not impose a freestanding administrative feasibility prerequisite to class certification."); Sandusky Wellness Ctr., LLC v. MedTox Sci., Inc., 821 F.3d 992, 996 (8th Cir. 2016) (holding that classes "must be adequately defined and clearly ascertainable" but not that administrative feasibility is a prerequisite for ascertainability (quoting Ihrke v. N. States Power Co., 459 F.2d 566, 573 n.3 (8th Cir. 1972))); Rikos v. Procter & Gamble Co., 799 F.3d 497, 525–26 (6th Cir. 2015) ("It is often the case that class action litigation grows out of systemic failures of administration, policy application, or records management that result in small monetary losses to large numbers of people. To allow that same systemic failure to defeat class certification would undermine the very purpose of class action remedies." (quoting *Carrera I*, 727 F.3d at 540)); Mullins v. Direct Dig., LLC, 795 F.3d 654, 658 (7th Cir. 2015) (reasoning "heightened ascertainability requirement[s]" upset the balance of factors used to determine class certification); Frey v. First Nat'l Bank Sw., 602 F. App'x. 164, 168 (5th Cir. 2015) ("[T]he court need not know the identity of each class member before certification; ascertainability requires only that the court be able to identify class members at some stage of the proceeding." (quoting 1 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3.3 (5th ed. 2011) [hereinafter 1 RUBENSTEIN 2011])).

12. Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 697–98 (2018).

13. *See, e.g.*, *Carrera I*, 727 F.3d at 308 (holding that administrative feasibility is a prerequisite to class certification for 23(b)(3) classes); *see also* 1 RUBENSTEIN 2020, *supra* note 10, § 3:3; Wasserman, *supra* note 12, at 698.

Rule 23(b)(3) classes or consumer class actions seeking individualized monetary relief.[14] Therefore, Rule 23(b)(2) plaintiffs are typically viewed as exempt from ascertainability requirements.[15] Recent district court rulings focusing on ascertainability requirements for Rule 23(b)(2) classes, however, introduce an additional layer of uncertainty.[16]

This Comment discusses the current circuit split regarding ascertainability in Rule 23(b)(3) class actions, as well as ascertainability's proliferation into Rule 23(b)(2) class certification at the district court level.[17] It argues that Rule 23(b)(2) suits structurally differ from the Rule 23(b)(3) suits (in which ascertainability is generally a question).[18] Rule 23(b)(2) suits do not involve the same notice and opt-out requirements.[19] Moreover, putative plaintiffs cannot be reliably determined at the outset of litigation because the remedies sought are injunctions or declaratory relief against a defendant's *future* actions.[20] Therefore, this Comment proposes that the Advisory Committee on Civil Rules weigh in on this dispute. Specifically, the committee should clarify that an administrative feasibility standard is inappropriate for Rule 23(b)(2) class certification.

This Comment begins with an overview of the current circuit split and uncertainty surrounding Rule 23(b)(3) class certification.[21] Next, it discusses the recent proliferation of ascertainability requirements in Rule 23(b)(2) class certification.[22] The Comment then proceeds to discuss the merits and disadvantages of applying administrative feasibility standards in Rule 23(b)(2) class certification proceedings.[23] It concludes by discussing potential ways of clarifying Rule 23(b)(2) so that trial court judges do not mistakenly import Rule 23(b)(3) requirements into the Rule 23(b)(2) class certification process.[24]

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14. *See* Geoffrey C. Shaw, *Class Ascertainability*, 124 YALE L.J. 2354, 2369 n.61 (2015); *see also* Jordan Elias, *The Ascertainability Landscape and the Modern Affidavit*, 84 TENN. L. REV. 1, 10 (2017).

15. *See* 1 RUBENSTEIN 2020, *supra* note 10, § 3:7; Shaw, *supra* note 14, at 2369 n.61; *see also* Elias, *supra* note 14, at 10.

16. *See, e.g.*, AW v. Magill, No. 2:17-1346-RMG, 2018 U.S. Dist. LEXIS 224886, at *8–10 (D.S.C. Sept. 7, 2018) (determining the plaintiffs' class was unascertainable because plaintiffs' definition was "predicated on measuring individuals in constant health flux" and would have created "over 152 moving targets"); A.R. v. Dudek, No. 12-60460-CIV-ZLOCH, 2016 U.S. Dist. LEXIS 95432, at *5–7 (S.D. Fla. Feb. 29, 2016) (finding the plaintiffs' class unascertainable because the "[p]laintiffs offer[ed] no objective measure by which to gauge the persons included within the class").

17. See *infra* Part II.C for a discussion of district court cases considering ascertainability.

18. See *infra* Parts III.A and III.B for a textual approach to Rule 23(b)(2) and administrative feasibility, and a discussion on how due process rights fundamentally differ in Rule 23(b)(2) class actions.

19. See *infra* Part II.C for a discussion on how ascertainability applies to Rule 23(b)(2) class certification.

20. *See infra* notes 211–17 and accompanying text.

21. *See infra* Part II.A.

22. *See infra* Parts II.B–II.D.

23. *See infra* Section III.

24. *See infra* Part III.E.

II. OVERVIEW

The requirement that a class be ascertainable once meant that a class needed to be defined by objective criteria.[25] In the wake of *Carrera v. Bayer Corporation*,[26] however, several circuits have required that Rule 23(b)(3) classes be defined in an administratively feasible way to achieve class certification.[27] This Section gives an overview of class certification procedure.

First, Part II.A discusses the traditional objective criteria approach to class certification. Part II.B then discusses the relationship between administrative feasibility requirements and Rule 23(b)(3) class certification. Part II.C discusses ascertainability as it pertains to Rule 23(b)(2) classes, suggesting that while ascertainability was not originally a requirement for Rule 23(b)(2) class certification, some judges are now holding that it is. Lastly, Part II.D concludes this Section by discussing civil rights class actions under Rule 23(b)(2) that seek *both* monetary damages and injunctive relief in the wake of *Dukes*.

A. Certifying the Class Under Rule 23: Are Objective Metrics Necessary?

Rule 23(a) sets out four requirements for class certification: (1) that classes be numerous, such that joinder of all parties is "impracticable;"[28] (2) that class members share common questions of law or fact;[29] (3) that class representatives be representative of their class;[30] and (4) that class representatives "fairly and adequately protect the interests of the class."[31] The purpose of Rule 23 is to allow people who "are isolated, scattered, and utter strangers to each other" to aggregate their claims for the sake of judicial efficiency.[32]

The language of Rule 23 does not explicitly require that classes be ascertainable; however, courts and commentators point to several context clues within Rule 23 to demonstrate that classes must be ascertainable.[33] First, many courts simply view ascertainability as a prerequisite to the other requirements of Rule 23 without citing to a particular part of the rule.[34] These courts generally reason that public policy supports the implicit requirement—without a precise class definition, it is difficult to ensure that putative plaintiffs receive notice or that only injured plaintiffs recover from suits.[35] Second, many courts believe that the word "class" presupposes an actual class that can

25. *See, e.g.*, *In re* Petrobras Sec., 862 F.3d 250, 264 (2d Cir. 2017) (holding that objective measures of class membership are required for class certification); Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015) (holding that classes must be clearly defined).

26. 727 F.3d 300 (3d Cir. 2013).

27. See *supra* note 11 for a discussion of each circuit's standard for class certification.

28. FED. R. CIV. P. 23(a)(1).

29. FED. R. CIV. P. 23(a)(2).

30. FED R. CIV. P. 23(a)(3).

31. FED. R. CIV. P. 23(a)(4).

32. Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 687–8 (1941).

33. Wasserman, *supra* note 12, at 702–03; *see also* 1 RUBENSTEIN 2020, *supra* note 10, § 3:2 (discussing three textual bases for finding a definiteness requirement in Rule 23).

34. 1 RUBENSTEIN 2020, *supra* note 10, § 3:2.

35. *Id.*

be ascertained.[36] Finally, some courts believe that ascertainability is codified in Rule 23(c)(1)(B), which states that "[a]n order that certifies a class action must define the class and the class claims, issues, or defenses."[37]

Nevertheless, critics argue that Rule 23 already includes four explicit requirements for class certification that seem to be exhaustive.[38] This leads some commentators and courts to question the prudence of an additional ascertainability requirement, defined in terms of administrative feasibility, prior to discovery.[39]

The traditional approach of requiring that a class be identifiable with regard to objective criteria is supported by strong policy and administrative convenience arguments.[40] First, such an approach incentivizes plaintiffs' attorneys to identify classes in a clear and meaningful way.[41] For instance, vague terms used in civil rights suits, such as "learning disabled children," might be too indefinite for a court to certify a class.[42] Such a class would be highly diverse and poorly defined; therefore, remedying the harms faced by that class might prove difficult or the specific issues of law may vary substantially.[43] When definitions are vague, it is difficult to know who falls within the bounds of the proposed class.[44] Some proponents claim that requiring classes to be delimited by geographic or temporal criteria, for example, allows courts to more adequately fashion remedies.[45]

The second argument in support of the objective criteria approach is that identifying putative class members by their states of mind creates evidentiary issues for courts.[46] Therefore, objective criteria tests might be warranted for administrative feasibility purposes.[47] Courts tend to prefer objective criteria, because it is difficult to prove putative class members' states of mind—certifying a class of individuals who "feared" retaliation or were "misled" by an advertiser therefore might raise evidentiary concerns.[48]

Commentators argue that administrative feasibility must be balanced with other goals, such as ensuring justice and due process for the parties involved;[49] however, the primary purpose of the class action mechanism is to preserve some modicum of

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36. *Id.*

37. *Id.* (quoting FED. R. CIV. P. 23(c)(1)(B)).

38. *See* Wasserman, *supra* note 12, at 703–04; *see also* Davis v. Cintas Corp., 717 F.3d 476, 483 n.1 (6th Cir. 2013) (describing the implicit requirement as "supplemental" and "perhaps superfluous" (citing 1 RUBENSTEIN 2011, *supra* note 11, § 3:1)).

39. *See* Wasserman, *supra* note 12, at 703–04; *see also Davis*, 717 F.3d at 483 n.1.

40. *See* Wasserman, *supra* note 12, at 705–12.

41. *See id.* at 705.

42. *See, e.g.*, Adashunas v. Negley, 626 F.2d 600, 603–04 (7th Cir. 1980) (holding that a proposed class of children with "learning disabilities" was "so highly diverse and so difficult to identify that it [was] not adequately defined or nearly ascertainable"); *see also* Wasserman, *supra* note 12, at 706 & n.63.

43. *Adashunas*, 626 F.2d at 604.

44. *See* Wasserman, *supra* note 12, at 706.

45. *See id.* at 706–07.

46. *See* 1 RUBENSTEIN 2020, *supra* note 10, § 3:5.

47. *See id.*; *see also* Wasserman, *supra* note 12, at 708.

48. *See* 1 RUBENSTEIN 2020, *supra* note 10, § 3:5.

49. *See* Wasserman, *supra* note 12, at 722 ("[C]oncern for judicial convenience alone should not justify dismissal of claims that cannot be pursued outside the class action context.").

administrative convenience and efficiency.[50] Accordingly, courts and commentators remain split regarding the weight to give administrative convenience in class certification proceedings.[51]

The third argument in support of the objective criteria approach is that objective criteria requirements ensure that classes are not overly broad, including people who are largely unconnected with the claim being litigated.[52] This is in line with traditional principles that govern class action suits.[53] If classes are defined too broadly, it is likely that not all members of the class actually suffered damages as the result of a defendant's actions.[54] Courts are rightfully hesitant to provide relief to people who have not actually suffered damages.[55] The objective criteria standard requires plaintiffs to outline clear standards for class membership.[56] Therefore, the traditional ascertainability requirement allows courts to determine at the outset whether all (or at least most) members of a proposed class actually have a claim against the defendant.[57]

The final argument in favor of the objective criteria approach is that objective definitions of class membership avoids the problem of "fail-safe classes," which are classes defined underinclusively to include only persons whose claims are bound to be successful on the merits.[58] For example, courts have been hesitant to define a class to include all persons "entitled to relief."[59] This is arguably unfair to defendants. Fail-safe classes do not allow the defendant the opportunity to secure preclusion at the end of proceedings.[60]

Preclusion refers to a binding judgment on all class members or finality of the suit.[61] In the case of fail-safe classes, a judgment in favor of the defendant would not be final because the class was initially defined so narrowly that similar claims might be brought by larger classes.[62] Therefore, a fail-safe class would allow putative class members to seek a remedy without necessarily being bound by an adverse judgment.[63] Either all the class members win, or they are not a class and therefore are not bound by adverse

50. *Cf.* Kalven, Jr. & Rosenfield, *supra* note 32, at 688 (discussing the utility of the class action suit as an instrument for effective redress).

51. 1 RUBENSTEIN 2020, *supra* note 10, § 3:2; *see also* Wasserman, *supra* note 12, at 697–98. See *supra* note 11 for an overview of the circuit split regarding ascertainability.

52. *See* Wasserman, *supra* note 12, at 709.

53. *See id.*

54. *See id.* at 710.

55. *See id. But see In re* Nexium Antitrust Litig., 777 F.3d 9, 21–22 (1st Cir. 2015) ("[I]t is difficult to understand why the presence of uninjured class members at the preliminary stage should defeat class certification. Ultimately, the defendants will not pay, and the class members will not recover, amounts attributable to uninjured class members, and judgment will not be entered in favor of such members.").

56. Wasserman, *supra* note 12, at 707; *see also* 1 RUBENSTEIN 2020, *supra* note 10, § 3:2.

57. *See* Wasserman, *supra* note 12, at 709.

58. *Id.* at 711.

59. *See, e.g.*, Randleman v. Fid. Nat'l Title Ins. Co., 646 F.3d 347, 352 (6th Cir. 2011).

60. *See* 1 RUBENSTEIN 2020, *supra* note 10, § 3:7.

61. *Id.* § 18:2.

62. *See* Wasserman, *supra* note 12, at 712.

63. *In re* Nexium Antitrust Litig.*,* 777 F.3d 9, 22 n.19 (1st Cir. 2015).

judgments.[64] This would defeat the purpose of the class action mechanism—to ensure "efficient and final resolution" for all class members and the defendants.[65]

For the aforementioned reasons, all circuits but the Tenth Circuit require that classes be defined with reference to objective criteria.[66] A stricter standard, however, has been advanced by many courts following the Third Circuit's holding in *Carrera*.[67] These courts have taken the approach that proposed classes must be definable in an "administratively feasible" way.[68] Part II.B discusses this emerging line of case law.

B. Ascertainability and Rule 23(b)(3) Class Certification

The requirement that Rule 23(b)(3) classes be identified with regard to objective criteria is relatively uncontroversial; however, the Third Circuit's ruling in *Carrera* has caused a circuit split.[69] In *Carrera*, the Third Circuit examined whether a class of consumers who purchased an over-the-counter diet supplement met the requirements for class certification.[70] These consumers alleged Bayer, a supplement manufacturer, falsely and deceptively advertised the product.[71] The court held that the class was not ascertainable, because class members were unlikely to have documentary proof of purchase, such as receipts, and Bayer did not have a list of purchasers as it sold its product through intermediaries.[72] Moreover, the drug was available over-the-counter.[73] This further complicated the process of identifying putative class members.[74] The court deemed the proffered methods of identifying class members—retailer records and affidavits—unreliable.[75]

The court held that ascertainability is a prerequisite to class certification under Rule 23(b)(3).[76] In line with the Supreme Court's holding in *Dukes*,[77] the *Carrera* court maintained that parties seeking class certification must "affirmatively demonstrate [their] compliance with" Rule 23.[78] The court further held that ascertainability requires an "administratively feasible" method for determining whether someone qualifies for class

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64. *Id.* (quoting Young v. Nationwide Mut. Ins. Co., 693 F.3d 532, 537 (6th Cir. 2012)).

65. Wasserman, *supra* note 12, at 712.

66. See *supra* note 11 for a discussion of each circuit's standard for class certification.

67. See *infra* Part II.B for a discussion of Carrera I, 727 F.3d 300 (3d Cir. 2013), and its impact on ascertainability in class actions. *See also supra* note 11.

68. *See supra* note 11.

69. *Compare, e.g.*, *Carrera I*, 727 F.3d at 308 (holding that the method for identifying class members under Rule 23(b)(3) must be a "manageable process that does not require much, if any, individual factual inquiry" (quoting 1 RUBENSTEIN 2011, *supra* note 11, § 3:3)), *with In re* Petrobras Sec., 862 F.3d 250, 267–68 (2d Cir. 2017) (reasoning that heightened ascertainability requirements duplicate and obscure Rule 23's requirement that district courts consider "the likely difficulties in managing a class action" (quoting FED. R. CIV. P. 23(b)(3)(D))).

70. *See Carrera I*, 727 F.3d at 304.

71. *Id.*

72. *Id.*

73. *See id.*

74. *See id.*

75. *See id.* at 304, 310.

76. *Id.* at 305.

77. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 (2011).

78. *Carrera I*, 727 F.3d at 306 (quoting *Dukes*, 564 U.S. at 350).

membership.[79] The court reasoned that the plaintiff's mere proposal of a method of ascertaining a class is insufficient—plaintiffs must establish through evidentiary support that the method will be successful.[80] The court explained that this more stringent approach to ascertainability is justified from the outset because it (1) protects due process rights by preserving the right of potential members of a class to "opt out," (2) protects the due process rights of defendants, and (3) is administratively efficient.[81]

This ruling followed in the footsteps of the Third Circuit's previous rulings in *Byrd v. Aaron's Inc*.[82] and *Marcus v. BMW of North America, LLC*.[83] The court in *Byrd* held that ascertainability is a prerequisite to class certification that is grounded in the nature of the "class-action device itself."[84] The court in *Marcus* expanded this holding by reasoning that in cases in which ascertaining class membership would require "extensive and individualized fact-finding or 'mini-trials,' . . . a class action is inappropriate."[85] *Carrera* expanded upon these rulings by adding an explicit administrative feasibility requirement.[86]

The Parts that follow explain the implications of *Carerra* for Rule 23(b)(3) class certification, as well as the justifications for the approach taken in *Carrera*. Part II.B.1 discusses due process concerns for putative class members. Part II.B.2 then details due process concerns for defendants. Part II.B.3 explains concerns for judicial convenience that resulted in a move toward administrative feasibility requirements for class certification.

1. Due Process for Putative Class Members

The first reason the court in *Carrera* adopted a more stringent test for ascertainability is to protect the due process rights of putative class members by providing them advance notice of the action.[87] The Federal Rules of Civil Procedure require "the best notice that is practicable under the circumstances" to all potential class members in Rule 23(b)(3) suits.[88] This includes "individual notice to all members who can be identified through reasonable effort."[89] The notice requirement is intended to ensure class members' rights to exclude themselves and pursue an action on their own behalf.[90]

The Seventh Circuit disagreed that notice is necessary for consumer class actions. The court wrote in *Mullins v. Direct Digital, LLC*[91] that in low-value consumer class actions, "only a lunatic or a fanatic" would choose to litigate the claim on her own, so

79. *Id.*
80. *Id.*
81. *Id.* at 307.
82. 784 F.3d 154 (3d Cir. 2015).
83. 687 F.3d 583 (3d Cir. 2012).
84. *Byrd*, 784 F.3d at 162.
85. *Marcus*, 687 F.3d at 593.
86. *Carrera I*, 727 F.3d at 307.
87. *See id.* at 307.
88. FED. R. CIV. P. 23(c)(2)(B).
89. *Id.*
90. *See* Wasserman, *supra* note 12, at 725.
91. 795 F.3d 654 (7th Cir. 2015).

opt-out rights are not likely to be exercised.[92] The rights would apply to a nonexistent class of people.[93] Some commentators agree.[94] They argue that requiring an administratively feasible means of identifying class members in order to facilitate notice has the consequence of denying all class members potential recovery to protect a nonexistent set of plaintiffs.[95]

2. Due Process for Defendants

The second reason the Third Circuit proffered for administrative feasibility requirements is that they protect due process rights for defendants.[96] Specifically, administrative feasibility requirements preserve defendants' rights to challenge the reliability of the evidence used to prove class membership.[97] The court in *Carrera* reasoned that defendants in class action suits have a due process right to raise challenges to individual claims and class members.[98] The court therefore suggested that classes cannot be certified in a way that "eviscerates this right or masks individual issues."[99]

For example, if the rule required a defendant to accept as valid all affidavits submitted to prove class membership, they would lose the right to question a potentially fraudulent piece of evidence.[100] The court in *Carrera* was particularly concerned that affidavits are unverifiable.[101] Even in cases where the defendants' own records are used, the court in *Carrera* said that it is necessary to allow defendants to depose corporate record keepers to question the reliability of evidence used to certify classes.[102]

Many commentators have argued that such concerns are unfounded.[103] First, they argue, as the Seventh Circuit noted in *Mullins*, that due process does not protect the right to a perfect mechanism for class certification.[104] Rather, it protects defendants' opportunity to challenge each individual class member's claim to recover during the damages phase.[105] Second, affidavits are arguably suitable mechanisms for identifying class membership.[106] Commentators have argued that affidavits should be considered "unobjectionable" when people can self-identify as members of a class with a requisite degree of certainty.[107] Although affidavits are typically inferior to relying on defendants'

92. *Id.*
93. *Id.*
94. *See, e.g.*, Wasserman, *supra* note 12, at 725.
95. *Id.*
96. Carrera I, 727 F.3d 300, 307 (3d Cir. 2013).
97. *Id.*
98. *Id.*
99. *Id.*
100. *See id.*
101. *See id.* at 309–12.
102. *See id.* at 308.
103. *See, e.g.*, Wasserman, *supra* note 12, at 728; *see also* Elias, *supra* note 14, at 3.
104. *See, e.g.*, Wasserman, *supra* note 12, at 729; *see also* Elias, *supra* note 14, at 19.
105. *See* Mullins v. Direct Dig., LLC, 795 F.3d 654, 671 (7th Cir. 2015).
106. *See, e.g.*, Elias, *supra* note 14, at 3.
107. *Id.*

databases and records, online affidavits are still subject to perjury requirements, and the potential to gain by fraudulently submitting such an affidavit is relatively small.[108]

3. Administrative Feasibility

The court in *Carrera* underscored the need to minimize the administrative burdens to the judicial system that are associated with class action litigation by highlighting the need to avoid individualized fact finding—"mini-trials"—to determine class membership.[109] The purpose for allowing class actions is their purported efficiency.[110] Without administrative feasibility requirements, courts might have to conduct time-consuming, individualized hearings to determine whether putative class members qualify for class membership.[111] These "mini-trials" could undercut the purpose of the class action mechanism.[112] Therefore, some argue that the onus should be on the plaintiff class to prove that it is effectively using judicial resources.[113]

However, concerns about administrative overload may not outweigh plaintiffs' rights to justice.[114] In many contexts, consumer class action suits are the only available method for resolving consumer controversies that are "worth less, per claimant, than the costs of litigation."[115] Moreover, most federal class actions settle, and the terms of settlement agreements often alleviate some of the administrative burdens placed on courts.[116]

Some commentators note that requiring an administratively feasible method for identifying putative class members at the beginning of the litigation process may be fatal to many small consumer class actions.[117] Commentators have therefore argued that judicial convenience, while important, should not be used to justify dismissing claims that could not otherwise be pursued.[118] These commentators criticize *Carrera* for overburdening plaintiffs and deterring consumer class actions as a method for resolving disputes.[119] Circuits, however, remain split about the weight to accord judicial convenience in the class certification process.[120]

108. *See id.*
109. Carrera I, 727 F.3d 300, 307–08 (3d Cir. 2013).
110. *See* Kalven, Jr. & Rosenfield, *supra* note 32, at 688.
111. Wasserman, *supra* note 12, at 719.
112. *Id.* at 718–19.
113. *See id.*
114. *See id.*
115. *Id.* at 721.
116. *Id.*
117. *E.g.*, *id.*
118. *See, e.g.*, *id.* at 722.
119. *See id.* at 721–22.
120. See *supra* note 11 for an overview of the current circuit split on ascertainability.

C. Ascertainability as It Pertains to Rule 23(b)(2) Class Certification

A Rule 23(b)(2) class is defined in contrast to the party from whom it seeks relief.[121] This rule is generally invoked in civil rights lawsuits.[122] Specifically, Rule 23(b)(2) states that such actions arise when "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."[123] This definition differentiates Rule 23(b)(2) classes from Rule 23(b)(3) classes in several ways.

First, the mechanisms of relief afforded to Rule 23(b)(2) classes are primarily injunctive or declaratory, meaning that the parties do not typically seek substantial monetary damages.[124] It is unclear whether Rule 23(b)(2) classes may even be given monetary relief.[125] Circuits remain split on this subject in the wake of *Dukes*;[126] however, the primary form of relief sought must be injunctive or declaratory.[127]

Second, in contrast to Rule 23(b)(3), the Rule 23(b)(2) class mechanism does not contain explicit references to efficiency. Rule 23(b)(3) requires that class actions "[be] superior to other available methods for fairly and efficiently adjudicating the controversy."[128] Rule 23(b)(2) includes no such requirement.[129] Finally, unlike Rule 23(b)(3), Rule 23(b)(2) makes no reference to the "likely difficulties in managing a class action."[130]

Commentators have noted that ascertainability requirements generally pertain only to suits seeking monetary damages.[131] Therefore, Rule 23(b)(2) suits, which are typically civil rights class actions, are typically excluded from administrative feasibility requirements.[132] Rule 23(b)(2) class actions do not require notice of a class certification decision, unlike Rule 23(b)(3) class actions.[133] Because plaintiffs do not typically pursue

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121. *See* FED. R. CIV. P. 23(b)(2) ("A class action may be maintained if Rule 23(a) is satisfied and 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.").

122. *See* Megan E. Barriger, Comment, *Due Process Limitations on Rule 23(b)(2) Monetary Remedies: Examining the Source of the Limitation in* Wal-Mart Stores, Inc. v. Dukes, 15 U. PA. J. CONST. L. 619, 623 (2012).

123. FED. R. CIV. P. 23(b)(2).

124. *See id.*; *cf.* Elias, *supra* note 14, at 10.

125. Barriger, *supra* note 122, at 620.

126. *Id.*

127. *See* FED. R. CIV. P. 23(b)(2).

128. FED. R. CIV. P. 23(b)(3).

129. *See* FED. R. CIV. P. 23(b)(2).

130. *Compare id.*, *with* FED. R. CIV. P. 23(b)(3).

131. Elias, *supra* note 14, at 10.

132. *See, e.g.*, Cole v. City of Memphis, 839 F.3d 530, 541–42 (6th Cir. 2016) (holding there is no practical efficiency gained by knowing the precise membership of a Rule 23(b)(2) class); Shook v. El Paso Cty., 386 F.3d 963, 972 (10th Cir. 2004) ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable . . . ."), *aff'd,* 543 F.3d 597 (10th Cir. 2008); Yaffe v. Powers, 454 F.2d 1362, 1366 (1st Cir. 1972) (holding that because notice is not required in Rule 23(b)(2) suits, actual membership of the class does not need to be precisely delimited), *abrogated by* Gardner v. Westinghouse Broad. Co., 437 U.S. 478 (1978).

133. 1 RUBENSTEIN 2020, *supra* note 10, § 4:36 ("Rule 23(c) makes notice *of a class certification decision* discretionary, but Rule 23(e) *requires* that (b)(2) class members receive notice of any *proposed settlement*.").

monetary damages in Rule 23(b)(2) suits, requiring notice to all putative class members would impose an undue financial burden on potential plaintiffs.[134] Moreover, because Rule 23(b)(2) class actions primarily seek injunctive or declaratory relief rather than monetary damages, defendants do not need to identify or pay damages to individual members of a Rule 23(b)(2) class action.[135] An Advisory Committee note to Rule 23 makes it clear that classes should be certified in cases "where a party is charged with discriminating unlawfully against a class" even where its "members are incapable of specific enumeration."[136]

Courts have generally agreed with this sentiment.[137] Because notice is not required at the class certification stage for Rule 23(b)(2) classes, there is no practical efficiency to be gained by knowing the precise membership of the class.[138] Moreover, in Rule 23(b)(2) suits, remedies obtained by one member of a class will not necessarily affect the others; therefore, the ability to "opt-out" is irrelevant.[139]

However, some courts have held that ascertainability requirements do apply to Rule 23(b)(2) classes. The court in *DeBremaecker v. Short*[140] refused to certify a class of residents of the State of Texas who were "active in the 'peace movement'" on the grounds that such a class is not ascertainable.[141] The court reasoned that injunctive relief was targeted at police within the City of Houston while the class extended beyond the City of Houston.[142] Therefore, the court upheld the district court's denial of class certification.[143] The court used the term "ascertainability" in the traditional manner, which merely requires that class members be delineated by objective criteria.[144]

Some district courts, however, are applying the heightened standard of "administrative feasibility" to Rule 23(b)(2) class certification.[145] In *AW v. Magill*,[146] the

134. *See* Elias, *supra* note 14, at 10–11.

135. *See id.*

136. FED. R. CIV. P. 23, advisory committee's note to 1966 amendment.

137. *See supra* note 132.

138. *Cole*, 839 F.3d at 541–42; *see also* 1 RUBENSTEIN 2020, *supra* note 10, § 4:36.

139. *See, e.g.*, Shelton v. Bledsoe, 775 F.3d 554, 561 (3d Cir. 2015); *see also* Thorn v. Jefferson-Pilot Life Ins. Co., 445 F.3d 311, 330 n.24 (4th Cir. 2006) (reasoning that Rule 23(b)(2) was created to facilitate civil rights class actions); *Shook*, 386 F.3d at 972 ("[M]any courts have found Rule 23(b)(2) well suited for cases where the composition of a class is not readily ascertainable . . . ."); *In re* Monumental Life Ins. Co., 365 F.3d 408, 413 (5th Cir. 2004) (stating that courts have held that a "precise class definition" is not as critical in Rule 23(b)(2) actions seeking injunctive relief, but becomes important where notice and opt-out rights are requested); *Yaffe*, 454 F.2d at 1366 (reasoning that because notice is not required in Rule 23(b)(2) suits, actual membership of the class does not need to be precisely delimited); Ligon v. City of New York, 288 F.R.D. 72, 80 (S.D.N.Y. 2013) ("[W]here the primary relief sought is injunctive . . . 'it is not clear that the implied requirement of definiteness should apply to Rule 23(b)(2) class actions at all.'" (citation omitted)).

140. 433 F.2d 733 (5th Cir. 1970).

141. *DeBremaecker*, 433 F.2d at 734.

142. *Id.*

143. *Id.*

144. *See id.*; *see also Wasserman*, *supra* note 12, at 705–12 (discussing the traditional approach to ascertainability).

145. *See, e.g.*, AW v. Magill, No. 2:17-1346-RMG, 2018 U.S. Dist. LEXIS 224886, at *9 (D.S.C. Sept. 7, 2018); A.R. v. Dudek, No. 12-60460-CIV-ZLOCH, 2016 U.S. Dist. LEXIS 95432, at *5–7 (S.D. Fla. Feb. 29, 2016).

146. No. 2:17-1346-RMG, 2018 U.S. Dist. LEXIS 224886 (D.S.C. Sept. 7, 2018).

plaintiff class alleged that Bryan Hospital, an inpatient facility in South Carolina, violated the Supreme Court's integration mandate under Title II of the Americans with Disabilities Act.[147] The plaintiff class sought to be discharged from Bryan Hospital's Adult Services Division and placed in integrated care settings on the basis of their mental disabilities.[148] The proposed plaintiff class included:

> All [1] current and future [2] adult, non-forensic residents of G. Werber Bryan Psychiatric Hospital who, [3] with appropriate supports and services, would [4] now or in the future [5] be able to live in an integrated community setting and [6] who do not oppose living in an integrated community setting.[149]

The court denied the plaintiffs' motion to certify the class, in part, because the class was not ascertainable.[150] Despite a list of patient names and placement notes that were maintained by the hospital, the court found that making determinations regarding class membership would require "extensive and individualized fact-finding."[151] The court denied class certification because the class description sought relief for individuals whose health may change on any given day and therefore could not be readily ascertained.[152] The court reasoned that the plaintiffs were asking the court to identify "over 152 moving targets," which was antithetical to the purpose of Rule 23.[153] In its opinion, the court defined ascertainability in terms of administrative feasibility and argued that ascertainability is a prerequisite to class certification.[154]

In *Steimel v. Minott*,[155] a class of developmentally disabled persons challenged their placement in a Medicaid waiver program that dramatically reduced the services they received.[156] A district court judge denied class certification on the basis that the class was not ascertainable.[157] The court rejected the plaintiffs' claim that a relaxed ascertainability requirement applies in Rule 23(b)(2) suits, citing two Seventh Circuit decisions.[158] The court reasoned that identifying eligible plaintiffs is a "complex, highly individualized task, and cannot be reduced to the application of a set of simple, objective criteria."[159] It is unclear whether the court imposed an objective criteria test or an administrative feasibility test, as the court said that it preferred objective criteria but also expressed concerns for judicial convenience.[160]

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147. *See Magill*, 2018 U.S. Dist. LEXIS 224886, at *2–3; *see also* 42 U.S.C. §§ 12201–13 (2018).

148. *See id.*

149. *Id.* at *3.

150. *Id.* at *9–10.

151. *Id.* at *6–7.

152. *Id.* at *8.

153. *Id.* at *10.

154. *Id.* at *8–10.

155. 1:13-cv-957-JMS-MJD, 2014 U.S. Dist. LEXIS 38228 (S.D. Ind. Mar. 24, 2014).

156. *Steimel*, 2014 U.S. Dist. LEXIS 38228, at *1–2.

157. *Id.* at *14–15.

158. *Id.* at *19.

159. *Id.* at *20 (quoting Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 482, 496 (7th Cir. 2012)).

160. *See id.* at *20–21 (dismissing the plaintiffs' contention that there was already an objective method of determining class membership as an "inappropriate proxy" and emphasizing that any determination would be "complex [and] highly individualized").

Traditional wisdom suggests that administrative feasibility requirements do not apply in Rule 23(b)(2) class actions; however, this Part demonstrated that the law is currently in flux. Courts apply administrative feasibility requirements to suits seeking injunctive or declarative relief with increasing frequency. The law surrounding Rule 23(b)(2) class actions becomes significantly more complicated when monetary compensation is involved.[161]

D. Ascertainability and Cases Requiring Individualized Monetary Relief

Sometimes, Rule 23(b)(2) class action suits seek more than injunctive relief—they also seek some form of monetary relief.[162] The textbook example of such cases have historically been Title VII employment discrimination class actions.[163] These suits have historically been brought under Rule 23(b)(2) and have typically sought monetary damages in the form of backpay.[164] This type of class action has become more difficult, if not impossible, to bring in the wake of *Dukes*.[165] This Part discusses whether Rule 23(b)(2) suits seeking monetary damages should be able to bypass ascertainability requirements.

Dukes, as Justice Scalia noted, was "one of the most expansive class actions ever."[166] In *Dukes*, the district and appellate courts certified a class consisting of nearly 1.5 million plaintiffs.[167] The plaintiffs were current or former employees of Walmart who alleged that the company's policy of allowing local supervisors to exercise discretion in hiring and promotion practices violated Title VII by discriminating against women.[168] They alleged disparate impact and sought both injunctive relief and backpay.[169]

The plaintiffs argued that Walmart's policy did not facially discriminate against women but allowed discretionary practices on the part of local managers that had the effect of discriminating against women in hiring and promotion decisions.[170] The plaintiffs claimed that every woman who worked at Walmart had been discriminated against because of this policy.[171] Because the corporate culture permitted bias to insidiously influence hiring and promotion positions "of each one of Wal-Mart's thousands of managers . . . every woman at the company [was] the victim of one common discriminatory practice."[172]

The Supreme Court rejected this analysis on the basis that these women had not suffered a single harm but rather several, discrete cases of discrimination—therefore,

161. *See infra* Part II.D.

162. Barriger, *supra* note 122, at 620 (discussing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011)).

163. *See id.*

164. *See id.*

165. *Id.* at 619.

166. *Dukes*, 564 U.S. at 342.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 344.

171. *Id.* at 345.

172. *Id.*

there was no commonality between the women's claims.[173] The Court reasoned that the commonality requirement means that all members of a putative class must have suffered the same injury—not just that the same law applies to all plaintiffs.[174] The Court explained that discretion did not give rise to commonality between the women's claims.[175] Discretion may be exercised in a myriad of different circumstances; for example, hiring and promotion decisions involve different types and degrees of discretion.[176] As such, it would be inappropriate to say that all of these women were subjected to the same legal injury.[177]

More pertinent to the present discussion, however, is the Court's dicta in *Dukes* concerning whether plaintiffs in Rule 23(b)(2) suits can seek monetary damages in addition to injunctive relief.[178] Walmart claimed that they could not.[179] The Court held that the certification of backpay was improper.[180] The Court reasoned that "individualized monetary claims belong in Rule 23(b)(3)."[181] The Court maintained that this is precisely because Rule 23(b)(2) lacks the procedural protections of Rule 23(b)(3), such as the right to opt out.[182] The class was improperly certified for monetary damages, because the class certification order did not determine whether the monetary claims or the injunctive claims "predominated."[183] By saying these claims should have been brought under Rule 23(b)(3), the Court made it impracticable to bring Rule 23(b)(2) claims that seek individualized monetary relief.[184]

Nonetheless, many employment lawsuits continue to seek monetary damages under Rule 23(b)(2).[185] This raises interesting problems for ascertainability analyses that have not yet been discussed in the literature. Civil rights lawsuits are typically brought under Rule 23(b)(2).[186] Yet, many civil rights suits may seek monetary relief too. This Part discussed the implications of *Dukes* for such lawsuits. In what follows, this Comment makes a distinction between monetary damages seeking systemic relief and individualized monetary damages under Rule 23(b)(2).[187]

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173. *Id.* at 359–60.

174. *Id.* at 349–50.

175. *Id.* at 355.

176. *Id.* at 355–56.

177. *See id.* at 356.

178. *See id.* at 360–63.

179. *Id.* at 347.

180. *Id.* at 360.

181. *Id.* at 362.

182. *Id.*

183. *See id.* at 363–65.

184. *See id.* at 362.

185. *See, e.g.*, FPX, LLC v. Google, Inc., 276 F.R.D. 543, 552 (E.D. Tex. 2011); Morrow v. Washington, 277 F.R.D. 172, 202 (E.D. Tex. 2011). *See generally* Barriger, *supra* note 122 (analyzing the *Dukes* holding regarding monetary relief under Rule 23(b)(2) through the lens of due process).

186. *See Dukes*, 564 U.S. at 361 ("'[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) is meant to capture." (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997))).

187. *See infra* Part III.D.

III. DISCUSSION

In the wake of *Carrera* and growing confusion from district courts, it is important to clarify the relationship between ascertainability requirements and Rule 23(b)(2) classes. This Section argues that Rule 23(b)(2) classes are structurally different than Rule 23(b)(3) classes and that even if an administrative feasibility argument can be rightfully applied to Rule 23(b)(3) class certification, it ought not be applied to Rule 23(b)(2) class certification.

A. A Textual Approach to Rule 23(b)(2) and Administrative Feasibility

Rule 23 never explicitly mentions ascertainability.[188] Many critics decry the requirement as judge-made law.[189] Most courts, however, have held that requiring classes to be defined by objective criteria is an implicit prerequisite to class certification.[190] Courts have long held that Rule 23(a)'s use of the word "class" "presupposes the existence of an actual 'class.'"[191] However, some courts have found it inappropriate to apply even traditional ascertainability requirements to Rule 23(b)(2) classes.[192]

Indeed, the Third Circuit held in *Shelton v. Bledsoe*[193] that ascertainability is not a requirement for Rule 23(b)(2) classes that seek only injunctive or declaratory relief.[194] The court reasoned that insofar as the "general demarcations of the proposed class are clear," the class should be certified.[195] The court noted several instances of unascertainable Rule 23(b)(2) classes being certified.[196] For example, one court certified a class of children who "are or will be at risk of neglect or abuse and whose status is or should be known to" the city.[197] Another court certified a class of all present and future female students who were "harmed by and want to end [Quinnipiac University's] sex discrimination."[198] Yet another court certified a class of

188. Tom Murphy, *Implied Class Warfare: Why Rule 23 Needs an Explicit Ascertainability Requirement in the Wake of* Bryd v. Aaron's Inc., 57 B.C. L. REV. 34, 35 (2016).

189. *Id.*

190. The Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits require that classes be defined in relation to objective criteria, even though they refuse to adopt a more stringent administrative feasibility standard. *See supra* note 11.

191. White v. Williams, 208 F.R.D. 123, 129 (D.N.J. 2002); *see also* Mullins v. Direct Dig., LLC, 795 F.3d 654, 657 (7th Cir. 2015) ("We and other courts have long recognized an implicit requirement under Rule 23 that a class must be defined clearly . . . .").

192. *See, e.g.*, Shelton v. Bledsoe, 775 F.3d 554, 563 (3d Cir. 2015) ("[A]scertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief . . . ."); Floyd v. City of New York, 283 F.R.D. 153, 172 (S.D.N.Y. 2012) ("It would be illogical to require precise ascertainability in a suit that seeks no class damages.").

193. 775 F.3d 554 (3d Cir. 2015).

194. *Shelton*, 775 F.3d at 563.

195. *Id.* at 563 (quoting *Floyd*, 283 F.R.D. at 172).

196. *Id.* (acknowledging *Floyd*'s discussion of several unascertainable Rule 23(b)(2) classes being certified (citing *Floyd*, 283 F.R.D. at 171–72 nn.115–17)).

197. Marisol A. *ex rel.* Forbes v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997) (quoting Marisol A. *ex rel.* Forbes v. Giuliani, 929 F. Supp. 662, 693 (S.D.N.Y. 1996)).

198. Biediger v. Quinnipiac Univ., No. 3:09cv621 (SRU), 2010 WL 2017773, at *7 (D. Conn. May 20, 2010) (alteration in original), *aff'd*, 691 F.3d 85 (2d Cir. 2012).

> all individuals who (1) suffer from mental illness, (2) would pose a substantial threat of physical harm to themselves or others in absence of court-ordered treatment in the community but would not pose a substantial threat of physical harm to themselves or others if directed to undergo a regimen of outpatient treatment and (3) are not eligible for services . . . because they do not meet the eligibility criteria for services.[199]

The application of ascertainability requirements to Rule 23(b)(2) class certification was once so rare that commentators treat the proposition that Rule 23(b)(2) classes are not subject to ascertainability requirements as self-evident.[200]

Public policy may support the idea that objective criteria requirements should be imposed on Rule 23(b)(2) classes as well as Rule 23(b)(3) classes. As discussed in Part II.A, the objective criteria requirement (1) incentivizes attorneys to define classes in a clear and definite way, so as to simplify the process of providing remedies and ensuring commonality;[201] (2) avoids the evidentiary problems associated with subjective standards;[202] and (3) avoids overbreadth of the class[203] or (4) under-inclusivity in the form of "fail-safe" classes.[204] This Comment therefore does not take issue with the application of objective criteria requirements to Rule 23(b)(2) classes.[205] However, applying administrative feasibility requirements to Rule 23(b)(2) classes does not comport with the text or spirit of Rule 23.

Rule 23(b)(3) requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy"[206] and requires courts to consider "the likely difficulties in managing a class action."[207] Rule 23(b)(2) contains no such requirements.[208] Indeed, Rule 23(b)(2) requires only that the legal question in dispute "appl[ies] generally to the class," making injunctive or declaratory relief appropriate.[209] The structure of Rule 23 therefore clearly demarcates Rule 23(b)(2) and Rule 23(b)(3) classes as subject to fundamentally different requirements.

Although Rule 23(a) requires numerosity, commonality, typicality, and representativeness,[210] it is clear from the language of the rule that this is an exhaustive list, meaning that proof of administrative feasibility ought not be required for class

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199. *See* Mental Disability Law Clinic v. Hogan, No. CV–06–6320 (CPS)(JO), 2008 WL 4104460, at *17–18 (E.D.N.Y. Aug. 29, 2008).

200. *See* Shaw, *supra* note 14, at 2369 n.61; *see also* Elias, *supra* note 14, at 10.

201. *See supra* notes 40–45 and accompanying text.

202. *See supra* notes 46–51 and accompanying text.

203. *See supra* notes 52–57 and accompanying text.

204. *See supra* notes 58–65 and accompanying text.

205. Some commentators assert that objective criteria requirements may inappropriately "frontload" litigation such that plaintiffs are at an undue disadvantage. *See, e.g.*, Simona Grossi, *Frontloading, Class Actions, and a Proposal for a New Rule 23*, 21 LEWIS & CLARK L. REV. 921, 955 (2017) (asserting that Rule 23(b) is "replete with technicalities and redundancies that generate frontloading"). These arguments are beyond the scope of this Comment, however.

206. FED. R. CIV. P. 23(b)(3).

207. FED. R. CIV. P. 23(b)(3)(D).

208. *See* FED. R. CIV. P. 23(b)(2).

209. *Id.*

210. FED. R. CIV. P. 23(a)(1)–(4).

certification.[211] Therefore, a Rule 23(b)(2) class ought to be certified if the written requirements of Rule 23(a) and Rule 23(b)(2) are met.[212] The requirements of Rule 23(b)(3) might be read to promote administrative convenience above all other policy concerns, as the rule specifically requires courts to do so; however, Rule 23(b)(2) contains no such requirement.[213] This indicates that requiring administrative feasibility sets an arbitrarily high bar for Rule 23(b)(2) class certification.

By their nature, Rule 23(b)(2) classes defy clear and precise definitions of class membership at the outset of litigation.[214] These cases are typically civil rights cases that involve race, gender, disability, or class.[215] A clear implication of Rule 23(b)(2) granting primarily injunctive relief is that it will be impossible to clearly identify all putative class members, especially at the outset of litigation.[216] Injunctions by definition prevent future action, and therefore it is impossible to identify the full realm of putative plaintiffs in advance.[217]

In addition to Rule 23's textual requirements, courts must consider policy and due process.[218] The Parts that follow address these concerns in the context of Rule 23(b)(2) classes. They conclude that many of the public policy and procedural arguments for requiring class representatives to prove administrative feasibility should not apply to Rule 23(b)(2) class actions.

B. Due Process

Many of the arguments for applying objective criteria or administrative feasibility standards to the class certification process are based on due process.[219] Commentators and courts maintain that ascertainability requirements are necessary to protect both plaintiffs' and defendants' due process rights.[220] Parts III.B.1 and III.B.2 discuss the due process rights of putative plaintiffs and defendants respectively, outlining why due process rights are fundamentally different in Rule 23(b)(2) class actions.

1. Plaintiffs' Rights to Notice

One of the key differences between Rule 23(b)(2) and Rule 23(b)(3) is the requirement that putative plaintiffs be given notice and a chance to opt out of the class action and pursue their own suit.[221] For Rule 23(b)(2) classes, the court may direct that notice be given to the class, but this notice is not required in all situations.[222] Conversely,

211. *See* Wasserman, *supra* note 12, at 703–04.

212. *See* FED. R. CIV. P. 23(a), (b)(2).

213. *Compare* FED. R. CIV. P. 23(b)(3)(D), *with* FED. R. CIV. P. 23(b)(2).

214. *See* FED. R. CIV. P. 23(b)(2).

215. *See supra* notes 2–5 and accompanying text; *see also* Barriger, *supra* note 122, at 623.

216. *See* FED. R. CIV. P. 23(b)(2).

217. *See Injunction*, MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/injunction [https://perma.cc/4Z7D-KB9P] (last visited Feb. 1, 2021).

218. *See* Wasserman, *supra* note 12, at 699–701.

219. *See supra* Part II.B.

220. *See supra* Part II.B.

221. *See* FED. R. CIV. P. 23(c)(2)(A)–(B).

222. *See* FED. R. CIV. P. 23(c)(2)(A); *see also* 1 RUBENSTEIN 2020, *supra* note 10, § 4:36.

for Rule 23(b)(3) classes, the court "must" require the "best notice that is practicable under the circumstances."[223]

A putative class member does not have a right to opt out of a Rule 23(b)(2) class action—that is why Rule 23(b)(2) classes are often referred to as mandatory classes.[224] The lack of opt-out rights can be justified through shared group interests.[225] Rule 23(a) already requires that class representatives raise "questions of law or fact common to the class"[226] and "fairly and adequately protect the interests of the class."[227] Therefore, plaintiffs should not need to seek individualized relief.[228] The requirements of Rule 23(a) are more than enough to ensure that the class representatives fairly represent group interests in Rule 23(b)(2) class actions.[229]

Conversely, Rule 23(b)(3) suits involve individualized monetary relief, meaning that these classes are more likely to foment conflicts of interest.[230] Because each individual party to the suit has a personal interest in maximizing their damages, it might be in a putative plaintiff's best interest to opt out and pursue an individualized claim for monetary damages.[231]

Because there is no requirement that class members be notified of an impending suit under Rule 23(b)(2), there is no need to identify putative class members, especially at the outset of litigation.[232] One of the primary reasons given for administrative feasibility requirements is that putative class members deserve notice so that they can opt out of proceedings.[233] It is impossible, however, to opt out of Rule 23(b)(2) proceedings in the same way.[234] Moreover, the notice requirements in Rule 23 themselves differ between Rule 23(b)(2) and Rule 23(b)(3) classes.[235]

The structural differences between the classes necessitate different treatment for the purposes of ascertainability analyses. A plaintiff's due process rights are not enhanced in any way through heightened ascertainability requirements in a Rule 23(b)(2) suit, whereas they arguably are in a Rule 23(b)(3) suit.[236] Therefore, due process arguments do not support requiring ascertainability for Rule 23(b)(2) classes, especially in light of the problems this Comment identifies with such requirements.

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223. FED. R. CIV. P. 23(c)(2)(B).

224. Barriger, *supra* note 122, at 624.

225. *Id.* at 624–25.

226. FED. R. CIV. P. 23(a)(2).

227. FED. R. CIV. P. 23(a)(4).

228. *See* Barriger, *supra* note 122, at 624–25.

229. *See* FED. R. CIV. P. 23(a).

230. Barriger, *supra* note 122, at 625.

231. *See id.*

232. *See* 1 RUBENSTEIN 2020, *supra* note 10, § 4:36.

233. *See* Carrera I, 727 F.3d 300, 307 (3d Cir. 2013).

234. *See* Barriger, *supra* note 122, at 624; *see also* 1 RUBENSTEIN 2020, *supra* note 10, § 4:36 ("[A Rule 23] (b)(2) class exists in situations in which individual litigation will invariably affect the rights of others, such as civil rights cases like *Brown v. Board of Education*. If an individual litigant like Linda Brown prevails, the resulting decree will impact all similarly situated school children. There is no realistic sense of 'opting out' of such a class.").

235. *See* FED. R. CIV. P. 23(c)(2)(A)–(B).

236. See *supra* Part II.B.1 for a discussion of the due process rights of putative class members.

2. Defendants' Due Process Rights

The Third Circuit in *Carrera* argued that administrative feasibility requirements preserve defendants' rights to challenge the reliability of the evidence used to prove class membership.[237] Classes, according to the *Carrera* court, "cannot be certified in a way that eviscerates this right or masks individual issues."[238]

However, Rule 23(b)(2) suits differ structurally from Rule 23(b)(3) suits.[239] First, Rule 23(b)(2) suits by their very nature often implicate categories that evade administratively feasible modes of classification.[240] Gender, race, and disability status are all inherently nebulous categories—yet, the difficulties with ascertaining the precise boundaries of classes seeking relief on these bases have not stopped courts from certifying such classes.[241]

Rule 23(b)(2) suits ask defendants to stop or modify discriminatory practices rather than give individualized monetary relief to putative class members.[242] As such, defendants have less of an interest in questioning and eliminating particular members of putative classes.[243] Moreover, under *Dukes*, all Rule 23(b)(2) class members must share the same injury to prove commonality.[244] Therefore, it follows that defendants do not need to identify all putative class members at the outset of litigation to protect their own due process rights.[245]

C. Public Policy: Balancing Administrative Convenience and Plaintiffs' Rights

Applying administrative feasibility requirements to Rule 23(b)(2) class certification does not comport with the spirit or text of Rule 23[246]—but is it sound policy? The primary justification for strict ascertainability requirements in class certification is administrative convenience.[247] Class members need to be identifiable "in a manner consistent with the efficiencies of a class action."[248] When class members cannot be clearly identified, class actions become an inefficient mechanism for resolving disputes.[249] Since the purpose of

237. *See Carrera I*, 727 F.3d at 307.

238. *Id.*

239. *See supra* notes 228–31 and accompanying text.

240. *See supra* Part II.C.

241. *See supra* notes 196–200 and accompanying text.

242. *See* Barriger, *supra* note 122, at 623; *see also* FED. R. CIV. P. 23(b)(2).

243. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2:04 (AM. LAW. INST. 2020) (discussing that when prohibitory injunctions or declaratory judgments are granted, those remedies "generally stand to benefit . . . all persons subject to the disputed policy practice, even if relief is only nominally granted to the named defendants").

244. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50 (2011).

245. See *supra* notes 216–17 and accompanying text for analysis about why injunctive relief focuses on the practice plaintiffs seek to stop as opposed to correct class identification.

246. *See infra* Part III.A.

247. *See* Geoffrey Holtz & Nitin Jindal, *The Critical Importance—Or Complete Irrelevance—Of Class Ascertainability in the Class Certification Decision, and the Unacceptable Circuit Split*, 26 COMPETITION 28, 31 (2017).

248. *Id.* at 32 (quoting Carrera I, 727 F.3d 300, 307 (3d Cir. 2013)).

249. *See id.* at 30.

a class action is to promote efficiency, time-consuming "mini-trials" to determine whether class members qualify for class membership are counterproductive.[250]

However, courts adopt different approaches to determining the timing and weight of ascertainability analyses.[251] The Third Circuit requires proof of administrative feasibility prior to and independent of Rule 23 requirements, whereas the Seventh Circuit defers questions of administrative convenience to its analysis of superiority and manageability.[252]

This distinction is important. Deferral avoids rendering the manageability requirement moot and preserves the right of plaintiffs to bring class actions when these suits are the only means of redressing harm.[253] Moreover, making class representatives prove an administratively feasible method for identifying class members at the beginning of litigation will lead to almost certain death for some civil rights class actions.[254] Normatively speaking, a less stringent approach to ascertainability is superior.[255]

Because the judiciary's purpose is to provide relief to those who have been legally wronged, concern for judicial convenience is not a sufficient justification for dismissing claims that could not meaningfully be redressed without a class action suit.[256] Likewise, the distribution of funds to plaintiffs takes place after litigation is concluded.[257] Therefore, it seems reasonable to delay considering whether a class can be identified in an administratively feasible way at least until the consideration of manageability.[258] Administrative feasibility could even be ignored until the claims administration process.[259]

Ascertainability requirements "frontload" class action suits by probing into the merits of the case prior to full discovery.[260] This leads to denials of justice for class action plaintiffs whose cases are dismissed because their classes are deemed unascertainable.[261] Furthermore, ascertainability requirements might themselves be administratively inefficient, as they duplicate the analysis for other requirements such as the manageability requirement.[262] When class action suits are frontloaded and plaintiffs are burdened with duplicative requirements, fewer plaintiffs reach an adjudication of the merits of their case.[263] This is especially true in civil rights cases due to the already nebulous nature of the categories that attorneys are attempting to define.[264] As a result,

250. Wasserman, *supra* note 12, at 718–19.
251. *Id.* at 719.
252. *Id.*
253. *See id.* at 719–21.
254. *Id.* at 721.
255. *See id.* at 722.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*
260. Grossi, *supra* note 205, at 954.
261. *See id.*
262. *See id.* at 949.
263. *See id.*
264. *See supra* notes 240–41 and accompanying text.

administrative feasibility requirements are harmful both procedurally and as a matter of policy.

One question the foregoing analysis leaves unanswered is the fate of Rule 23(b)(2) plaintiffs who seek monetary relief in addition to declaratory relief. The next Part addresses this question in light of *Dukes*.

D. Individualized Monetary Relief in the Wake of Dukes

As noted in Part II.C, most Rule 23(b)(2) suits do not seek monetary relief, but employment discrimination lawsuits under Title VII are a notable exception to this rule.[265] In *Dukes*, the Supreme Court strongly implied that such suits should be brought under Rule 23(b)(3);[266] however, some commentators suggest that the Justices might have simply been concerned about the sheer size of the class being certified and not individualized monetary damages in Rule 23(b)(2) suits altogether.[267] Nonetheless, it seems important to clarify what type of ascertainability requirements, if any, should be imposed on Rule 23(b)(2) suits seeking individualized monetary relief.

One of the primary reasons for ascertainability requirements in Rule 23(b)(3) suits is the protection of putative class members' rights to opt out.[268] This suggests that where opt-out rights become relevant in Rule 23(b)(2) suits, ascertainability requirements ought to apply.[269] It might be suggested, however, that opt-out rights are never relevant in Rule 23(b)(2) suits because Rule 23(b)(2) classes are mandatory.[270] This is an area where Rule 23 is unclear. Public policy would suggest that opt-out rights are important in cases such as employment discrimination cases, because individual plaintiffs might be able to maximize their damages by pursuing their claims separately. Therefore, there is not the same level of class cohesion in Rule 23(b)(2) suits seeking individualized damages as in those seeking purely injunctive relief.[271]

Perhaps the Supreme Court correctly stated that these claims should be brought under Rule 23(b)(3) for this reason.[272] Moreover, there are concerns for the rights of defendants implicated by individualized monetary damages in Rule 23(b)(2) suits.[273] If defendants cannot ascertain the class, it is nearly impossible for them to gauge the number of people to whom they might be liable or to question whether putative class members do or should qualify.[274]

Following the Court's reasoning in *Dukes* can help ease this tension. The *Dukes* Court strongly suggested that claims seeking individualized monetary damages should

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265. *See* Barriger, *supra* note 122, at 623–24.

266. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011).

267. *See* Barriger, *supra* note 122, at 621.

268. *See* 1 RUBENSTEIN 2020*, supra* note 10, § 4:36.

269. *See, e.g.*, *In re* Monumental Life Ins. Co., 365 F.3d 408, 413 (5th Cir. 2004) (noting courts have held that a "precise class definition is not as critical" in Rule 23(b)(2) actions seeking injunctive relief, but becomes important where notice and opt-out rights are requested).

270. *See* Barriger *supra* note 122, at 624.

271. *Cf. id.* at 625 (noting the lack of class cohesion in Rule 23(b)(3) cases seeking individualized monetary relief).

272. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011).

273. *See supra* Part II.B.2.

274. *See supra* Part II.B.2.

be brought under Rule 23(b)(3).[275] Requiring civil rights plaintiffs to seek individualized monetary damages under Rule 23(b)(3) would subject them to objective criteria requirements—which is reasonable given the due process concerns related to individualized monetary damages.[276] Given the current circuit split, however, the fear is that these suits would become too difficult to bring in circuits that require proof of administrative feasibility as part of class certification.[277] Commenting on administrative feasibility requirements for Rule 23(b)(3) class certification is beyond the scope of this analysis; however, as a matter of policy, such requirements should be approached with caution for the reasons discussed in Section II.[278]

E. Solutions

There are four governmental actors with the institutional competence to resolve the circuit split on ascertainability generally[279]: the Advisory Committee on Civil Rules,[280] the U.S. Supreme Court, lower federal courts,[281] and Congress.[282] Each of these institutions has varying levels of institutional competence and authority.[283] This Comment argues that the Advisory Committee on Civil Rules is best equipped to clarify the Federal Rules of Civil Procedure's disposition regarding ascertainability for Rule 23(b)(2) classes.

1. The Advisory Committee on Civil Rules

The Supreme Court has the option of deferring to the rulemaking process set out in the Rules Enabling Act.[284] Many lower courts have indicated their desire for the Advisory Committee on Civil Rules to take up the issue.[285]

The Advisory Committee on Civil Rules is comprised of trial and appellate court judges, practitioners, and academics that have subject-matter expertise in the Federal Rules of Civil Procedure and their application.[286] Many of the members are either judges

275. *Dukes*, 564 U.S. at 362.

276. *See generally* Barriger, *supra* note 122 (discussing the due process concerns surrounding claims for individualized monetary damages brought under Rule 23(b)(2)).

277. *See supra* notes 118–20 and accompanying text.

278. *See supra* Section II.

279. Wasserman, *supra* note 12, at 731.

280. *See infra* Part III.E.1.

281. *See infra* Part III.E.2.

282. *See infra* Part III.E.3.

283. *See generally* Lumen N. Mulligan & Glen Staszewski, *Institutional Competence and Civil Rules Interpretation*, 101 CORNELL L. REV. ONLINE 64 (2016) (discussing the concept of institutional competence and setting forth a model for the treatment of differing types of cases).

284. *See* 28 U.S.C. §§ 2072–73 (2018) (allowing the Advisory Committee on Civil Rules to add, take away from, or modify the Federal Rules of Civil Procedure).

285. *See, e.g.*, Byrd v. Aaron's Inc., 784 F.3d 154, 177 (3d Cir. 2015) (Rendell, J., concurring) ("Until we revisit this issue as a full Court or it is addressed by the Supreme Court or the Advisory Committee on Civil Rules, we will continue to administer the ascertainability requirement in a way that contravenes the purpose of Rule 23 and, in my view, disserves the public."); Carrera v. Bayer Corp. (*Carrera II*), No. 12-2621, 2014 WL 3887938, at *1 (3d Cir. May 2, 2014) (Ambro, J., dissenting) (suggesting that ascertainability "merits . . . review by the Judicial Conference's Committee on Rules of Practice and Procedure").

286. Wasserman, *supra* note 12, at 755.

with lifetime appointments or tenured faculty at law schools, meaning that they have job security.[287] Therefore, they are not as susceptible to political pressure as members of Congress who are constantly seeking reelection.[288] The committee also offers greater opportunities for public comment as compared to the Supreme Court.[289] The most advantageous feature of the committee, however, is that it can fully amend rules rather than ruling on the specific case or controversy before it.[290] Therefore, the committee is not bound to the facts of a specific case and can issue more sweeping changes to the Federal Rules of Civil Procedure.

During a meeting in April 2015, the Advisory Committee called ascertainability "the biggest topic not on [the Rule 23 Subcommittee's] list."[291] The subcommittee has indicated a clear desire to avoid the "center of the controversy."[292] Therefore, further discussion of ascertainability has been repeatedly put "on hold."[293] It is unclear whether this pattern will persist given that the Supreme Court has refused to grant certiorari in several cases involving ascertainability since the issue was tabled.[294] If the committee fails to act, then it risks exacerbating the forum shopping risks associated with its continued silence.[295]

The Advisory Committee on Civil Rules is in the best position to resolve rising disputes involving the application of ascertainability rules in Rule 23(b)(2) suits and ascertainability rules more generally. The committee can amend the entirety of Rule 23 if it wants to avoid ambiguity and resolve the circuit dispute.[296] It is in a uniquely advantageous position to clarify rules regarding ascertainability in Rule 23(b)(2) suits,

287. *Id.*

288. *Id.*

289. *Id.*

290. *See id.* at 756.

291. ADVISORY COMM. ON CIVIL RULES, DRAFT MINUTES OF THE APRIL 2015 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 30 (2015), *reprinted in* ADVISORY COMM. ON CIVIL RULES, ADVISORY COMMITTEE ON CIVIL RULES, SALT LAKE CITY, UTAH, NOVEMBER 5–6, 2015, at 52 (2015) [hereinafter ADVISORY COMM., NOVEMBER 2015 AGENDA BOOK].

292. *See* RULE 23 SUBCOMM., NOTES OF JULY 15, 2015 SUBCOMMITTEE CONFERENCE CALL, 18 app.2 at 21 (2015) [hereinafter RULE 23 SUBCOMM. JULY 2015 CONFERENCE CALL NOTES], *reprinted in* ADVISORY COMM., NOVEMBER 2015 AGENDA BOOK, *supra* note 291, at 261; *see also* RULE 23 SUBCOMM., RULE 23 SUBCOMMITTEE REPORT 29–30 (2015) [hereinafter RULE 23 SUBCOMMITTEE REPORT], *reprinted in* ADVISORY COMM., NOVEMBER 2015 AGENDA BOOK, *supra* note 291, at 115–16.

293. *See* RULE 23 SUBCOMMITTEE REPORT, *supra* note 292, at 29–30; *see also* Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1607–08 (2016) (noting, as a member of the Advisory Committee on Civil Rules, that ascertainability has been put on hold indefinitely). The word ascertainability has not been mentioned in subsequent reports, except to discuss what a mess discussing it was. *See, e.g.*, MULTIDISTRICT LITIG. SUBCOMM., NOTES OF CONFERENCE CALL ON MAY 13, 2019, *reprinted in* ADVISORY COMM. ON CIVIL RULES, ADVISORY COMMITTEE ON CIVIL RULES, WASHINGTON, DC, OCTOBER 29, 2019, at 217 (2019) ("This sounds somewhat like the 'ascertainability' issue that so roiled the class action bar several years ago. . . . [W]e risk being inundated by unfavorable comment and triggering much unnecessary controversy.").

294. Wasserman, *supra* note 12, at 736–37.

295. *Id.* at 761.

296. *See id.* at 756–57.

because this type of litigation has not yet been heard by many courts of appeals.[297] These rules are misinterpreted by federal district court judges, whom this Comment has argued are applying the wrong standard because of general confusion surrounding ascertainability requirements.[298]

The Advisory Committee could eliminate a significant source of confusion without venturing into the "center of the controversy."[299] The committee itself admits that most cases involving ascertainability are Rule 23(b)(3) suits.[300] Therefore, the committee could avoid controversy while also resolving a disputed area of law.

Should the Advisory Committee decide to weigh in on this dispute through either a change to Rule 23 or a change to the notes accompanying it, it should clarify that application of administrative feasibility standards to Rule 23(b)(2) suits is not appropriate. By definition, it is impossible to define the class of plaintiffs who are subject to injunctive relief because injunctive relief is forward looking.[301] Moreover, Rule 23(b)(2) suits are not subject to notice or administrative convenience requirements per Rule 23's text.[302]

If the committee applies administrative feasibility requirements to any class of plaintiffs, it should do so in suits seeking individualized monetary relief.[303] However, in light of *Dukes*, it is no longer clear that such suits can even be brought under Rule 23(b)(2).[304] Therefore, the question of ascertainability and Rule 23(b)(2) suits is one that can be resolved without substantial controversy yet is of grave importance for plaintiffs in civil rights class actions.

2. The Courts

A second option for resolving the ascertainability dispute is through the federal court system. The Supreme Court could grant a petition for a writ of certiorari in a case involving ascertainability in Rule 23(b)(2) classes.[305] A bona fide circuit split has emerged regarding ascertainability in Rule 23(b)(3) cases, making the issue a prime candidate for a Supreme Court ruling.[306] The Supreme Court, however, has denied petitions for certiorari in cases involving ascertainability four times to date.[307]

297. *But see* Jamie S. v. Milwaukee Pub. Sch., 668 F.3d 481, 493 (7th Cir. 2012) (denying class certification under Rule 23(b)(2) for a class of "all Milwaukee-area disabled students, regardless of differences in their disabilities or educational situations, whose procedural or substantive rights under the IDEA were violated in any way").

298. See *supra* Part II.C for a discussion of how this standard has been misapplied to plaintiffs to whom this standard would not have previously been applied.

299. *See* RULE 23 SUBCOMM. JULY 2015 CONFERENCE CALL NOTES, *supra* note 292, at app.2 at 21.

300. *See* RULE 23 SUBCOMMITTEE REPORT, *supra* note 292, at 31.

301. *See supra* notes 216–17 and accompanying text.

302. *See supra* Part III.A.

303. See *supra* Part III.D for an evaluation of individualized monetary relief.

304. *See* Barriger, *supra* note 122, at 619–21.

305. Wasserman, *supra* note 12, at 731.

306. *Id.*

307. *Id.* at 736–37.

Why is this? Generally, the Court will grant certiorari in cases in which it is evident that (1) there is a circuit split, and (2) the split is significant.[308] In this instance, however, it is unlikely that the Supreme Court is denying petitions for certiorari due to the lack of a significant circuit split.[309] Commentators suggest three potential reasons that the Court continues to deny certiorari to cases addressing ascertainability: (1) a hope that lower courts will resolve the conflict themselves, (2) deference to Congress, and (3) deference to the rulemaking process.[310]

Because the Supreme Court does not seem likely to grant certiorari to a case involving ascertainability and Rule 23(b)(3) classes imminently, it is far less likely to resolve the uncertainty surrounding ascertainability as applied to Rule 23(b)(2) classes. As previously noted, the application of ascertainability standards to Rule 23(b)(2) classes is a relatively new phenomenon emerging from district court rulings.[311] Litigation is a lengthy process. Therefore, the lack of a clear *appellate-level* split about ascertainability and Rule 23(b)(2) classes means the Supreme Court is likely not the most expedient institutional choice for reducing uncertainty about ascertainability as it pertains to Rule 23(b)(2) classes. If the Supreme Court refuses to weigh in on ascertainability in an area in which the circuit split is prominent, it seems unlikely that the Court will weigh in on a less pronounced dispute.

The Supreme Court is unlikely to hear a case on ascertainability and Rule 23(b)(3) classes any time soon,[312] let alone a case involving ascertainability and Rule 23(b)(2) classes. Therefore, it might make sense to let the lower courts work out the issue on their own. However, the lower federal courts have shown a similar hesitance to reviewing decisions regarding the circuit split.[313] For example, the Third Circuit denied a petition that sought an en banc review of the administrative feasibility approach taken in *Carrera*.[314] It would take at least two circuits to grant an en banc review of ascertainability standards to create symmetry between circuits.[315] These decisions would need to be heard en banc in order to reverse previous precedent set by singular panels and to establish uniform precedent between circuits.[316] This is unlikely given that only a small number of cases are heard en banc.[317]

Once courts of appeals agree to hear these cases en banc, the circuits would then need to reconsider their approach to ascertainability in order to establish a workable standard for ascertainability in Rule 23(b)(3) cases.[318] However, even a resolution about the role of ascertainability requirements in Rule 23(b)(3) cases would not clarify the standard regarding the role of ascertainability for Rule 23(b)(2) class certification.

308. *See id.* at 734–37.

309. *Id.* at 737–38.

310. *Id.* at 738.

311. *See supra* Part II.C.

312. *See* Wasserman *supra* note 12, at 737–38.

313. *See id.* at 742–44.

314. *Id.* at 743.

315. *Id.* at 744.

316. *See The Politics of En Banc Review*, 102 HARV. L. REV. 864, 864 (1989).

317. Wasserman, *supra* note 12, at 744.

318. *See id.*

Therefore, deferring to the courts to resolve this problem does not seem to be a fruitful way forward.

3. Congress

Congress has the authority to regulate judicial procedure under Article III;[319] however, it may not always be ideal for Congress to act because it is subject to lobbying.[320] Moreover, members of Congress may be less specialized and therefore less qualified to weigh in on questions of civil procedure.[321] Nonetheless, Congress has taken some action on addressing ascertainability.[322] The Fairness in Class Action Litigation Act of 2017, passed by the House of Representatives but not the Senate, would deny class certification to:

> a class action seeking monetary relief unless the class is defined with reference to objective criteria and the party seeking to maintain such a class action affirmatively demonstrates that there is a reliable and administratively feasible mechanism (a) for the court to determine whether putative class members fall within the class definition and (b) for distributing directly to a substantial majority of class members any monetary relief secured for the class.[323]

The Senate has not acted on the bill to date, except to refer it to the Committee on the Judiciary.[324] However, the fact that the House referenced ascertainability indicates that the House was at least cognizant of the circuit split and the resultant lack of uniformity in the application of class action rules.

This proposed legislation, however, is contentious.[325] Critics suggest that the passage of the bill would "short-circuit" the Rules Enabling Act's deliberative process, which generally defers to the judicial branch on questions of procedure.[326] Moreover, the language is subject to the criticisms of administrative feasibility standards.[327] The bill is not likely to pass.[328] Yet, if Congress were to pass this type of legislation, this Comment proposes that it should clarify the status of Rule 23(b)(2) suits. Specifically, any iteration of the bill should include language stating that Rule 23(b)(2) suits are exempt from the administrative feasibility requirements discussed in the proposed legislation.

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319. *See* U.S. CONST. art. III.

320. Wasserman, *supra* note 12, at 751.

321. *See id.*

322. *See, e.g.*, Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103 (as passed by House of Representatives, Mar. 9, 2017) (proposing the addition of 28 U.S.C. § 1718(a)).

323. *Id.*

324. *See H.R.985 - Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017*, CONGRESS.GOV, http://www.congress.gov/bill/115th-congress/house-bill/985/actions?q=%7B%22search%22%3A%5B%22fairness+in+class+action+litigation%22%5D%7D [https://perma.cc/Y5ME-CW23] (last visited Feb. 1, 2021).

325. *See* Wasserman, *supra* note 12, at 752–54.

326. *Id.* at 753–54 ("The letter expressed concern that if the legislation passed by the House were enacted into law, it would short-circuit the REA's deliberative process."); *see also* H.R. REP. NO. 115-25, at 46 (2017) (providing dissenting views).

327. See *supra* Part III.C for a discussion of how administrative feasibility requirements frontload litigation and place a disproportionate burden on plaintiffs in consumer class actions.

328. *See* Wasserman, *supra* note 12, at 754.

This is unlikely to happen. Congress is inherently political.[329] Moreover, it is likely to adopt legislation that merely re-entrenches strict ascertainability requirements (if it adopts any legislation).[330] There is also no indication that any legislation passed would clarify standards for Rule 23(b)(2) litigation. Therefore, this Comment concludes that Congress is not the ideal institution for adjudicating the dispute concerning ascertainability. The only remaining institution that might be able to resolve this dispute is the Advisory Committee on Civil Rules.

V. CONCLUSION

The administrative feasibility standard is inappropriate when applied in most Rule 23(b)(2) cases. Most Rule 23(b)(2) cases do not seek individualized monetary relief. Moreover, because most Rule 23(b)(2) cases seek injunctive or declaratory relief, the relief they seek is necessarily preemptive. It is impossible to identify all putative plaintiffs at the outset of litigation, because part of the purpose of Rule 23(b)(2) suits is to deter future civil rights violations on the part of defendants.

Recent trial court decisions, however, demonstrate confusion about when administrative feasibility requirements should be applied. Therefore, this Comment proposes that the Advisory Committee on Civil Rules clarify the requirements of Rule 23 to make it clear that ascertainability requirements do not apply in cases seeking primarily injunctive or declaratory relief. The Advisory Committee is the only non-political entity with the institutional competence and authority to address this issue without an active case or controversy. This means that the Advisory Committee could resolve confusion and preserve a vital mechanism for civil rights enforcement without addressing the broader debate about ascertainability.

329. *See id.* at 744–45.

330. *See, e.g.*, Fairness in Class Action Litigation and Furthering Asbestos Claim Transparency Act of 2017, H.R. 985, 115th Cong. § 103 (as passed by House of Representatives, Mar. 9, 2017) (proposing the addition of 28 U.S.C. § 1718(a)).