

**THE COMMONALITY OF DIFFERENCE: A  
FRAMEWORK FOR OBTAINING CLASS  
CERTIFICATION IN ADA CASES AFTER WAL-MART**

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#### INTRODUCTION

The Americans with Disabilities Act (ADA)<sup>1</sup> reflects a dual focus on remedying systemic, pervasive patterns of discrimination, as enumerated in the Act’s Findings,<sup>2</sup> and affording individuals tailored accommodations necessary to allow each person with a disability equal access to employment opportunities, governmental services, and public accommodations.<sup>3</sup> But redressing individual experiences of disability discrimination often requires structural reforms to entities, programs, and benefits, particularly when alleged violations involve State agencies and other public entities under Title II. Therefore, in order realize the broad

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1. *See Americans with Disabilities Act*, 42 U.S.C. §§ 12101–12213 (2021).

2. *See id.* § 12101 (a)(1)–(8).

3. This dual focus is reflected throughout the statute, its legislative history, and implementing regulations. *See* ARLENE MAYERSON, AMERICANS WITH DISABILITIES ACT ANNOTATED, § 2(a) at 41, 44 (1994) (analyzing the Findings and Purposes of the Act through a lens that focuses first on the effects of discrimination on individuals with disabilities and then on the effects of discrimination on society).

objectives of the ADA, disability advocates have invoked class actions as a tool for vindicating individual rights.

From the myopic perspective of Rule 23,<sup>4</sup> class certification of claims under the ADA demands a creative approach to resolve the dualism inherent in the statutory structure: the vision of the ADA to eradicate the systemic discrimination, segregation, devaluation, and even denial of personhood of individuals with disabilities, and the mandate to accommodate their individualized conditions to afford them equal access. Recent class certification jurisprudence has made that approach somewhat more complicated,<sup>5</sup> by elevating the Rule's requirement that there must be a common practice impacting the entire class which can be redressed by a single remedy. And while strategies that succeeded in the past may not automatically do so with similar ease, ADA classes have been certified, post-*Wal-Mart*, provided they attend to a focus on the systemic practices which generate discrimination rather than the accommodations that relieve it.<sup>6</sup>

Despite the prevalence of class actions in the disability context, and their success in building more equitable and integrated service systems, little has been written about their history, or the practical challenges of litigating these cases in the 21st century. What articles do exist pre-date significant and evolving Supreme Court precedents interpreting the requirements for class certification under Rule 23.<sup>7</sup> This Article seeks to fill that gap by offering a general review of class certification under all three Titles of the ADA and a more targeted analysis of Title II systemic reform cases in particular. It then shifts to providing practical strategies to address the issues raised in class actions brought against public entities, including those arising under the Supreme Court's seminal disability decision, *Olmstead v. L.C.*<sup>8</sup>

Sections I and II explore the ADA's dual purpose of remedying systemic discrimination and providing the individual accommodations

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4. FED. R. CIV. P. 23. For an overview of the requirements of the Rule, see *infra* Sec. II.C.1.

5. *Wal-Mart v. Dukes*, 564 U.S. 338, 360 (2011); *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013); *Comcast Corp. v. Behrend*, 569 U.S. 27, 38 (2013).

6. See *List of Selected ADA Class Action Cases*, CTR. FOR PUB. REPRESENTATION, <https://www.centerforpublicrep.org/wp-content/uploads/ADA-Class-Certification-Case-List.2020.pdf> (last visited Apr. 19, 2021) [hereinafter *Selected ADA Cases*].

7. For a creative framework for litigating class claims under Title I, see Michael Ashley Stein & Michael F. Waterstone, *Disability, Disparate Impact, and Class Actions*, 56 DUKE L.J. 861 (2006). However, the authors' analysis and conclusions are less convincing today, given the Supreme Court's decision in *Wal-Mart*, and this appears to be the most recent discussion focusing exclusively on class certification in ADA cases.

8. 527 U.S. 581 (1999).

needed to ensure equal access. Section II briefly considers the virtual absence of class certification in employment discrimination cases brought under Title I, and the remedy-specific invocation of class certification in public accommodation cases under Title III. Section III traces the necessity for class actions in cases brought against governmental entities and presents the conceptual framework for obtaining class certification in ADA Title II cases. Sections IV and V, respectively, consider the challenges of satisfying the commonality prong of Fed. R. Civ. 23(a)(2) and the systemic relief test of Rule 23(b)(2) after the Supreme Court's 2011 decision in *Wal-Mart v. Dukes*.<sup>9</sup> Finally, Section VI discusses the particular challenges of certifying a class in *Olmstead* cases and concludes with suggestions for defining a certifiable class under Title II.

### I. THE ADA'S STATUTORY DUALISM

The title, scope, and text of the ADA reflect its dual focus on redressing systemic discrimination and ensuring disabled individuals equal access to opportunities and benefits available to all citizens. This balance, and the tension that sometimes results, was presaged by the Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*,<sup>10</sup> where Justice White rejected a heightened scrutiny analysis under the Equal Protection Clause, precisely because the very nature of disability was that it affected differently disabled persons in different ways, required different accommodations, and demanded different remedies.<sup>11</sup> It resurfaced in the ADA's Findings,<sup>12</sup> which indirectly sought to reestablish heightened scrutiny by referencing the operative phrase from *United States v. Carolene Products Co.* that persons with disabilities were "a discrete and insular minority."<sup>13</sup> And significantly, it was the underlying theme in the Court's seminal Title II decision, *Olmstead v. L.C.*,<sup>14</sup> where the Court articulated an expansive discrimination rule that prohibited the unnecessary segregation of all persons with disabilities in publicly sponsored, segregated facilities based on the experiences of two individual plaintiffs.

Most subsequent ADA cases, and particularly Title II cases, seeking to require governmental entities and public accommodations to end

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

10. See 473 U.S. 432, 445–47 (1985).

11. See *id.* at 442–45.

12. See 42 U.S.C. § 12101(a)(6).

13. 304 U.S. 144, 152 n.4 (1938).

14. See 527 U.S. 581, 602 (1999).

systemic discriminatory practices, unnecessary segregation, and denial of access to community activities have been brought as class actions pursuant to Fed. R. Civ. P. 23.<sup>15</sup> When these ADA cases challenged obvious systemic conditions, such as physically inaccessible locations—like courthouses, or voting booths—courts routinely certified these cases as class actions.<sup>16</sup> But often the discriminatory practice is less obvious, and may manifest itself in different ways, particularly in cases alleging unnecessary segregation or the discriminatory denial of governmental benefits.<sup>17</sup> In these situations, courts have been less willing to certify a class, particularly after *Wal-Mart v. Dukes*.

In *Wal-Mart*, the Supreme Court considered “one of the most expansive class actions ever,” and its implications for the application of Rule 23 standards for class certification.<sup>18</sup> At issue were lower court decisions certifying a class of 1.5 million female Wal-Mart employees in 3,400 stores nationwide.<sup>19</sup> The plaintiffs claimed that supervisor discretion in the company’s hiring and advancement process resulted in

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15. See FED. R. CIV. P. 23(a); see also *Selected ADA Cases*, *supra* note 6.

16. See *Lacy v. Dart*, No. 14 C 6259, 2015 U.S. Dist. LEXIS 56625, at \*20 (N.D. Ill. Apr. 30, 2015), *aff’d sub nom* *Lacy v. Cook Cty.*, 897 F.3d 847, 852 (7th Cir. 2018) (certifying class of all Cook County Jail inmates in wheelchairs denied access to courthouse); *Westchester Indep. Living Ctr. v. State Univ. of N.Y. Purchase Coll.*, 331 F.R.D. 279, 301–02 (S.D.N.Y. 2019) (certifying class of students and visitors with mobility disabilities who seek removal of access barriers on campus); *Nevarez v. Forty Niners Football Co.*, 326 F.R.D. 562, 592 (N.D. Cal. 2018) (certifying class of stadium visitors with mobility disabilities to enforce ADA building standards); see *Kerrigan v. Phila. Bd. of Election*, 248 F.R.D. 470, 478 (E.D. Pa. 2008) (certifying class of voters with mobility disabilities denied access to polling places).

17. See *Steimel v. Minott*, No. 1:13-CV-957-JMS-MJD, 2014 U.S. Dist. LEXIS 38228, at \*38 (S.D. Ind. Mar. 24, 2014) (denying certification and concluding because “Plaintiffs’ proposed method [for determining appropriateness for services] is inadequate, the only option left would be an arduous individual review of each [class-member’s] case file. But even this would not be sufficient, as no mere ministerial review of case files could resolve the difficulty created by . . . individuals with different levels of need.”), *aff’d sub nom* *Steimel v. Wernert*, 823 F.3d 902, 917–18 (7th Cir. 2016); see *Ligas v. Maram*, No. 05 C 4331, 2009 U.S. Dist. LEXIS 132611, at \*10 (N.D. Ill. July 7, 2009) (de-certifying class because class representatives were eligible for community service and, therefore, would not be typical of class members who were not eligible; difference in eligibility amongst class members defeated commonality).

18. 564 U.S. 338, 342 (2011).

19. *Id.* In 2004, the district court originally certified a Rule 23(b)(2) class defined as: “all women employed at any Wal-Mart domestic retail store at any time since December 26, 1998, who have been or may be subjected to Wal-Mart’s challenged pay and management track promotions policies and practices.” *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137, 141 (N.D. Cal. 2004). This definition was later modified on rehearing by the 9th Circuit. See *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) (en banc), *rev’d*, 564 U.S. 338 (2011).

employment discrimination based on gender.<sup>20</sup> Ultimately, the plaintiffs' contention that a corporate culture institutionalized and enabled gender bias failed to persuade the majority that the commonality requirements of Rule 23(a) were met.<sup>21</sup>

In a 5-4 decision, the Court concluded that plaintiffs' claims of bias did not stem from a general policy or uniform practice of the defendants.<sup>22</sup> Nor did Wal-Mart supervisors appear to operate with a common mode in their exercise of discretion in individual pay and promotion decisions.<sup>23</sup> Rather, Justice Scalia's majority opinion echoes the 9th Circuit's dissent, characterizing the plaintiffs' claim as an attempt to sue about "literally millions of employment decisions at once."<sup>24</sup> Without a central or "common contention" of law or fact capable of class wide resolution, and whose "truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke," the Court concluded that Rule 23's commonality requirement cannot be satisfied.<sup>25</sup>

This articulation arguably represents a departure from the "low bar" traditionally set for commonality and prevents litigants from satisfying the standard by simple recitation of a common legal injury.<sup>26</sup> However, the facts surrounding the *Wal-Mart* case can be readily distinguished from most class action, system reform cases brought on behalf of persons with disabilities under the ADA, and its holding has not altered the viability of these actions. Still, the Court's legal analysis of commonality, and the appropriateness of single injunctive relief, must now inform how these class action cases are pleaded, argued, and defended, making class-based discovery increasingly common, and necessitating greater vigilance in order to preserve longstanding interpretations of Rule 23 in civil rights cases.

Since *Wal-Mart*, a few courts have found that the very nature of disability and the command of the ADA demands an individualized

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20. *Walmart*, 564 U.S. at 342.

21. Another unique factor influencing the Court's decision was the nature of the alleged Title VII violation and the limited ability to discern whether the defendant's alleged actions met the requisite level of intent required for employment discrimination claims. *Id.* at 356.

22. *Id.* at 354-55.

23. *Id.* at 352-53.

24. *Id.* at 352.

25. *Id.* at 350.

26. *Walmart*, 564 U.S. at 350. In its opinion, the majority denies allegations that it conflated the standards of 23(a) and 23(b)(3), stating that its consideration of "dissimilarities" was not to determine if common issues predominated among the class, but rather whether there existed "[even] a single [common] question." *Id.* at 357. However, its definition of "the common question" in this context, and its rigorous examination of differences, suggest otherwise. *Id.* at 351-52.

approach that precludes commonality under Rule 23(a)(2), undermines typicality under Rule 23(a)(3), and/or requires individually tailored relief under Rule 23(b)(2).<sup>27</sup> Ironically, the denial of class certification, especially in Title II integration cases, frustrates the objectives of the ADA and runs counter to the teaching of *Olmstead*,<sup>28</sup> making systemic relief almost impossible given the Court's view of the government's fundamental alteration defense.<sup>29</sup>

But most courts have been receptive, post-*Wal-Mart*, to several arguments for proving systemic discriminatory practices, despite the individualized focus of the ADA. Demonstrating that the challenged practices constitute a pattern of discrimination has been central to satisfying the commonality prong of Rule 23(a).<sup>30</sup> Classes have been certified when they allege and offer some proof of the common fact that a public entity's planning, administration, funding, and operation of a service system that results in the discriminatory denial of access to its services.<sup>31</sup> Class certification also is appropriate when the differential

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27. See *S.S. v. City of Springfield*, 318 F.R.D. 210, 223 (D. Mass. 2016) (The court found that "the diversity of circumstances affecting members of the proposed class will create a myriad of unique challenges that will have to be overcome on a student by student basis in order to implement each of these entwined services."), *aff'd sub nom* *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 35 (1st Cir. 2019); see also *P.P. v. Compton Unified Sch. Dist.*, No. CV15-3726-MWF (PLAx), 2015 U.S. Dist. LEXIS 134772, at \*75 (C.D. Cal. Sept. 29, 2015) (denying class certification due to the named plaintiffs potentially not meeting class definition).

28. See 527 U.S. 581, 603 (1999) ("If the expense entailed in placing one or two people in a community-based treatment program is properly measured for reasonableness against the State's entire mental health budget, it is unlikely that a State, relying on the fundamental-alteration defense, could ever prevail.").

29. See *id.* at 605–06.

30. See *Wal-Mart*, 564 U.S. at 353.

31. See *Thorpe v. D.C.*, 303 F.R.D. 120, 124 (D.D.C. 2014) (certifying class of all persons with physical disabilities in long-term care facilities who want to live in the community and need community placement), *aff'd*, *Brown v. D.C.*, 928 F.3d 1070, 1074 (D.C. Cir. 2019); see also *Steward v. Janek*, 315 F.R.D. 472, 493 (W.D. Tex. 2016) (certifying class of all Medicaid-eligible adults with IDD in nursing facilities or who are screened for admission pursuant to PASSR); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1333 (W.D. Wash. 2015) (same); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014) (certifying class of Medicaid-eligible children with a mental health disorder who seek community-based services); *Kenneth R. v. Hassan*, 293 F.R.D. 254, 271–72 (D. N.H. 2013) (certifying class of all persons with serious mental illness who are unnecessarily institutionalized and who need specific mental health services to live in the community); *Van Meter v. Harvey*, 272 F.R.D. 274, 283–88 (D. Me. 2011) (certifying class of MaineCare eligible adults who should be screened for admission to nursing facilities and who need community-based services as well as active treatment while in facilities); *State Off. of Prot. and Advoc. for Pers. with Disabilities v. Connecticut*, 706 F. Supp. 2d 266, 273–74 (D. Conn. 2010) (certifying class of individuals with mental illness who could live in the community with supports); *Colbert v. Blagojevich*, No. 07-C-4737, 2008 U.S. Dist. LEXIS 75102, at \*28 (N.D. Ill. Sept. 29, 2008) (certifying class of all Medicaid-eligible adults who are unnecessarily confined in nursing facilities and who need

impact of a disability is irrelevant to whether the individual is qualified to participate in a city's park and recreational program,<sup>32</sup> or would benefit from a hospital corporation's diagnostic testing program.<sup>33</sup> The inherent differences between persons with disabilities need not undermine commonality or typicality, at least where they all are qualified for the government's benefit or activity despite these differences.<sup>34</sup> Arguments that individualized determinations are necessary to afford relief have

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community-based services); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 U.S. Dist. LEXIS 109917, at \*8 (N.D. Fla. Oct. 14, 2008) (same); *Williams v. Blagojevich*, No. 05 C 4673, 2006 U.S. Dist. LEXIS 83537, at \*15–16 (N.D. Ill. Nov. 13, 2006) (same); *Rolland v. Cellucci*, No. 98-30208-KPN, 1999 U.S. Dist. LEXIS 23814, at \*30 (D. Mass. Feb. 2, 1999) (certifying class of adults with IDD who should be screened for admission to nursing facilities and who seek provision of community-based services and active treatment while in facilities).

32. See *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 522 (N.D. Cal. 2011) (certifying class of all mobility or vision impaired visitors denied access at national park); *Nevarez v. Forty Niners Football Co.*, 326 F.R.D. 562, 592 (N.D. Cal. 2018) (certifying class of football stadium visitors with mobility disabilities claiming noncompliance with ADA building standards).

33. See *Access Now, Inc. v. Ambulatory Surgery Ctr. Grp.*, 197 F.R.D. 522, 529–30 (S.D. Fla. 2000) (certifying class of all persons with disabilities seeking access to services of hospitals); *Postawko v. Mo. Dep't of Corr.*, No. 2:16-CV-04219-NKL, 2017 U.S. Dist. LEXIS 117238, at \*3 (W.D. Mo. July 26, 2017) (certifying class of all inmates with Hep-C who seek access to treatment via antiviral drugs), *aff'd*, 910 F.3d 1030, 1041 (8th Cir. 2018).

34. See *Liberty Res., Inc. v. City of Phila.*, No. CV 19-3846, 2020 U.S. Dist. LEXIS 118396, at \*11 (E.D. Pa. July 7, 2020) (citing FED. R. CIV. P. 23(a)–(b)) (certifying class of pedestrians with mobility and vision impairment seeking accessible sidewalks and curb ramps); see also *Westchester Indep. Living Ctr. v. State Univ. of N.Y. Purchase Coll.*, 331 F.R.D. 279, 292–93 (S.D.N.Y. 2019) (first citing *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418 (S.D.N.Y. 2012); then citing *Raymond v. Rowland*, 220 F.R.D. 173, 180 (D. Conn. 2004); then citing 42 U.S.C. § 12101 (2021); and then citing FED. R. CIV. P. 23(a)); *Leiken v. Squaw Valley Ski Corp.*, No. CIV. S-93-1622 LKK, 1994 U.S. Dist. LEXIS 21281, at \*36 (E.D. Cal. June 28, 1994) (citing FED. R. CIV. P. 23(b)(2)) (certifying class of all visitors with disabilities denied access to ski resort); *Kurlander v. Kroenke Arena Co.*, 276 F. Supp. 3d 1077, 1087 (D. Colo. 2017) (first citing *Colo. Cross-Disability Coal. v. Abercrombie & Fitch*, 765 F.3d 1205, 1216 (10th Cir. 2014); then citing *Colo. Cross-Disability Coal. v. Taco Bell*, 184 F.R.D. 354, 361–62 (D. Colo. 1994); and then citing FED. R. CIV. P. 23(a)(2)–(3)) (certifying class of stadium patrons with hearing impairment who seek captioning of aural content at sporting events); *Newkirk v. Pierre*, No. 19-CV-4283 (NGG) (SMG), 2020 U.S. Dist. LEXIS 155539, at \*1–2 (E.D.N.Y. Aug. 26, 2020) (first citing 29 U.S.C. § 794 (2021); then citing 42 U.S.C. § 12101); then citing FED. R. CIV. P. 23(b)(2); and then citing FED. R. CIV. P. 72(b)(2)) (certifying class of SNAP/TA applicants with disabilities who seek accommodations to the benefit application process); *S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 112 (M.D. Pa. 2018) (certifying class of children with mental health disabilities entitled to mental health community care under EPSDT); *Dunn v. Dunn*, 318 F.R.D. 652, 683–84 (M.D. Al. 2016) (first citing 29 U.S.C. § 705(9)(B) (2021); then citing 42 U.S.C. § 12102 (2021); and then citing FED. R. CIV. P. (a), (b)(2)) (certifying class of prisoners with disabilities seeking removal of access and communication barriers in prison); *Lacy v. Dart*, No. 14 C 6259, 2015 U.S. Dist. LEXIS 56625, at \*14 (N.D. Ill. Apr. 30, 2015); *Bloomberg*, 290 F.R.D. at 418 (citing *Raymond* 220 F.R.D. at 180) (certifying class of all people with disabilities in New York City seeking an accessible and fair emergency preparedness plan).



been rejected when an alternative, non-judicial process is available, like an individual service planning process, to assess whether the person is qualified to live in an integrated setting and does not oppose transition.<sup>35</sup> Persuading courts that differences do not matter with respect to systemic discriminatory practices is a central theme in successful ADA class certification decisions.

## II. REDRESSING DISCRIMINATION UNDER THE ADA

The ADA was enacted against a backdrop of civil rights legislation designed to eradicate discrimination based upon race,<sup>36</sup> national origin,<sup>37</sup> gender,<sup>38</sup> and age,<sup>39</sup> in a broad range of activities, including voting,<sup>40</sup> employment,<sup>41</sup> education,<sup>42</sup> housing,<sup>43</sup> public accommodations,<sup>44</sup> and other activities of interstate commerce.<sup>45</sup> It was the culmination of more than two decades of piecemeal legislation,<sup>46</sup> regulations,<sup>47</sup> and demonstrations<sup>48</sup> that sought to proscribe disability discrimination by

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35. See *Lane v. Kitzhaber*, 283 F.R.D. 587, 601 (D. Or. 2012); *Kenneth R.*, 293 F.R.D. at 271.

36. See Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d (2021).

37. See *id.*

38. See Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-2(a)(1) (2021).

39. See Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 (2021).

40. See Voting Rights Act of 1965, 52 U.S.C. § 10101 (2021).

41. See 42 U.S.C. § 2000e (2021).

42. See Civil Rights Act of 1964, Title III, 42 U.S.C. § 2000c-6 (2021); Education Amendments of 1972, Title IX, 20 U.S.C. § 1681 (2021).

43. See 42 U.S.C. § 2000a-3(a) (2021); Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619, 3631 (2021).

44. See 42 U.S.C. § 2000a-3(a).

45. See *id.* § 2000a-3(b)–(c).

46. See Rehabilitation Act of 1973, §§ 501, 505, 29 U.S.C. §§ 791, 794 (2021); Developmentally Disabled Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6010 (2021); Community Mental Health Act of 1963, Pub. L. No. 88-164, 77 Stat. 282; Mental Health Systems Act of 1978, 42 U.S.C. § 9501 (2021). See generally MAYERSON, *supra* note 3, § 2(a) at 49–50 (noting the limitations of earlier enactments that addressed a single problem or a single disabled group); *Hearing on H.R. 2273 Before the Subcomm. on Civ. and Const. Rts. of the H. Comm. on the Judiciary*, 101st Cong. 191 (1989) (statement of Dick Thornburgh, Attorney General of the United States) (“Over the past 20 years, civil rights laws protecting disabled persons have been enacted in piece-meal fashion. Thus, existing Federal laws are like a patchwork quilt in need of repair. There are holes in the fabric, serious gaps in coverage that leave persons with disabilities without adequate civil rights protections.”).

47. See 45 C.F.R. §§ 84, 86 (2021) (section 504 regulations); see also 45 C.F.R. § 1325.3 (2021) (Developmental Disabilities Assistance and Bill of Rights Act regulations); 34 C.F.R. § 300 (2021) (IDEA regulations).

48. See Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/> (describing the twenty-eight-day sit-in at the Department of Health, Education, and Welfare’s (HEW) San Francisco office in 1977).

federally funded entities,<sup>49</sup> public transportation,<sup>50</sup> and educational programs.<sup>51</sup> It echoed Justice Marshall's famous dissent in *City of Cleburne v. Cleburne Living Center*,<sup>52</sup> which compared the segregation imposed on persons with disabilities to the worst vestiges of Jim Crow.<sup>53</sup> Passage of the ADA capped years of protests, sit-ins, and collective action by all elements of the disability community<sup>54</sup> demanding justice and equality and an end to the disability-analogue to Jim Crow.<sup>55</sup> In signing the ADA in 1990, then President George H.W. Bush famously noted: "This act is powerful in its simplicity. It will ensure that people with disabilities are given the basic protections for which they have worked so long and so hard; independence, freedom of choice, control of their lives, the opportunity to blend fully and equally into the rich mosaic of the American mainstream."<sup>56</sup> That laudable goal remains elusive today, more than three decades after enactment of the ADA. More troubling, that sweeping pronouncement has been undermined by some courts which have focused exclusively on the individualized language of the Act.

*A. The ADA's Systemic Reform Goals & Individualized Requirements*

The ADA's dualistic statutory structure demands that litigation strategies and procedural tools at least equally serve its systemic goals and provide for individualized remedies.

*1. The ADA's Broad Goals of Preventing Discrimination*

Unlike various disability-related statutes that preceded it,<sup>57</sup> the ADA did not focus on people with particular disabilities, but instead, sought to protect all Americans with disabilities. This is, perhaps, its greatest

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49. See 45 C.F.R. § 84.

50. See Fed. Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (codified as amended at 49 U.S.C. § 41713 (2021)); Air Carrier Access Act, 49 U.S.C. § 41705 (2021).

51. See Individuals with Disabilities in Education Act, 20 U.S.C. § 1400(a) (2021).

52. See 473 U.S. 432, 445 (1985).

53. See *id.* at 461–62.

54. See Mayerson, *supra* note 48 (describing lobbying efforts, task forces, protests, and legal strategies to ensure the eradication of discrimination in all areas for all persons with disabilities).

55. *Id.* ("The ADA is radical only in comparison to a shameful history of outright exclusion and segregation of people with disabilities. From a civil rights perspective the Americans with Disabilities Act is a codification of simple justice.").

56. Remarks on Signing the Americans with Disabilities Act of 1990, PUB. PAPERS (July 26, 1990), available at <https://bush41library.tamu.edu/archives/public-papers/2108>.

57. See Javits-Wagner-O'Day Act, 41 U.S.C. § 8501–8506 (2021); Developmental Disabilities Assistance and Bill of Rights Act of 1975, 42 U.S.C. § 6001 (2021); Mental Health Systems Act of 1978, 42 U.S.C. § 9501 (2021).

accomplishment, the product of a remarkable cross-disability coalition that staunchly resisted legislative efforts to distinguish or diminish its reach, based upon medical conditions or disability labels.<sup>58</sup> Its singular focus on the rights of persons with disabilities,<sup>59</sup> rather than solely dictating the obligations of entities, agencies, or organizations that interact with individuals, represent a prescient, person-centered focus that empowered and emboldened the disability community.

Nowhere is the statute's systemic emphasis more evident than in its Findings. Beginning with the past, Congress found that:

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem.<sup>60</sup>

Pivoting to the present, Congress then determined that:

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally.<sup>61</sup>

Finally, deciding that action was necessary to rectify this past and present discrimination, Congress concluded that:

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who

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58. Mayerson, *supra* note 48 (“From the beginning the ‘class’ concept prevailed—groups representing specific disabilities and specialized issues vowed to work on all of the issues affecting all persons with disabilities.”).

59. *See* 42 U.S.C. § 12101(a)(1) (2021).

60. *Id.* § 12101(a)(2).

61. *See id.* § 12101(a)(3), (5)–(6).

have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(7) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(8) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and non-productivity.<sup>62</sup>

These Findings—explicitly confessing the sordid history and persistence of institutionalization, isolation, and discrimination which persons with disabilities suffered for centuries and continue to endure—constitute the roadmap for the systemic reforms that the ADA envisioned. They respond directly to Justice Marshall's historical recapitulation and equal protection analysis.<sup>63</sup> They reflect the ordinary reality of people with disabilities in America. But while the ADA's universality is heralded in its title and purpose,<sup>64</sup> it is subsequently restricted in its sectional definitions, limiting the protections of the Act to “qualified individuals with disabilities.”<sup>65</sup>

## 2. *The ADA's Individualized Requirements of Qualification & Accommodations*

While the ADA broadly defines disability,<sup>66</sup> and the rules of construction encourage the broadest possible reading of that definition,<sup>67</sup> the additional definitions in Title I limit the scope of the Act's employment protections to “a qualified individual.”<sup>68</sup> This threshold requirement reflects an unmistakable attention on the individual's abilities, limitations, and needs for a “reasonable accommodation”<sup>69</sup> that

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62. *See id.* § 12101(a)(4), (7)–(8).

63. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 461–62, 471–73 (1985) (quoting *U. of Cal. Regents v. Bakke*, 438 U.S. 265, 303 (1978)).

64. 42 U.S.C. § 12101(b).

65. 42 U.S.C. § 12111(8), 12131(2) (2021).

66. 42 U.S.C. § 12102(1) (2021).

67. *Id.* § 12102(4)(A).

68. 42 U.S.C. § 12111(8). “The term ‘qualified individual’ means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential...” *Id.*

69. *Id.* § 12111(9).

would allow the individual to perform the essential functions of the job. The prohibition on employment discrimination is tethered to these definitions, prohibiting covered employers<sup>70</sup> from subjecting “an applicant or employee” to a range of discriminatory practices.<sup>71</sup>

A similar, restrictive definition appears in Title II.<sup>72</sup> The prohibition on discrimination by public entities is limited to “a qualified individual with a disability.”<sup>73</sup> It is this individualized application that has led some courts to deny class certification to claims brought under Title II.<sup>74</sup>

Significantly, Title III’s general prohibition on discrimination applies to all individuals with disabilities<sup>75</sup> and even those without disabilities who are perceived to have a disability.<sup>76</sup> Its rules of construction repeatedly reference class-based limitations on the denial of participation and the provision of separate benefits to either an individual or a class by a private entity that qualifies as a public accommodation.<sup>77</sup> The rules go so far as to explicitly call out class-based discrimination by these entities,<sup>78</sup> providing a convincing rationale for class action challenges under Title III.

#### *B. Litigation Options to Realize the ADA’s Systemic Reform Purpose*

Redressing the structural discrimination that animates the ADA’s vision is not purely the province of litigation. Congress responded to

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70. *Id.* § 12111(5).

71. 42 U.S.C. § 12112(b) (2021). Oddly, while six of the seven discriminatory practices proscribed by Title I speak only of the applicant or employee, the prohibition on the use of qualification criteria include a reference to “a class of individuals with disabilities,” representing the only explicit suggestion in the entire section that employment discrimination can be challenged by aggregate, class-based claims. *Id.* § 12112(b)(6) (prohibiting “qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or class of individuals with disabilities....”). For a creative framework for litigating class claims under Title I, see Stein & Waterstone, *supra* note 7. (However, the authors’ analysis and conclusions are less convincing today, given the Supreme Court’s decision in *Wal-Mart*.)

72. 42 U.S.C. § 12131(2) (2021). “The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” *Id.*

73. *Id.* § 12132.

74. *Steimel v. Minott*, No. 1:13-CV-957-JMS-MJD, 2014 U.S. Dist. LEXIS 38228, at \*38 (S.D. Ind. Mar. 24, 2014); *S.S. v. City of Springfield*, 318 F.R.D. 210, 223 (D. Mass. 2016).

75. 42 U.S.C. § 12182(a) (2021).

76. *Id.* § 12182(b)(1)(E).

77. *Id.* § 12182(b)(1)(A)(i), (iii).

78. *Id.* § 12182(b)(1)(A)(iv).

constrained judicial interpretations of “qualified individual”<sup>79</sup> through the ADA Amendments of 2008.<sup>80</sup> The United States Department of Justice issued a detailed Technical Assistance Manual<sup>81</sup> and expansive guidelines for applying the integration mandate of Title II.<sup>82</sup> But litigation has served a unique function in realizing the promise of the ADA, through individual cases, declaratory judgments,<sup>83</sup> and class actions. Each of these litigation options offers unique opportunities and challenges for demanding an end to a discriminatory practice or the restructuring of a discriminatory program.

### *1. Individual Plaintiffs*

Many of the seminal ADA decisions were brought by individual plaintiffs who challenged a specific discriminatory practice. These decisions often interpreted the Act in a manner that created a new rule or obligation consistent with the ADA’s broad purpose. For instance, *Pennsylvania Department of Corrections v. Yeskey* made clear that Title II’s equal access mandate applies to prisons and correctional services.<sup>84</sup> *PGA Tour v. Martin* determined that Title III required public accommodations like the PGA Tour to modify its rules so that a disabled golfer could reasonably compete in tournaments, since those rules were not considered an essential feature of the game.<sup>85</sup> But courts have not been so moved by the goal of Title I, almost invariably restricting the scope and import of the ADA’s vision of equal employment opportunity.<sup>86</sup>

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79. *Sutton v. United Air Lines*, 527 U.S. 471, 477–78 (1999); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 195–96 (2002), *overruled by the ADA Amendments Act of 2008*, Pub. L. 100-325, § 8, 122 Stat. 3553.

80. ADA Amendments Act of 2008, Pub. L. 100-325, 122 Stat. 3553.

81. U.S. Dep’t of Just., Title II Technical Assistance Manual (1994).

82. *See Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L.C.*, U.S. DEP’T OF JUST. (Feb. 25, 2020), [https://www.ada.gov/olmstead/q&a\\_olmstead.htm](https://www.ada.gov/olmstead/q&a_olmstead.htm) [hereinafter *DOJ Statement*].

83. Some courts have held that availability of declaratory relief against state officials obviates the appropriateness and undermines the necessity for class certification. The Eleventh Circuit, in particular, has imposed a necessity requirement under Rule 23, and directs the lower courts to assume that state officials will afford all eligible persons the benefit of any declaratory relief ordered for the named plaintiff. *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974); *Access Now, Inc. v. Walt Disney World Co.*, 211 F.R.D. 452, 455 (M.D. Fla. 2001); *McArthur v. Firestone*, 690 F. Supp. 1018, 1019 (S.D. Fla. 1988).

84. 524 U.S. 206, 213 (1998).

85. 532 U.S. 661, 690–91 (2001).

86. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 80–82 (2002) (applying the “direct threat” exception under 42 U.S.C. § 12111(3) to the employee’s own health or safety); *Sutton*

Even though individual cases have resulted in systemic modifications to governmental programs or public accommodations, their limitations are palpable. Defendants may be quick to offer the individual plaintiff individual relief, thus mooting the case without addressing the root cause of the discrimination. Even if the case proceeds, limitations on discovery, proof, and remedies often preclude revisions to the practices that impact similarly situated persons with disabilities. And there may be a unique obstacle inherent in the ADA's fundamental alteration defense, which simultaneously demands the individual plaintiff prove that the desired relief can be obtained for that individual without altering its program for others.<sup>87</sup>

The Supreme Court's *Olmstead v. L.C.* decision is instructive in demonstrating how these challenges can render individual plaintiff litigation unavailing.<sup>88</sup> L.C. and E.W. were women with disabilities confined in one of Georgia's state psychiatric hospitals.<sup>89</sup> They convinced a district court, and then a court of appeals, that they were entitled to relief under Title II of the ADA because the State could, and therefore must, accommodate their individual disabilities by modifying its community mental health service system to include a program that would allow them to live safely in the community.<sup>90</sup> The Supreme Court adopted a definition of discrimination that included unnecessary segregation.<sup>91</sup> The fact that, according to the State's own treatment professionals, L.C. and E.W. were qualified to live in the community demonstrated that they were unnecessarily segregated.<sup>92</sup> But whether they were entitled to relief could not, according to the plurality, be determined solely by whether providing these women with needed mental health services could be accomplished without requiring a fundamental alteration of Georgia's mental health service system.<sup>93</sup> Rather, the proper application of the government's fundamental alteration defense required a much broader analysis that took into account the needs, preferences, and costs of serving a class of

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v. United Air Lines, 527 U.S. 471, 493–94 (1999) (allowing employers to consider the ameliorative effects of mitigating measures in order to find an employee who does not have a disability); *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 194–95 (2002) (holding that many conditions which may impair a person's ability to engage in gainful employment do not constitute a substantial disability).

87. *Id.*

88. 527 U.S. 581, 607 (1999).

89. *Id.* at 588.

90. *Id.* at 587.

91. *Id.* at 600.

92. *Id.* at 607.

93. *Olmstead*, 527 U.S. at 604–05.

other persons with disabilities.<sup>94</sup> To refuse to do so “would leave the State virtually defenseless,<sup>95</sup> and “effectively . . . [displace] . . . persons at the top of the community placement waiting list by individuals lower down who commenced civil actions.”<sup>96</sup> Thus, in balancing an individual plaintiff’s rights under the ADA with the public entity’s fundamental alteration cost defense, the Court concluded it was more appropriate to evaluate the requested relief by considering the impact on the State’s resources for all similarly situated persons, much as would be required for relief in a class action.<sup>97</sup> This reasoning severely limited the ability of the individual plaintiffs to obtain relief under the integration mandate of Title II and set the stage for a generation of class action cases demanding systemic reforms needed to ensure individuals with disabilities had the opportunity to live and receive services in the most integrated settings appropriate for their needs.

### *C. The Systemic Focus of Class Actions*

The 1966 Amendments to Rule 23 were designed to afford litigants the ability to aggregate claims of similarly situated persons and seek relief for a collective of plaintiffs injured by the same conduct.<sup>98</sup> The Amendments, enacted in the wake of desegregation cases following *Brown v. Board of Education*,<sup>99</sup> are especially applicable to civil rights litigation.<sup>100</sup> In fact, as the drafters of the Amendments noted in their comments, the relief standard of Rule 23(b)(2) is almost always met in civil rights injunctive cases.<sup>101</sup>

#### *1. Rule 23’s Collective Requirements*

First, for the uninitiated, this section offers a basic primer on the requirements for class certification under Rule 23 of the Federal Rules of

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94. *Id.*

95. *Id.* at 603.

96. *Id.* at 606.

97. *Id.*

98. See David Marcus, *The Public Interest Class Action*, 104 GEO. L.J. 777 (2016) (providing a helpful analysis of the Rule as it applies to public interest litigation—which is particularly relevant to cases involving claims under Title II of the ADA). A comprehensive discussion of the purpose and scope of the Rule is beyond the scope of this Article.

99. 347 U.S. 483 (1954).

100. Marcus, *supra* note 98, at 783–84; see also Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575, 580 (1997).

101. Marcus, *supra* note 98, at 788; see FED. R. CIV. P. 23(b)(2) advisory committee’s note to 1966 amendment. (listing civil rights actions “where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration” as examples of appropriate Rule 23(b)(2) actions.).



Civil Procedure. The moving party must satisfy all four components of Rule 23(a) as well as at least one of the subdivisions of Rule 23(b).<sup>102</sup> Thus, plaintiffs seeking certification must demonstrate that the proposed class complies with Rule 23(a) requirements on: (1) numerosity: the class must be so numerous that joinder of all members is impracticable; (2) commonality: the members of the class must share common questions of law or fact; (3) typicality: the claims or defenses of the named representatives must be typical of those of the class; and (4) adequacy: the persons representing the class must be able to fairly and adequately represent the interests of the class.<sup>103</sup> Rule 23(b)(2)—the division of Rule 23(b) most relevant to plaintiffs seeking only injunctive or declaratory relief—is satisfied 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.”<sup>104</sup> While the moving party must produce evidence that each of these elements is met, the purpose of a class certification ruling is not to adjudicate the merits of the case; rather, it is to select the *method* best suited to adjudicate the controversy in a fair and efficient manner.<sup>105</sup>

In most ADA cases, satisfying the numerosity prong is straightforward, since courts have held that, at least in cases seeking injunctive relief, it may be impossible to precisely identify the exact number of class members<sup>106</sup> and have certified classes comprised of more than 40–50 individuals.<sup>107</sup> Similarly, but more nuanced, courts generally

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102. Marcus, *supra* note 98, at 785.

103. FED. R. CIV. P. 23(a)(1)–(4).

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

105. *See* Amgen Inc. v. Conn. Ret. Plans & Trust Funds, 568 U.S. 455, 466 (2013) (citing Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 351 (2011)) (“Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.”).

106. *See* WILLIAM B. RUBENSTEIN ET AL., NEWBERG ON CLASS ACTIONS § 23.2 (5th ed. 2015) (“Courts generally have not required detailed proof of class numerosness in government benefit class actions when challenged statutes or regulations are of general applicability to a class of recipients, because those classes are often inherently very large.”).

107. Griffin v. Burns, 570 F.2d 1065, 1072–73 (1st Cir. 1978) (123 voters are sufficient to satisfy Rule 23(a)(1)); Korn v. Franchard Corp., 456 F.2d 1206, 1209 (2d Cir. 1972) (class consisting of at least 70, and possibly 212 members, is sufficient); Phillips v. Joint Legis. Comm., 637 F.2d 1014, 1022 (5th Cir. 1981) (“The plaintiffs nonetheless established at a certification hearing that there were at least 33 such applicants; there may have been many more.”); DeRosa v. Mass. Bay Commuter Rail Co., 694 F. Supp. 2d 87, 98 (D. Mass. 2010) (certifying a class of approximately 110 members); Tyrell v. Toumpas, No. 09-CV-243-JD, 2010 U.S. Dist. LEXIS 3099, at \*12 (D.N.H. Jan. 14, 2010) (quoting Andrews v. Bechtel Power Corp., 780 F.2d 124, 131 (1st Cir. 1985)) (“Unless the class is very small, ‘numbers alone are usually not determinative . . . .’”); George Lussier Enter., Inc. v. Subaru of New England, Inc., No. Civ. 99-

have found that proposed classes satisfy the typicality prong of Rule 23(a), at least when they meet the commonality requirement, given the substantial overlap between the two. The test for “typicality” asks whether the class representatives “possess the same interest and suffer the same injury” as other class members, but it does not require that the claims of the named plaintiffs be identical to the claims of the other class members.<sup>108</sup> “[T]he critical inquiry is whether the class representative’s claims have the same essential characteristics of those of the putative class. If the claims arise from a similar course of conduct and share the same legal theory, factual differences will not defeat typicality.”<sup>109</sup> Additionally, most courts agree that “the test for typicality is not demanding.”<sup>110</sup> The other elements of Rule 23(a) are more contentious and are discussed in more detail below.<sup>111</sup>

## 2. Class Certification After Wal-Mart

Despite early attempts to limit the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes* to massive class action damage cases or employment discrimination litigation, there is now consensus that the decision heightened the certification standard for all forms of class

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109-B, 2001 U.S. Dist. LEXIS 12054, at \*10 (D.N.H. Aug. 3, 2001) (class of approximately seventy-five present and former Subaru dealers satisfies the numerosity requirements); see RUBENSTEIN ET AL., *supra* note 106, § 23.2 (“Courts generally have not required detailed proof of class numerosness in government benefit class actions when challenged statutes or regulations are of general applicability to a class of recipients . . .”).

108. Gen. Tel. Co. of the Sw. v. Falcon, 457 U.S. 147, 166 (1982) (citing E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403); see also Mullen v. Treasure Chest Casino, LLC, 186 F.3d 620, 625 (5th Cir. 1999) (citing Lightbourn v. County of El Paso, 118 F.3d 421, 426 (5th Cir. 1997)) (discussing the test for typicality as “focus[ing] on the similarity between the named plaintiffs’ legal and remedial theories and the theories of those whom they purport to represent.”).

109. See M.D. v. Perry, 294 F.R.D. 7, 29 (S.D. Tex. 2013) (quoting James v. City of Dallas, 254 F.3d 551, 571 (5th Cir. 2011) (holding that particularities regarding circumstances that are not relevant to the claims do not undermine typicality).

110. Mullen, 186 F.3d at 625; D.G. v. Devaughn, 594 F.3d 1188, 1199 (10th Cir. 2010) (citing Milonas v. Williams, 991 F.2d 931, 938 (10th Cir. 1982)) (“[T]ypicality exists where, as here, all class members are at risk of being subjected to the same harmful practices, regardless of any class member’s individual circumstances.”); Neff v. VIA Metro. Transit Auth., 179 F.R.D. 185, 194 (W.D. Tex. 1998) (finding the typicality standard satisfied in ADA case where named representatives are adversely affected by the same facilities, policies, and practices as absent class members, regardless of the manner in which they have been injured); Morrow v. Washington, 277 F.R.D. 172, 194 (E.D. Tex. 2011) (same).

111. See discussions *infra* Sections IV.A (commonality), V (injunctive relief), VI (*Olmstead* and adequacy of representation).

actions, at least with respect to the commonality prong of Rule 23(a) and the indivisibility test of injunctive relief under Rule 23(b)(2).<sup>112</sup>

Whether it also has heightened the quantum of proof to meet that standard is debatable. Well before *Wal-Mart*, courts were required to conduct a “rigorous analysis” of the evidence submitted in support of a class certification motion.<sup>113</sup> That test, and the evidence needed to satisfy that test, has not been enlarged nor made more demanding by *Wal-Mart*.<sup>114</sup> Clarifying and applying its decision in *Wal-Mart*, the Supreme Court rejected the argument that a court must demand affirmative proof from the plaintiffs concerning the merits of their claims.<sup>115</sup> Establishing class requirements, including commonality, does not require a “mini-trial” on the merits to determine the answers to the common questions.<sup>116</sup> Thus, the rigorous analysis required at the class certification stage can and should be conducted based upon allegations in the complaint, supplemented by some evidence of those allegations, so that the class determination does not devolve into a preliminary trial of the entire case.<sup>117</sup>

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112. Much has been written about the impact of *Wal-Mart* on all forms of class actions, in the public interest and private corporate contexts. See Marcus, *supra* note 98, at 792 (“Few doubt that the decision raises the bar for class certification”); Katherine E. Lamm, *Work in Progress: Civil Rights Class Actions After Wal-Mart v. Dukes*, 50 HARV. C.R.-C.L. L. REV. 153, 154–55 (2015). No doubt it has changed the landscape for all class actions, including civil rights ones. *D.L. v. D.C.*, 713 F.3d 120, 126 (D.C. Cir. 2013). But as proposed below, all is not hopeless, and class certification for ADA cases—at least those brought to vindicate rights under Titles II and III—are within reach, provided careful attention is paid to the framing of common questions and description of the requested relief.

113. See *Falcon*, 457 U.S. at 160 (“[S]ometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question.”)

114. 564 U.S. 338, 350–52 (2011).

115. Speaking for the Court, Justice Ginsburg declared that: “[a]lthough we have cautioned that a court’s class-certification analysis must be ‘rigorous’ and may ‘entail some overlap with the merits of the plaintiff’s underlying claim,’ . . . Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied.” *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 465–66 (2013) (quoting *Wal-Mart*, 564 U.S. at 351).

116. *Id.* at 477.

117. Courts have also continued to certify classes in a variety of civil rights and other contexts, and refused to de-certify existing classes after *Wal-Mart*. See *M.D. v. Perry*, 294 F.R.D. 7, 66–67 (S.D. Tex. 2013) (certifying class of children in the Texas child welfare system); *Henderson v. Thomas*, 289 F.R.D. 506, 508 (M.D. Ala. 2012) (certifying a class of eight prisoners alleging Title II discrimination claims based upon their HIV status); *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 U.S. Dist. LEXIS 28123, at \*5, \*17, (N.D. Cal. Mar. 2, 2012) (certifying a class of persons whose services will be “limited, cut, or terminated” under California’s home-care program, in violation of the ADA, the Rehabilitation Act, and the Medicaid Act); *Pashby v. Cansler*, 279 F.R.D. 347, 356 (E.D.N.C. 2011) (same); *Morrow v. Washington*, 277 F.R.D. 172, 204 (E.D. Tex. 2011) (certifying a class of motorists who

*D. Differences in Class Certification under the ADA's Different Titles*

Class certification motions under the ADA have fared differently—in fact, quite differently—depending on the nature of the claims and the Titles under which those claims arise.

*1. Title I—Discrimination in Employment*

Given the individualized focus of Title I, and particularly its requirements that the individual must be “qualified,” courts generally have been unwilling to aggregate employment discrimination claims.<sup>118</sup> This is so even when the case challenges a blanket exclusionary policy, or a stubborn unwillingness to engage in an interactive process that courts have readily deemed a necessary obligation of the employer.<sup>119</sup> And it

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alleged they had been targeted by police because they were members of racial or ethnic minority groups); *Connor B. v. Patrick*, 278 F.R.D. 30, 31 (D. Mass. 2011) (following the *Wal-Mart* decision and declining to de-certify class of foster children harmed by systemic deficiencies in state’s foster care system); *Johnson v. General Mills, Inc.*, 276 F.R.D. 519, 521 (C.D. Cal. 2011) (finding injury results from a common core of salient facts unlike *Wal-Mart*); *In re Ferrero Litig.*, 278 F.R.D. 552, 558 (S.D. Cal. 2011) (finding that the plaintiffs need not prove a common class-wide injury at class certification stage; rather, they need only to demonstrate that there is a common contention that is capable of class wide resolution); *Montanez v. Gerber Childrenswear, LLC*, No. CV 09-7420 DSF, 2011 U.S. Dist. LEXIS 150942, at \*5 (C.D. Cal. Dec. 15, 2011) (finding unlike *Wal-Mart*, there is common control over the challenged practice); *Parkinson v. Freedom Fidelity Mgmt., Inc.*, No. CV-10-345-RHW, 2012 U.S. Dist. LEXIS 2852, at \*9 (E.D. Wash. Jan. 10, 2012) (certifying class for violations of state Consumer Protection Act and Debt Adjusting Statute, although plaintiffs suffered different statutory violations in different ways by different debt collectors); *Arthur v. Sallie Mae, Inc.*, No. C10-0198JLR, 2012 U.S. Dist. LEXIS 3313, at \*21 (W.D. Wash. Jan. 10, 2012) (finding commonality only requires a single question of law or fact).

118. RUBENSTEIN ET AL., *supra* note 106, § 23:4.

119. *See Hohider v. United Parcel Serv., Inc.*, 574 F.3d 169, 190 (3rd Cir. 2009) (discussing that the ADA only prohibits discrimination against a qualified individual whereas Title VII proscribes differential treatment of any person on account of gender). In a presage of the Supreme Court’s *Wal-Mart* decision, the Third Circuit held that even a facial attack on an employer’s “100% healed” policy or per se challenge to its failure to engage in any conversation with an employee seeking to return to work could not be properly certified under Rule 23(a)(2) and (b)(2), since only qualified individuals could assert a claim under Title I, which demands an individualized inquiry into the person’s qualifications. *Id.* at 195. This rather extreme application of commonality and aggregation not only could foreclose most Title I class action cases, but also could be—though clearly should not be—extended to many Title II class claims as well, since the latter also are only available to qualified individuals. 42 U.S.C. § 12131(2) (2021). Moreover, the Third Circuit’s decision is inconsistent with other cases, pre- and post-*Wal-Mart*, that have certified employment discrimination lawsuits that assert the facial illegality of an employer’s exclusionary policy. *See Bates v. United Parcel Serv.*, 204 F.R.D. 440, 447–48 (N.D. Cal. 2001) (certifying class of hearing-impaired drivers who challenged a company-wide policy barring sign language as an acceptable form of communication); *Hendricks-Robinson v. Excel Corp.*, 164 F.R.D. 667, 668 (C.D. Ill. 1996) (discussing a class action challenging company’s medical layoff policy); *Kasper v. Ford Motor Co.*, No. 1:18-CV-2895, 2019 U.S. Dist. LEXIS 48081, at \*8–9 (N.D. Ohio Mar. 22, 2019) (denying the defendant’s motion to strike class allegations, stating that “Ford’s online

ignores the explicit statutory reference to class-based discrimination in one section of the Title's prohibition on discrimination.<sup>120</sup>

2. *Title III—Discrimination by Private Entities & Public Accommodations*

Class actions raising claims that earmark policies and practices of private entities that engage in interstate commerce and operate as public accommodations<sup>121</sup> have fared far better, in significant part due to the absence of a restriction that Title III only applies to qualified individuals.<sup>122</sup> Coupled with a repeated recitation of class-based forms of discrimination,<sup>123</sup> and ancillary, systemic proscriptions against the use of methods of administration or practices that segregate, deny participation, or limit association by persons with disabilities,<sup>124</sup> courts frequently have certified classes challenging the discriminatory policies and practices under Title III. This trend is fact specific, however, both because some Title III cases often request individual accommodations, and others seek relief only for individual plaintiffs.

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application process and Ford's failure to grant accommodation requests likely resulted in Ford failing to hire other similarly situated disabled persons besides Plaintiff. That is enough at the pleading stage.”)

120. 42 U.S.C. § 12112(b)(6) (2021). But in light of *Wal-Mart*, the proposal to aggregate disparate impact claims under this section is not likely to succeed. Stein & Waterstone *supra* note 7, at 903–04.

121. *Leiken v. Squaw Valley Ski Corp.*, Nos. CIV. S-93-505 IKK and CIV. S-93-1622 LKK, 1994 U.S. Dist. LEXIS 21281, at \*37–38 (certifying class of all ski area visitors with disabilities seeking physical access to facilities); *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 461 (S.D. Fla. 2002) (certifying class of patrons with disabilities challenging access barriers at gas stations); *Colorado Cross-Disability Coal. v. Taco Bell Corp.*, 184 F.R.D. 354, 355 (D. Colo. 1999) (certifying class of wheelchair and scooter users challenging compliance with ADA Accessibility Guidelines (“ADAAG”)); *Kurlander v. Kroenke Arena Co.*, 276 F. Supp. 3d 1077, 1087 (D. Colo. 2017) (certifying class of hearing-impaired stadium visitors seeking captioning of aural content during sporting events); *Colo. Cross-Disability Coal. v. Abercrombie & Fitch Co.*, No. 09-CV-02757-WYD-KMT, 2012 U.S. Dist. LEXIS 55680, at \*2 (D. Colo. Apr. 20, 2012) (certifying class of mobility impaired shoppers seeking redesign of store entrance in compliance with ADAAG), *aff'd*, 765 F.3d 1205 (10th Cir. 2014); *Hernandez v. AutoZone, Inc.*, 323 F.R.D. 496, 503 (E.D.N.Y. 2018) (certifying class of store patrons with mobility disabilities challenging access barriers); *Lucas v. Kmart Corp.*, No. 99-CV-01923-JLK, 2005 U.S. Dist. LEXIS 48338, at \*2 (D. Colo. July 13, 2005) (certifying class of wheelchair and mobility scooter users seeking removal of access barriers at store.); *see also* Katherine C. Carlson, *Down in Front: Entertainment Facilities and Disabled Access Under the Americans with Disabilities Act*, 20 HASTINGS COMM. & ENT. L.J. 897, 901 (1998).

122. 42 U.S.C. § 12182(a) (2021) (“No individual shall be discriminated against on the basis of disability . . .”).

123. *Id.* § 12182(b)(1)(A)(i)–(iv).

124. *Id.* § 12182(b)(1)(B)–(E).

3. *Title II—Discrimination by Public Entities in Government Services*

Title II is situated squarely in the middle. Like Title I, it provides protection only to qualified individuals with disabilities.<sup>125</sup> Like Title III, it seeks to redress systemic practices, but only of public entities.<sup>126</sup> Its distinguishing feature, and the foundation of most successful ADA class certification motions, is the assertion that the entire class can be deemed qualified, *qua class*, without the necessity for individualized determinations of eligibility for the entity's public program.<sup>127</sup> We turn now to test the viability of that formulation and suggest a conceptual framework that best captures that characteristic.

III. FRAMING SYSTEMIC VIOLATIONS OF TITLE II

A. *The Conundrum of the Level of Generality*

As some scholars have noted, securing class certification, particularly in public interest litigation that primarily seeks systemic, injunctive relief, was rather routine not much more than a decade ago.<sup>128</sup> But with the Supreme Court's recent federalism jurisprudence<sup>129</sup> and specifically its reframing of the commonality and systemic prongs of Rule 23 in *Wal-Mart Stores, Inc. v. Dukes*,<sup>130</sup> that task has become decidedly more complex. Where governmental entities retain plainly discriminatory policies or operate obviously inaccessible locations that are easily subject to facial challenges, *Wal-Mart's* demand for a single injunction that can resolve the claims of all class members "in one stroke,"<sup>131</sup> has not presented significant challenges for class certification motions.<sup>132</sup> But where no formal policies or written directives exist that

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125. 42 U.S.C. § 12131(2) (2021).

126. *Id.* § 12131(1)(A)–(C).

127. *Id.* § 12131.

128. *See* Marcus, *supra* note 98, at 785.

129. *See* *Horne v. Flores*, 557 U.S. 433, 439 (2009); *see also* *Frew v. Hawkins*, 540 U.S. 431, 442 (2004).

130. 564 U.S. 338, 350 (2011).

131. *Id.*

132. *Lacy v. Dart*, No. 14 C 6259, 2015 U.S. Dist. LEXIS 56625, at \*1 (N.D. Ill. Apr. 30, 2015); *Dodson v. CoreCivic*, No. 3:17-cv-00048, 2018 U.S. Dist. LEXIS 171129, at \*14, \*15 (M.D. Tenn. Oct. 3, 2018) (certifying class of inmates with diabetes seeking provision of medical services); *Kerrigan v. Phila. Bd. of Election*, 248 F.R.D. 470, 478 (E.D. Pa. 2008); *Westchester Indep. Living Ctr. v. State Univ. of N.Y. Purchase Coll.*, 331 F.R.D. 279, 300–01 (S.D.N.Y. 2019); *Newkirk v. Pierre*, No. 19-CV-4283 (NGG) (SMG), 2020 U.S. Dist. LEXIS 155539, at \*2 (E.D.N.Y. Aug. 26, 2020) (certifying class of SNAP/TA applicants with disabilities requesting accommodations to the benefit application process); *Nevarez v. Forty Niners Football Co.*, 326 F.R.D. 562, 573–74 (N.D. Cal. 2018) (certifying class of stadium

cause, or at least contribute, to the entity's discriminatory conduct, class certification motions must focus on "systemic practices" or "patterns of conduct," which can be elusive to define and daunting to prove.<sup>133</sup>

The solution, it seems, rests in the ability to conceptualize the practice or conduct with a requisite degree of specificity to be meaningful and satisfy *Wal-Mart's* command to do more than simply describe a violation of law. At the same time, that conceptualization must be sufficiently general and comprehensive to encompass all class members and simultaneously avoid individualized inquiries into impact or harm from the practice. That resolution of that conundrum—often referred to as the requisite level of abstraction<sup>134</sup> or generality for describing the challenged practice or conduct—often dictates the outcome of the endeavor.<sup>135</sup>

### *B. Conceptualizing the Practice*

In most ADA Title II class action cases, the challenge is directed to the public entity's practices that deny individuals with disabilities equal access to the entity's programs, services, and activities. These practices constitute the basis for the common contention that is susceptible to a common answer, through a single injunction that would require the entity to remedy this deficiency and accommodate the needs of all persons with disabilities. But describing that practice with the requisite specificity may be complicated, will necessitate proof beyond allegations in the complaint, often demands some preliminary discovery, and certainly requires considerable care in defining the class and describing the systemic practices and conduct.

For instance, in a Title II integration case challenging the state's unnecessary segregation of persons with disabilities, a possible conceptualization of that practice could be: State officials continue to plan, operate, administer, and fund a disability service system that: (1)

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visitors with mobility disabilities challenging violations of ADA building standards); *Postawko v. Mo. Dep't of Corr.*, No. 2:16-CV-04219-NKL, 2017 U.S. Dist. LEXIS 117238, at \*3 (W.D. Mo. July 26, 2017).

133. See *Westchester Indep. Living Ctr.*, 331 F.R.D. at 300.

134. Marcus, *supra* note 98, at 786; see also *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997).

135. See *Kenneth R. v. Hassan*, 293 F.R.D. 254, 268 (D. N.H. 2013) (citing *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 497 (7th Cir. 2012)) (holding that common questions such as "whether there is a systemic deficiency in a core set of community-based mental health services and whether this deficiency has placed class members at serious risk of unnecessary institutionalization—are at a low enough level of generality (or high enough level of specificity) to pass muster under *Wal-Mart.*") In other words, the common questions here are not amorphous or "superficial.").

unduly relies on segregated institutions; (2) does not offer integrated community living and support opportunities to all eligible institutionalized persons; and (3) has not modified its segregated system, despite numerous reports recommending more integrated services. In this situation, the state agency's standardized administration and funding of their disability service system denies persons with disabilities in segregated settings the community services required to avoid unnecessary institutionalization and to allow them to live in the most integrated setting. As a result, the class is suffering because of a common course of conduct by the public entity, from which arises a set of common claims and contentions.

*C. Connecting the Practice to the Violation Affecting All Class Members*

Class actions are particularly appropriate where governmental policies and practices have a broad impact upon a class of recipients, and the scope of the relief is dictated by the nature of the violation.<sup>136</sup> In most ADA Title II cases, the challenge is directed to the public entity's discriminatory practices which constitute the common contention that is susceptible to a common answer, through a single injunction that would require the entity to remedy this deficiency and accommodate the needs of all persons with disabilities. The injuries to this class can be redressed by a modification to the public agency's program that would afford persons with disabilities equal access to agency's benefits, services, and activities. This modification can be achieved through indivisible relief to the class as a whole. Thus, a court can, "in a single stroke," ensure that eligible class members have the opportunity to equally participate in the public entity's program.<sup>137</sup> Consequently, there is a long line of decisions granting class certification in Title II cases challenging systemic practices of institutionalizing persons with disabilities in violation of federal statutory and constitutional provisions.<sup>138</sup>

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136. See *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011) ("[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples' of what (b)(2) [classes] [are] meant to capture.").

137. *Wal-Mart*, 564 U.S. at 350.

138. In several ADA or Rehabilitation Act post-*Wal-Mart* cases, courts have certified classes, re-certified classes, or refused to decertify classes. See *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1304 (W.D. Wash. 2015) (class certification involving Medicaid-certified nursing facilities); *Thorpe v. D.C.*, 303 F.R.D. 120, 124 (D.D.C. 2014) (certifying a class of Medicaid-eligible individuals with physical disabilities living in nursing facilities seeking to live in the community with appropriate community supports); *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 U.S. Dist. LEXIS 28123, at \*5, \*17, (N.D. Cal. Mar. 2, 2012) (certifying a class of persons whose services will be "limited, cut, or terminated" under California's home-care program, in violation of the ADA, the Rehabilitation Act, and the Medicaid Act); *Henderson v. Thomas*, 289 F.R.D. 506, 508 (M.D. Ala. 2012) (certifying a class of eight



*D. Avoiding Individualized Inquiries*

It is critical to avoid relying on practices that either directly or indirectly demand that individualized inquiries occur into either the violation or the remedy.<sup>139</sup> Specifically, it is essential to circumvent the need to determine, on an individual basis, whether each class member is qualified—and thus entitled to invoke the protection of Title II—or otherwise appropriate for the public entity's benefit—and thus entitled to a Title II remedy. Instead, ADA Title II class action cases must focus on the standardized conduct of the governmental entity and not depend on individualized determinations of either liability or remedy. Courts frequently certify ADA classes, precisely because the Title II claims focus on an agency's systemic practices, not the individual plaintiffs' conditions.<sup>140</sup>

*E. Proving the Practice*

An oft overlooked and deeply problematic aspect of *Wal-Mart* is its disregard for expert opinion concerning the nature, scope, and impact of the company's discriminatory practices. It is now undisputable that mere allegations of such practices in the complaint are insufficient.<sup>141</sup> Something more is necessary. But the Supreme Court has provided inconsistent direction on the quantum of proof required to allow lower courts to make evidentiary findings that support their conclusions concerning adherence to each element of the Rule and to support their decisions to certify a class under Title II.<sup>142</sup>

The starting point should be the entity's own data and documents that demonstrate, or at least arguably support, the existence of a practice.

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prisoners alleging Title II discrimination claims based upon their HIV status); *Pashby v. Cansler*, 279 F.R.D. 347, 356 (E.D.N.C. 2011) (same); *Gray v. Golden Gate Nat. Recreational Area*, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011) (denying request to decertify class based upon the Ninth Circuit's decision in *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 988 (9th Cir. 2011)).

139. As discussed in *infra* Section IV that the state may ultimately make individualized decisions concerning which persons want to leave nursing facilities and what community services each person needs does not undermine class certification, since the state-operated process for making these decisions is not part of the federal court proceedings. Instead, these decisions are properly made in an individualized service planning process, subject to state administrative law, similar in many respects to the state's treatment planning process.

140. See *Selected ADA Cases*, *supra* note 6.

141. See *Wal-Mart*, 564 U.S. at 354–55 (quoting *Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 191–92 (N.D. Cal. 2004)).

142. See, e.g., *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1040 (2016) (finding representative sample could constitute permissible evidence for certifying a class); *Comcast Corp. v. Behrend*, 569 U.S. 27, 32 (2013) (finding respondents' model did not sufficiently establish damages for purposes of certifying a class).

There frequently are legislative studies, data from state or federal oversight bodies, or utilization data that document the pervasiveness and impact of the practice. There may be clinical evaluations from state professionals or consultants that identify the number and characteristics of persons with disabilities negatively impacted by the practice.<sup>143</sup> In the absence of such information, it may be necessary for the plaintiffs to conduct their own study and generate expert findings that support the discriminatory impact on similarly situated persons from the state's practices.<sup>144</sup>

#### IV. INDIVIDUALIZED DISCRIMINATION UNDER TITLE II & THE SYSTEMIC REQUIREMENTS OF RULE 23(A)

ADA Title II integration cases focus on the standardized conduct of public entities and do not depend on individualized determinations of either liability or remedy.<sup>145</sup> As a result, these cases are certified precisely because the relevant legal claims focus on systemic practices of public entities, not individual class members with disabilities.<sup>146</sup>

Any class of individuals with disabilities, no matter how narrowly defined, will include people with varying conditions, strengths, needs, and preferences. For this reason, and because the putative class is likely to contain unidentified prospective members, there is an increased likelihood that not all class members will have experienced precisely the same harm or been harmed to the same degree. These types of differences are frequently raised by public entities seeking to refocus the court's attention on the litigants, as opposed to the entity's alleged misconduct, and to challenge the appropriateness of class certification. As a result, persuading courts that individual differences do not undermine commonality is a central theme, and a common challenge, in class certification decisions under Title II of the ADA.

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143. For example, in Texas, a state consultant conducted a review of nursing facility residents with intellectual and developmental disabilities (IDD) and concluded that most could safely transition to the community with appropriate supports. The district court relied heavily on the consultants' reports and findings to support its conclusion that the state engaged in a widespread practice of unnecessarily institutionalizing thousands of persons with IDD. *See Steward v. Janek*, 315 F.R.D. 472, 482–83 (W.D. Tex. 2016).

144. *See Kenneth R. v. Hassan*, 293 F.R.D. 254, 261 (D. N.H. 2013) (relying heavily upon the plaintiffs' client review to support its decision to certify a class of persons with serious mental illness who were confined in, or at serious risk of being admitted to, the state hospital).

145. *See supra* Section III.

146. *See Selected ADA Cases, supra* note 6.

*A. Commonality & the Challenge of Different Disabilities*

Public entities in Title II cases often misread *Wal-Mart* to demand convincing proof of a single policy or practice that causes exactly the same harm, in precisely the same way, and for the same reason, to all putative class members. As a result, they pose a somewhat tortured and circular argument: 1) the public entity serves people with different conditions, needs, and preferences; 2) those people experience the consequences and severity of alleged discrimination in a variety of ways because of their individual differences; and, therefore, 3) the entity cannot be seen as acting or refusing to act in a way that results in a common injury to the class, even if that class is focused on individuals eligible for the public entity's services. This view has been rejected by most federal courts where the public entity's illegal or discriminatory practices affect all class members, and the resulting systemic violations can be remedied in a uniform way—and at a level—that benefits the class as a whole.<sup>147</sup>

For similar reasons, courts have not required individuals with disabilities to affirmatively prove that all putative class members are qualified for, and would benefit from, the proposed remedial services, in order for class treatment to be appropriate.<sup>148</sup> These cases are consistent with long-standing class certification principles as well as the Supreme Court's decision in *Wal-Mart*,<sup>149</sup> since the commonality standard articulated in *Wal-Mart* and applied in a host of post-*Wal-Mart* cases does

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147. 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) (quoting *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418–19 (S.D.N.Y. 2012) (certifying class of individuals with mobility impairments alleging systemic failures to ensure accessible programs and services and who use, or will use, pedestrian rights of way on the SUNY purchase campus “even though the putative “class members have diverse disabilities and will not all be affected by the alleged [barriers] in the same way.”); *Brooklyn Ctr.*, 290 F.R.D. at 419 (quoting *Raymond v. Rowland*, 220 F.R.D. 173, 180 (D. Conn. 2004) (citing *Henrietta D. v. Giuliani*, No. 95-cv-0641(SJ), 1996 U.S. Dist. LEXIS 22373 at \*14, \*22 (E.D.N.Y. Oct. 25, 1996) (finding that commonality is satisfied where the suit challenges “acts and omissions of the [the defendant] that are not specific to any particular [p]laintiff,” but instead are best construed as denying an entire class of disabled individuals meaningful access . . . .”); *Thorpe v. D.C.*, 303 F.R.D. 120, 124 (D.D.C. 2014) (certifying a class of Medicaid-eligible nursing home residents with different physical disabilities seeking appropriate community supports but denied transitional services by the state); *Steward*, 315 F.R.D. at 482 (certifying class of nursing home residents with developmental disabilities, and finding that “[t]he 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. Moreover, although the State's failures may be unique to each individual class member, the failures can also be quantified and remedied by the Court in ways that are common across the class”).

148. See *Kenneth R.*, 293 F.R.D. at 264; *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012).

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

not require precise uniformity in order for the class to present a common question or contention, based on a core of salient facts, which is susceptible to a common answer.<sup>150</sup>

Commonality is not defeated by differences in the nature or impact of disability, nor by the type, intensity, or range of remedial services requested. Nowhere in *Wal-Mart*, or in subsequent cases applying *Wal-Mart* to Title II of the ADA, is there a requirement that plaintiffs must demonstrate that each and every class member has been harmed in precisely the same way by the State's practices, procedures, or policies, in order to establish commonality.<sup>151</sup> Rather, what matters is the capacity of a class wide proceeding to "generate common *answers* apt to drive the resolution of the litigation."<sup>152</sup>

Courts have certified classes before and after *Wal-Mart* where common policies and practices are being challenged, and despite individual differences between class members or their experience of the alleged discriminatory conduct.<sup>153</sup> Nor are disabled people required to

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150. *See, e.g.*, *D.L. v. D.C.*, 302 F.R.D. 1, 12 (D.D.C. 2013) (first quoting *D.L. v. D.C.*, 713 F.3d 120, 128 (D.C. Cir. 2013); and then quoting *Wal-Mart*, 564 U.S. at 353) (holding that the existence of a "uniform policy or practice that affects all class members, bridges the gap between individual claims of harm and the existence of a class of persons who have suffered the same injury as that individual."), *aff'd*, *D.L. v. D.C.*, 860 F.3d 713, 731–32 (D.C. Cir. 2017).

151. *See* 7A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1763 (3d ed. 2020) ("When plaintiff is alleging the existence of a pattern and practice of discrimination or the existence of a discriminatory policy applicable to the class members, the question of the discriminatory character of defendant's conduct is basic to the action and the fact that the individual class members may have suffered different effects from the alleged discrimination is immaterial for purposes of this prerequisite."); *see also* *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 U.S. Dist. LEXIS 28123, at \*5 (N.D. Cal. Mar. 2, 2012) (certifying class of individuals placed at risk of institutionalization by the defendants' cuts to in-home support services and rejecting the defendants' assertion that class members do not meet the commonality requirement because they suffer different service reductions); *Connor B. v. Patrick*, 272 F.R.D. 288, 296 (D. Mass 2011) (finding that harms suffered by unnamed class members differs from that experienced by named plaintiffs does not undermine commonality or typicality).

152. *Wal-Mart*, 564 U.S. at 350 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

153. *See, e.g.*, *S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 109, 112 (M.D. Pa. 2018) (certifying class of children in state custody with mental health disabilities alleging that public entities' policies and practices failed to provide them with mental health services in the most integrated setting appropriate, and failed to afford equal access to other services to achieve stability and permanency based on their disabilities) ("In determining whether DHS has policies or practices that fail to provide the members with medically necessary services, there will of course be some factual considerations that are individualized for each member. However, the main question of whether DHS provides a sufficient array of services to meet the needs of dependent children with mental health disabilities or whether DHS has failed to establish contracts to provide for these placements or services are class wide questions of fact."); *Churchill v. Cigna Corp.*, No. 10-6911, 2011 U.S. Dist. LEXIS 90716, \*11 (E.D. Pa.

prove that each individual class member's abilities, needs, or conditions are identical in order for commonality to exist.<sup>154</sup> Persons with disabilities must allege at least one common question of law or fact,<sup>155</sup> and that common question or contention must assert a legal injury that *affects* all class members, although not necessarily equally or in the same way.<sup>156</sup> For this reason, the existence of systemic deficiencies that place persons with disabilities at serious risk of unnecessary institutionalization<sup>157</sup>

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Aug. 12, 2011) (quoting Nagareda, *supra* note 152, at 132) (the plaintiff class denied the benefit of treatment for Autism Spectrum Disorder stated common claims as well as “common answers apt to drive the resolution of the litigation” despite their different conditions, treatment needs, and abilities to benefit from ABA therapy).

154. See *Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994) (first citing *Hassine v. Jeffes*, 846 F.2d 169, 176–77 (3d Cir. 1988); then citing *Weiss v. York Hosp.*, 745 F.2d 786, 809 (3d Cir. 1984); then citing *WRIGHT & MILLER*, *supra* note 151, § 1763; then citing *Eisenberg v. Gagnon*, 766 F.2d 770, 786 (3d Cir. 1985); and then citing *Troutman v. Cohen*, 661 F. Supp. 802, 811 (E.D. Pa. 1987)) (“We underscore at the outset, however, that neither of these requirements mandates that all putative class members share identical claims, and that factual differences among the claims of the putative class members do not defeat certification.”); see also *Postawko v. Mo. Dep’t of Corr.*, No. 2:16-CV-04219-NKL, 2017 U.S. Dist. LEXIS 117238, at \*20–21 (W.D. Mo. July 26, 2017) (quoting *Downing v. Goldman Phipps PLLC*, No. 4:13CV206 CDP, 2015 U.S. Dist. LEXIS 90840, at \*11–12 (E.D. Mo. July 14, 2015) (citing *FED. R. CIV. P. 23(a)(2)*) (finding commonality “does not require that every question of law or fact be common to every member of the class . . . and may be satisfied, for example, where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated.”), *aff’d*, *Postawko v. Mo. Dep’t of Corr.*, 910 F.3d 1030, 1041 (8th Cir. 2018).

155. See *Wal-Mart*, 564 U.S. at 359, 376 (first quoting Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 175–76 n.110 (2003), and then quoting Nagareda, *supra* note 152, at 131) (citing *FED. R. CIV. P. 23(b)(3)*) (“We quite agree that for purposes of Rule 23(a)(2) ‘[e]ven a single [common] question’ will do.”); *id.* at 338–39 (quoting *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984)) (first citing *FED. R. CIV. P. 23(b)(2)*; and then citing 42 U.S.C. § 2000e-1 (2021)).

156. See *Parsons v. Ryan*, 754 F.3d 657, 684, 688 (9th Cir. 2014) (first citing *FED. R. CIV. P. 23(a)(2)*; and then citing *Wal-Mart*, 564 U.S. at 354) (“A clear line of precedent, stretching back long before *Wal-Mart* and unquestionably continuing past it, firmly establishes that when inmates provide sufficient evidence of systemic and centralized policies or practices in a prison system that allegedly expose all inmates in that system to a substantial risk of serious future harm, Rule 23(a)(2) is satisfied.”); see also *D.L. v. D.C.*, 302 F.R.D. 1, 12 (D.D.C. 2013) (first quoting *D.L. v. D.C.*, 713 F.3d 120, 128 (D.C. Cir. 2013); and then quoting *Wal-Mart*, 564 U.S. at 353) (holding that the existence of a “uniform policy or practice that affects all class members bridges the gap between individual claims of harm and the existence of a class of persons who have suffered the same injury as that individual.”); *D.L. v. D.C.*, 860 F.3d 713, 731–32 (D.C. Cir. 2017); *M.D. v. Perry*, 294 F.R.D. 7, 39, 58 (S.D. Tex. 2013) (citing *FED. R. CIV. P. 23(a)(2)*, (f)) (finding that the States’ policies and practices brought about the challenged systemic conditions), *lv. to appeal dismissed*, 547 F. App’x 543, 545 (5th Cir. 2013).

157. See *Kenneth R. v. Hassan*, 293 F.R.D. 254, 268 (D. N.H. 2013) (citing *Wal-Mart*, 564 U.S. at 357) (holding that common questions such as “whether there is a systemic deficiency in a core set of community-based mental health services and whether this deficiency has placed class members at serious risk of unnecessary institutionalization or continued

result in segregated employment<sup>158</sup> or fail to provide reasonable modifications<sup>159</sup> can pass muster under *Wal-Mart* and Rule 23(a), even where a person's individual service and accommodation needs are not identical, because they raise a common question which can be answered yes or no for the class as a whole<sup>160</sup> These shared conditions and characteristics supersede individual differences, becoming the "glue" that holds the class claims together.<sup>161</sup> Thus, commonality can be established

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unnecessary institutionalization are at a low enough level of generality (or high enough level of specificity) to pass muster under *Wal-Mart*.”).

158. See *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012) (finding that the “common question of . . . whether defendants have failed to plan, administer, operate and fund a system that provides employment services that allow persons with disabilities to work in the most integrated setting” satisfied commonality requirements). The *Lane* case is also an example of where the class members' circumstances were not identical in all—or sometimes even in many—respects. The court noted that “[f]or example, not all of the named plaintiffs work in sheltered workshops; some have worked in (or declined the opportunity to work in) integrated settings; and appropriate vocational training will differ for each individual,” but concluded that “commonality only requires a single common question of law or fact.” *Id.* at 597–98.

159. See *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 518–19 (N.D. Cal. 2011) (citing *Wal-Mart*, 564 U.S. at 344) (certifying a class of individuals with different types of disabilities affecting their mobility and/or vision, and requiring different reasonable accommodations, concluding that commonality was satisfied by the defendant's general policies and practice of failing to address access barriers at the national recreational area); see also *Gray v. Golden Gate Nat'l Recreational Area*, 866 F. Supp. 2d 1129, 1142 (N.D. Cal. 2011) (citing *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 980 (9th Cir. 2011) (denying request to decertify class based upon the Ninth Circuit's decision in *Ellis*).

160. *Wal-Mart*, 564 U.S. at 350 (noting that class claims “must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of class-wide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”); see also *M.F. v. N.Y.C. Dep't of Educ.*, No. 18 Civ. 6109 (NG)(SJB), 2019 U.S. Dist. LEXIS 102089, at \*1–2, \*11–12. (E.D.N.Y. June 18, 2019) (first citing Rehabilitation Act of 1973, Pub. L. No. 92-112, § 504, 87 Stat. 355 (codified at 29 U.S.C. § 794 (2021)); then citing 42 U.S.C. §§ 12101–12213 (2021); and then citing N.Y.C. ADMIN. CODE §§ 8-101–8-102 (2021)) (certifying class of students with diabetes alleging violations of Section 504 of the Rehabilitation Act, the ADA, and the N.Y.C. Human Rights Law (NYCHRL) and finding that there are “fundamental legal disputes common to the class, and it is possible that plaintiffs will be able to prove, through common testimonial and documentary evidence”); *Postawko v. Mo. Dep't of Corr.*, No. 2:16-CV-04219-NKL, 2017 U.S. Dist. LEXIS 117238, at \*24 (W.D. Mo. July 26, 2017) (citing *Parsons v. Ryan*, 754 F.3d 657, 678 (9th Cir. 2014)) (“The Court is satisfied that the commonality requirement is met because the alleged HCV-treatment policies or customs are the “glue” that holds together the putative class; either these policies are unlawful as to all inmates or they are not.”), *aff'd*, *Postawko v. Mo. Dep't of Corr.*, 910 F.3d 1030, 1041 (8th Cir. 2018); *Parsons*, 754 F.3d at 675 (quoting *Evon v. L. Off. of Sidney Mickell*, 688 F.3d 1015, 1029 (9th Cir. 2012)) (“[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists.”).

161. *S.R. v. Pa. Dep't of Human Servs.*, 325 F.R.D. 103, 110 (M.D. Pa. 2018) (“Because the putative class in *Dukes* did not assert a company-wide practice or policy that caused each instance of alleged discrimination, the court would need to look to the specifics of each

without people with disabilities having to prove that they are identically situated, that they have suffered the same injury, or that they are individually qualified to receive proposed accommodations or remedial services.<sup>162</sup> To conclude otherwise would require disabled persons to answer, rather than simply pose, a common question, and to do so prior to discovery on the merits, making early resolution of class certification motions impractical.<sup>163</sup> Similarly, there is no requirement that all questions of law and fact involved in the dispute be common to all members of the class. Even a single common question will do.<sup>164</sup> Only where there are *no* common questions of fact or law should certification be denied.<sup>165</sup>

Importantly, differences between individuals' abilities and disabilities typically have no bearing on a state entity's systemic failures, or the extent to which the entity is providing the modifications and services required for compliance with the ADA.<sup>166</sup> This is particularly true where there is a

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employment decision as it pertained to that class member. In the instant action, conversely, Plaintiffs and the putative class allege that systemic deficiencies in the availability of placements and services cause each violation of Title XIX, that the policies and practices for allocating placements and services cause each violation of Title XIX, and that the policies and practices for allocating placements and services in general cause discrimination under the ADA and Section 504. This is exactly the type of "common mode" or practice predicated each alleged violation that was noticeably absent from *Dukes*.").

162. See, e.g., *Liberty Res., Inc. v. City of Phila.*, No. CV 19-3846, 2020 U.S. Dist. LEXIS 118396, at \*6-7 (E.D. Pa. July 7, 2020) (noting that commonality does not demand identical claims or facts among class members, and finding the plaintiffs' claims give rise to numerous questions of law and fact that will be common to the class as a whole, including whether the City's policies and practices have resulted in its failure to provide compliant, accessible curb ramps); *Lacy v. Cook Cty.*, 897 F.3d 847, 865 (7th Cir. 2018) ("Although it is true that the reasonableness of a given accommodation will vary among individuals with differing disabilities, any dissimilarities among the proposed class members will not impede the generation of common answers in this case."); see *Holmes v. Godinez*, 311 F.R.D. 177, 220 (N.D. Ill. 2015) (noting that state's prison practices concerning the lack of accommodations for deaf prisoners satisfy commonality, even though individual determinations of hearing abilities and needs are needed to prove harm).

163. *Postawko*, U.S. Dist. LEXIS 117238, at \*15 (citing FED. R. CIV. P. 23(c)(1)(A)) ("While Rule 23 was changed to say class certification motions should be resolved as early as "practicable," a full evidentiary hearing to resolve disputed issues of fact would effectively result in class certification being resolved at the same time as the merits, and only after discovery. It would never be "practical" to resolve the issue expeditiously or early"), *aff'd Postawko*, 910 F.3d at 1041.

164. See *Wal-Mart*, 564 U.S. at 359 (citing FED. R. CIV. P. 23(a)(2), (b)(3)).

165. See *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972) (first citing *Balt. Contractors, Inc. v. Bodinger*, 348 U.S. 176, 178-79, 181, (1955); and then citing 28 U.S.C. § 1292(a)(1) (2021)), *abrogated on other grounds by Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478, 480 (1978).

166. See *Rolland v. Patrick*, No. 98-30208-KPN, 2008 U.S. Dist. LEXIS 66477, at \*14 (D. Mass. Aug. 19, 2008) ("[A]ny identified factual differences between the named Plaintiffs and some of the class they sought to represent did not undermine commonality and, in particular, did

statutory duty to act, and decision-making regarding the challenged administrative policies and practices is centralized within a public entity, as opposed to millions of individualized employment decisions in *Wal-Mart*. As one district court observed, there is a “significant difference between challenging the inadequacy or complete failure to enact policies and procedures and alleging an erroneous application of a policy to individuals.”<sup>167</sup>

Cases decided post-*Wal-Mart* recognize that the Supreme Court’s decision does not preclude injunctive relief designed to remedy these types of overarching deficiencies in governmental service systems.<sup>168</sup> Public entities’ arguments on difference pre-suppose the need for a highly individualized causation analysis at the class certification stage, whereas the overwhelming majority of federal court decisions conclude the opposite—that discriminatory practices affecting all class members can result in a single injury satisfying *Wal-Mart*’s commonality standard.<sup>169</sup> Increasingly, public entities have advanced an even more extreme argument—that by their very nature, Title II *Olmstead* cases are inappropriate for class certification because individualized determinations of clinical need, and specifically the ability to “handle and benefit”<sup>170</sup> from integrated services are required just to state a claim.<sup>171</sup> This theory has received little, if any support, primarily because it runs contrary to, and would effectively upend, two decades of ADA class certification precedent.

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not preclude certification of a class of persons with mental retardation who were challenging Defendants’ practices.”).

167. *D.L. v. D.C.*, 302 F.R.D. 1, 13 (D.D.C. 2013).

168. *See Connor B. v. Patrick*, 278 F.R.D. 30, 33, 35 (D. Mass. 2011) (citing *Wal-Mart*, 564 U.S. at 360 (2011)); *see also M.D. v. Perry*, 294 F.R.D. 7, 38–39 (S.D. Tex. 2013) (first citing *Wal-Mart*, 564 U.S. at 343; and then citing U.S. CONST. amend. XIV) (“[*Wal-Mart*] involved a far-flung class action where the plaintiffs’ claims were based on sexual discrimination . . . Plaintiffs’ claim here is different. On behalf of the General Class, Plaintiffs make out a claim that caseworkers carry excessive caseloads, which results in class members being deprived of their Fourteenth Amendment rights.”)

169. *See Wal-Mart*, 564 U.S. at 369 (quoting Nagareda, *supra* note 154, at 176 n.110 (2003)) (citing FED. R. CIV. P. 23(a)) (“[e]ven a single question . . . common to the members of the class.”).

170. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999) (first citing *Allen v. Wright*, 468 U.S. 737, 755 (1984); then citing *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978); and then citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)) (“There can be no doubt that [stigmatizing injury often caused by racial discrimination] is one of the most serious consequences of discriminatory government action.”).

171. This argument and its impact are addressed in more detail in *infra* Section VI.



Ultimately, commonality is not defeated by the presence of individual differences amongst class members with disabilities<sup>172</sup> where those persons have suffered a common injury and where that injury can be redressed by a single injunction requiring a public entity to modify, fund, or operate its disability service system consistent with federal law.<sup>173</sup> Despite public entities' persistence in highlighting differences among class members with disabilities, if there is a least one common question of fact or law that—after discovery and trial—can be answered 'yes' or 'no' for the class as a whole, and will drive the resolution of class claims, then the contention is capable of class wide resolution and the requirements of commonality should be satisfied.

*B. Adequacy of Representation & the Challenge of Difference*

Rule 23(a)(4) requires that the named plaintiffs adequately represent the interests of all class members, which in turn requires that their interests coincide with, and not be antagonistic to, one another.<sup>174</sup> While

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172. See, e.g., *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 U.S. Dist. LEXIS 28123, at \*4–6 (N.D. Cal. Mar. 2, 2012) (certifying class of individuals with different disabilities requiring different accommodations because all were impacted by the same governmental inaction); *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988) (citing FED. R. CIV. P. 23(a), (b)(3)) (Rule 23(a) requires that “common questions of law or fact exist; only in class actions sought to be certified under Rule 23(b)(3) must such questions *predominate*.”); *Appleyard v. Wallace*, 754 F.2d 955, 958 (11th Cir. 1985) (“The similarity of the legal theories shared by the plaintiffs and the class at large is so strong as to override whatever factual differences might exist and dictate a determination that the named plaintiffs’ claims are typical of those of the members of the putative class.”); *but see Green v. Mansour*, 474 U.S. 64, 65–66 (1985) (citing U.S. CONST. amend. XI); *Milonas v. Williams*, 991 F.2d 931, 938 (10th Cir. 1982) (citing FED. R. CIV. P. 23(a)(3)) (“Regardless of their source of funding or, indeed, their individual disability or behavioral problems, all of the boys at the school were in danger of being subjected to the four enjoined ‘behavior-modification’ practices. In our view, the typicality and commonality requirements of Fed. R. Civ. P. 23(a)(3) have been met.”). In fact, allegations of similar discriminatory practices generally meet the commonality requirement. See *Lightbourn v. County of El Paso*, 118 F.3d 421, 426 (5th Cir. 1997) (citing *Shipes v. Trinity Indus.*, 987 F.2d 311, 316 (5th Cir. 1993)); see also *Curtis v. Comm’r.*, 159 F.R.D. 339, 341 (D. Me. 1994) (“[w]here a question of law refers to standardized conduct of the defendant towards . . . the proposed class, commonality is usually met.”).

173. See *Ind. Prot. & Advoc. Servs. Comm’n v. Comm’r, Ind. Dep’t of Corr.*, No. 1:08-cv-0317-TWP-MJD, 2012 U.S. Dist. LEXIS 182974, at \*44–45 (S.D. Ind. Dec. 31, 2012) (citing FED. R. CIV. P. 23(a), (b)(2)) (certifying a class of prisoners with a range of mental illnesses who have been or will be subject to segregation); see also *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 418–19 (S.D.N.Y. 2012) (finding commonality after *Dukes* because class members with “diverse disabilities” challenged “a City-wide policy and its alleged failure to take into account the needs of disabled citizens.”).

174. See FED. R. CIV. P. 23(a)(4); see also *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982) (quoting *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 405–06 (1977)) (citing FED. R. CIV. P. 23(a)); *Bertulli v. Indep. Ass’n of Cont’l Pilots*, 242 F.3d 290, 296 (5th Cir. 2001); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 282 (W.D. Tex. 2007); *Neff v. VIA Metro. Transit Auth.*, 179 F.R.D. 185, 194 (W.D. Tex. 1998).

differences based upon disability, the nature and effect of a disabling condition, or the scope and intensity of requested supports should be irrelevant to the adequacy of representation,<sup>175</sup> public entities frequently repeat the same arguments made to challenge commonality or typicality in their opposition to compliance with Rule 23(a)(4). Although these efforts are largely misplaced, some differences do matter under the Rule.

Like any case where a class asserts different legal claims or theories for recovery, there must be a named plaintiff who has suffered an injury and has standing to pursue each claim, at least at the time of filing the complaint.<sup>176</sup> A Title II case that asserts a violation of the integration mandate as well as a separate violation of discrimination based upon the type of disability, such as a lack of accommodations for persons with challenging behaviors, requires a named plaintiff who has suffered each form of discrimination.<sup>177</sup> Similarly, where the class includes persons in different facilities and asserts facility-specific facts, like the failure to provide accessible programs in each state correctional facility, there must be a named plaintiff from each facility, unless the failure is the result of a standard, statewide policy or practice.<sup>178</sup> If the class is comprised of different subgroups, for example, persons unnecessarily segregated in a facility, and those at risk of institutionalization, there should be a named

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175. Differences that are not central to the claim, not significant, speculative, or not likely to result in prejudice to absent class members do not constitute a conflict of interest that would undermine adequacy of representation or defeat class certification. *See RUBENSTEIN ET AL., supra* note 105, § 3.58 (citing *Amchem Prods. v. Windsor*, 521 U.S. 591, 625–27 (1997)).

176. It has become rather common in ADA cases, and particularly in Title II integration cases, for the public entity to offer the named plaintiffs access to the requested services, benefit, or activities in order to render these individuals inadequate representatives of the class and thus moot the case. Even when these offers are accepted before a class is certified, the named plaintiffs may still satisfy Rule 23(a)(b) based upon the relating back doctrine. *See Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 822 (5th Cir. 2014) (citing *FED. R. CIV. P.* 68) (finding that even a class certification motion filed four days after receipt of offer of complete relief to the individual plaintiff is sufficiently timely and diligent to prevent class claim from being mooted); *see also Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1045 (5th Cir. 1981) (finding that where a class certification motion is timely and diligently filed, a rejected Rule 68 offer made after the filing of the class certification motion, but before the court can decide the motion that provides the named plaintiff complete relief, “relate back” to the date of the complaint is filed and are not moot).

177. *See RUBENSTEIN ET AL., supra* note 106, § 2.5.

178. *See Parsons v. Ryan*, 754 F.3d 657, 685–86 (9th Cir. 2014) (first citing *Hanon v. Dataproducts Corp.* 976 F.2d 497, 508 (9th Cir. 1992); and then citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)) (affirming certification of a class composed of inmates from various Arizona correctional facilities who have a range of health care needs and suffered a range of health care deficiencies because they challenge statewide policies and practices that result in those divergent practices and deficiencies).

plaintiff who is a member of each subgroup.<sup>179</sup> Of course, where these subgroups are actually certified as separate subclasses, there must be a representative of each subclass.<sup>180</sup> Provided that these basic standing and representational elements are met, the adequacy of representation requirement, as well as the principles governing its application, generally do not present a special challenge for ADA lawsuits.

The qualifier “generally” is important. Where ADA claims demand proof of specific conditions, like whether the person is qualified for a service or seeks a specific type of accommodation, then there must be a named plaintiff who can adequately represent others who are similarly qualified or request a similar accommodation.<sup>181</sup> The overlap here with the typicality requirement is obvious, since the standard for certification under Rule 23(a)(3) insists that the named plaintiff’s injury and relief is similar to those of the entire class.<sup>182</sup> Still, public entities frequently combine, conflate, or even confuse the relational requirements for typicality and the coinciding interest requirement for adequacy of representation, repeating arguments about difference in an effort to defeat certification under both subsections of the Rule.<sup>183</sup> This is particularly so in integration claims under *Olmstead*, where the very elements of the claim—that individuals are appropriate for, and do not oppose, services in an integrated setting—create the potential for antagonistic interests.<sup>184</sup>

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179. See RUBENSTEIN ET AL., *supra* note 106, § 2.5 (nothing there must be one named plaintiff that has standing on each claim).

180. See *id.* § 3.58 n.12 (discussing how each subclass requires a named plaintiff with interests that are consistent with, and not antagonistic to, members of that subclass).

181. See *id.* § 3:32 (quoting *In re Am. Med. Sys.*, 75 F.3d 1069, 1083 (6th Cir. 1996)) (citing Fed. R. Civ. P. 23(a)(4)) (citing cases where courts address both requirements simultaneously because they are “related.”)

182. See *id.* § 3:32 (citing *In re Am. Med. Sys.*, 75 F.3d at 1082; see also *id.* § 3.57, n.7 (first citing *In re Safeguard Sci.*, 216 F.R.D. 577, 582 (E.D. Pa. 2003); then citing *Commander Props. Corp. v. Beech Aircraft Corp.*, 164 F.R.D. 529, 535, (D. Kan. 1995); and then citing *Welling v. Alexy (In re Cirrus Logic Sec.)*, 155 F.R.D. 654, 657–58 (N.D. Cal. 1994)); Fed. R. Civ. P. 23(a)(3).

183. See RUBENSTEIN ET AL., *supra* note 106, § 3.57 (noting defendants often rely upon the same evidence to demonstrate that the claims of the named representative are not typical of, and thus conflict with, those of the class.); citing Fed. R. Civ. P. 23(a)(3); see also *Thomas & Thomas Rodmakers, Inc. v. Newport Adhesives & Composites*, 209 F.R.D. 159, 165 (C.D. Cal. 2002) (discussing the overlap of the defendants’ arguments on typicality and adequacy of representation).

184. See *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999). In an ADA Title II case involving persons with psychiatric disabilities who were segregated in the New Hampshire Hospital, the defendants argued that since some class members wanted one type of community mental health service, like supported housing, while others wanted only another type of service, like crisis intervention, there was an inherent conflict within the class. See *Kenneth R. v. Hassan*, 293 F.R.D. 254, 270 (D. N.H. 2013). The district court rejected this effort to prove that the named plaintiffs were not adequate representatives of the class. *Id.* For a discussion of the

For instance, if the named plaintiffs sought relief for which members of the proposed class were not eligible, or that would directly harm their legal interests, these conflicts would have cascading effects on all elements of class certification, including adequacy of representation.<sup>185</sup>

Provided the prerequisites of standing are satisfied, only differences that reflect actual antagonistic interests between the named plaintiff and members of the class are sufficient to defeat class certification under Rule 23(a)(4). While differences amongst the class about needs or preferences present similar opportunities for public entities to oppose class certification under all three components of Rule 23(a), the concepts and strategies that are useful in demonstrating commonality should be able to be useful in proving typicality and adequacy of representation.

#### V. INDIVIDUALIZED REMEDIES UNDER TITLE II & THE SYSTEMIC REQUIREMENTS OF RULE 23(B)

ADA Title II classes are frequently certified under Fed. R. Civ. P. 23(b)(2) precisely because they are systemic in nature—presenting questions about a public entity’s conduct that are susceptible to a common solution and seeking modifications that can be applied uniformly across the entity’s program or services to the benefit of all.<sup>186</sup> Despite this precedent, public entities routinely challenge the appropriateness of class-wide injunctive remedies in Title II cases, asserting that people with disabilities’ individual conditions, needs, and preferences necessitate individualized relief.<sup>187</sup> In so doing, public entities essentially recast the same arguments rebutted above—that the individualized nature of disability is somehow incompatible with Rule 23(b)(2), no matter how thoughtfully the class is defined. However, if the proposed class contains individuals who are eligible for the public entity’s program or services, who have been affected by a common course of discriminatory conduct, and whose alleged violation of federal law can

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unique problems posed by conflicts between named plaintiffs and absent class members concerning their preference for community compared to institutional services, see discussion *infra* Section VI.B.

185. *Cf. Ball v. Kasich*, No. 2:16-cv-282, 2018 LEXIS 207152, at \*11–12 (S.D. Ohio Dec. 7, 2018) (discussed in *infra* Section V).

186. For this reason, class actions are particularly appropriate where governmental policies and practices have a broad impact upon a class of recipients and the scope of the relief can be dictated by the nature of the violation. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979); *Morrow v. Washington*, 277 F.R.D. 172, 193 (E.D. Tex. 2011) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011)) (“[A]s *Wal-Mart* emphasized, ‘[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples’ of what (b)(2) is meant to capture.”).

187. *See Kenneth R.*, 293 F.R.D. at 270.

be remedied by a single injunctive order directing a change in public entity's conduct that benefits the class as a whole, then class certification should be appropriate.<sup>188</sup>

*A. Single Remedy & the Challenge of Different Services, Benefits, & Accommodations*

The central rationale for class certification under Rule 23(b)(2) is that a public entity has acted or refused to act on grounds generally applicable to the class as a whole, making final injunctive or declaratory relief appropriate.<sup>189</sup> Although underscoring the importance of an injunction that resolves class claims “in a single stroke,” the Supreme Court decision in *Wal-Mart* does not foreclose class certification under Rule 23(b)(2) where class members have differing diagnoses or treatment needs.<sup>190</sup> As with commonality, the proper level of analysis for class certification under Rule 23(b)(2) is the public entity's actions and inactions, the effect those actions or inactions have on the class as a whole, and the extent to which class members' legal claims are capable of resolution by a single injunction.<sup>191</sup> Both before and after *Wal-Mart*, class certification and orders for prospective, injunctive relief, continue to be the most efficient methods by which to litigate and remedy systemic civil rights violations alleged under Title II of the ADA.<sup>192</sup>

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188. See *Neal v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)) (“class relief is consistent with the need for case-by-case adjudication,” especially where “it is unlikely that differences in the factual background of each claim will affect the outcome of the legal issue.” This is especially true where plaintiffs request declaratory and injunctive relief against a defendant engaging in a common course of conduct toward them, and there is therefore no need for individualized determinations of the propriety of injunctive relief.”).

189. See FED. R. CIV. P. 23(b)(2).

190. See *Wal-Mart*, 564 U.S. at 350; see also FED. R. CIV. P. 23(b)(2).

191. See, e.g., *Westchester Indep. Living Ctr. v. State Univ. of N.Y. Purchase Coll.*, 331 F.R.D. 279, 293 (S.D.N.Y. 2019) (“Here, despite variations in the buildings to which putative class members were denied access, and even despite the fact that some class members were able to access certain buildings while others were not, the core issue presented is whether Defendants engaged in a general course of conduct of not providing accessible paths of travel throughout the Campus, thereby denying people with mobility disabilities meaningful access. The answer to this question will resolve all of the class claims.”); see also *Yates v. Collier*, 868 F.3d 354, 367 (5th Cir. 2017) (upholding class certification in class action by all inmates challenging climate control policy because “the conditions . . . apply uniformly to the class of inmates as a whole”); *Shelton v. Bledsoe*, 775 F.3d 554, 565 (3d Cir. 2015) (vacating lower court's denial of class certification to all inmates in a facility in a conditions of confinement case); *Parsons v. Ryan*, 754 F.3d 657, 675 (9th Cir. 2014) (“[w]here the circumstances of each particular class member vary but retain a common core of factual or legal issues with the rest of the class, commonality exists”).

192. See *Wal-Mart*, 564 U.S. at 361–62 (citing FED. R. CIV. P. 23(b)(2)); *Neal*, 43 F.3d at 64 (citing FED. R. CIV. P. 23(b)(2)) (“The writers of Rule 23 intended that subsection (b)(2)

In the context of Title II system reform litigation, it is typically not individual medical or clinical decisions that result in illegal discrimination. Instead, class members' experience of discrimination is a product of structural deficiencies in the public service system arising from its administration, funding, policies, or operation by the public entity.<sup>193</sup> For this reason, persons with disabilities properly focus on the public entity's systemic conduct, how that conduct affects the proposed class, and the broader systemic violations that must be remedied in order to ensure compliance with the ADA.<sup>194</sup>

Although public entities often argue post-*Wal-Mart* that "dissimilarities" between individuals with disabilities and their experience of alleged discrimination impede the generation of common answers and precludes class wide relief, this is mostly an attempt to reframe a pattern of discriminatory conduct into repeated, discrete violations.<sup>195</sup> As noted by the four dissenting Justices in *Wal-Mart*, this view also risks importing predominance requirements from Rule 23(b)(3) that do not belong in the (b)(2) analysis.<sup>196</sup> Where differences in the

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foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights."); *see also* *Nevarez v. Forty Niners Football Co.*, 326 F.R.D. 562, 590 (N.D. Cal. 2018) (citing *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 502–03 (N.D. Cal. 2011)) ("Defendants argue that final injunctive relief respecting the class as a whole is impossible because persons with disabilities will need different types of relief. This is unpersuasive. Plaintiffs only seek to certify a class of persons with mobility disabilities, which removes any force from Defendants' argument that common injunctive relief is inappropriate. Underscoring the point, courts have certified similar injunctive classes."); *D.L. v. D.C.*, 860 F.3d 713, 726 (D.C. Cir. 2017) (citing *FED. R. CIV. P. 23(b)(2)*) ("The Rule 23(b)(2) class action . . . was designed for" civil rights cases challenging "systemic harms."); *Parsons*, 754 F.3d at 675–76.

193. *See* *Kenneth R. v. Hassan*, 293 F.R.D. 254, 269 (D. N.H. 2013) (citing *Glazer v. Whirlpool Corp. (In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.)*, 722 F.3d 838, 855 (6th Cir. 2013)) (" . . . the existence of preference differences among class members does not change the fact that the State's practices with regard to community services have been shown, by substantial proof, to affect all class members.").

194. *See* CHARLES ALAN WRIGHT & R. MILLER, 7AA FED. PRAC. AND PROC. § 1775, CLASS ACTIONS FOR INJUNCTIVE OR DECLARATORY RELIEF UNDER RULE 23(B)(2)—IN GENERAL (2021).

195. *See Westchester Indep. Living Ctr.*, 331 F.R.D. at 300 (first citing *Brooklyn Ctr. for Indep. of the Disabled v. Bloomberg*, 290 F.R.D. 409, 420 (S.D.N.Y. 2012); and then citing *Lovely H. v. Eggleston*, 235 F.R.D. 248, 257 (S.D.N.Y. 2006)) (finding the defendants "general course of conduct of not providing accessible rights-of-way throughout the Campus or, in other words, a 'systemic failure . . . to properly fulfill statutory requirements' as set forth in the ADA and Rehabilitation Act, and 'not merely a cumulation [sic] of individual cases.'").

196. *See Wal-Mart*, 564 U.S. at 376–77 (Ginsburg, J., dissenting) (internal citations omitted)

Because Rule 23(a) is also a prerequisite for Rule 23(b)(1) and Rule 23(b)(2) classes, the Court's "dissimilarities" position is far reaching. Individual differences should not

factual background of individuals with disabilities are unlikely to affect the outcome of the legal claims at issue, and where the individuals request for declaratory and injunctive relief redresses a public entity's common course of conduct, there should be no need for individualized determinations of the propriety of injunctive relief.<sup>197</sup>

Even when class members are injured in the same way by the public entity's discriminatory conduct, the entity may point to the individuals' specific accommodation requests, community service needs, or treatment preferences as differences demanding individualized injunctive relief. This argument wrongly assumes that single injunctions preclude subsequent, non-judicial forums from addressing an individual's needs and preferences, such as state clinical treatment and discharge planning processes that determine appropriate services. The existence of such a process does not defeat the singularity or the finality of the injunction; rather, it supports and is a necessary adjunct to the judicial order.<sup>198</sup> Nor does it prevent systemic reforms—like the availability of integrated community services—from benefiting the class as a whole.<sup>199</sup> To the contrary, a person-centered treatment planning process allows the district court to issue a single injunction that remedies the structural deficiency within the system without having to engage in a judicial inquiry regarding

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bar a Rule 23(b)(1) or Rule 23(b)(2) class, so long as the Rule 23(a) threshold is met . . . . For example, in *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 96 S. Ct. 1251, 47 L.Ed.2d 444 (1976), a Rule 23(b)(2) class of African-American truck drivers complained that the defendant had discriminatorily refused to hire black applicants. We recognized that the “qualification[s] and performance” of individual class members might vary. “Generalizations concerning such individually applicable evidence,” we cautioned, “cannot serve as a justification for the denial of [injunctive] relief to the entire class.”

197. See *Neal*, 43 F.3d at 57 (citing *Califano v. Yamasaki*, 442 U.S. 682, 701 (1979)).

198. See, e.g., *Voss v. Rolland*, 592 F.3d 242, 253 (1st Cir. 2011) (noting that differences in service needs, and the appropriateness of continued institutionalization were more properly addressed in the State's individual service planning process).

199. In *Steward*, the district court squarely addressed the appropriateness of injunctive relief for *Olmstead* claims like those presented here:

Defendants argue that class-wide injunctive relief is not possible because such relief would require the Court to determine which services and supports were appropriate for each individual class member based on their individual needs. As above, however, the propriety of class-wide injunctive relief depends upon the level of generality at which Plaintiffs seek relief. Plaintiffs are not asking the Court to order individualized relief, but seek injunctions targeted at the deficiencies that they allege exists within Defendants' Medicaid service system . . . . This relief—seeking to rectify [Defendants'] systemic failure to comply [with] specific statutory duties—is not only an appropriate structure under Rule 23(b)(2) for relief in this case, but fits the most frequent[ ] . . . vehicle for civil rights actions and other institutional reform cases that receive class action treatment.

315 F.R.D. 472, 492 (W.D. Tex. 2016) (citing *D.L. v. D.C.*, 302 F.R.D. 1, 16 (D.D.C. 2013)).

the necessity of individualized relief. Instead, these decisions occur after a judgment is issued, and without the involvement of the Court.<sup>200</sup>

Most Title II injunctive orders require implementation by the public entity, including a designated process whereby current and future class members can access court-ordered program modifications or expanded service options.<sup>201</sup> For instance, a single injunction directing the expansion of integrated community services is designed to benefit the class as a whole by removing systemic barriers to integration. Such an order can resolve class-wide claims of discriminatory segregation, while individual service planning and the delivery of person-centered treatment—approaches now common within State disability service systems—allow class members to receive remedial services consistent with their individual needs and preferences.<sup>202</sup> Where plaintiffs are not asking the court to make separate determinations concerning the

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200. See *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1333 (W.D. Wash. 2015) (acknowledging need for “separate determinations concerning the individual services that are appropriate. . .”); *Kenneth R. v. Hassan*, 293 F.R.D. 254, 271 (D. N.H. 2013) (“individual treatment determinations for the State’s existing individually-targeted administrative process.”); *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012) (citing *Olmstead v. L.C.*, 527 U.S. 581, 602 (1999)) (“As in *Olmstead*, whether a class member is qualified for the services he or she seeks is determined by the reasonable judgments of professionals.”)

201. Crafting a single order for injunctive relief can present some complexities where class members have a range of service needs involving multiple public entities, and in some instances an array of remedial reforms may be necessary in order to adequately redress ADA violations. However, the fact that a single injunction would address multiple violations or seek multiple, remedial services or interagency planning requirements does not cause it to become a “super claim” seeking a laundry list of relief. See *M.D. ex. rel. Stukenberg v. Perry*, 675 F.3d 832, 846 (5th Cir. 2012). A “super-claim,” as used by the Fifth Circuit, refers not to the kind of multiple discrete and specific systemic deficiencies that the plaintiffs have identified here, but rather to an “attempt[]” by the plaintiffs to “aggregate several amorphous claims of systemic or widespread conduct” that challenges virtually every aspect of a defendants’ operation. *Id.* at 844 (citing *Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997)). The Fifth Circuit recognized that a class could challenge multiple “structural deficienc[ies]” such as inadequate staffing, without constituting a “super-claim,” where a single injunction resolves the legality of the defendants’ behavior with regard to the “class as a whole.” *Id.* at 847–48 (citing *FED. R. CIV. P. 23(b)(2)*).

202. Numerous courts have certified injunctive classes in *Olmstead* cases seeking just this sort of relief. See, e.g., *Steward*, 315 F.R.D. at 492 (finding class treatment of an *Olmstead* action was appropriate because the plaintiffs did not “ask[ ] the [c]ourt to order individualized relief,” but instead sought “injunctions targeted at the deficiencies that they allege exists within [d]efendants’ Medicaid service system.”); *Lane*, 283 F.R.D. at 602 (certifying an *Olmstead* class seeking supported employment services because, rather than requiring an analysis of individual class members’ circumstances, the type of relief sought by plaintiffs “focuses on the defendants’ conduct, not on the treatment needs of each class member.”); *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me. 2011) (certifying class of nursing home residents who sought an order requiring state to “develop a system of evaluation and implementation of corresponding services that complies with federal standards,” because plaintiffs sought “relief from systemic barriers to proper treatment.”).



individual services that are appropriate for each class member, and where a single injunction broadly expanding access to community services could remedy the alleged systemic violation “in a single stroke,” and benefit the class as a whole, class certification under Rule 23(b)(2) remains appropriate.<sup>203</sup>

#### VI. THE UNIQUE CHALLENGES OF CERTIFYING CLASSES UNDER *OLMSTEAD*

The Supreme Court’s holding in *Olmstead v. L.C.*, and its recognition that unnecessary institutionalization is a form of discrimination under the ADA’s “integration mandate,” represented a fundamental affirmation of the ADA’s vision and systemic goals, creating opportunities to end segregation and compel the creation of integrated community based service systems.<sup>204</sup> Although the case was brought on behalf of two women, its real impact has been achieved through class action litigation on behalf people with disabilities in segregated facilities. For the past two decades, this decision has animated hundreds of systemic reform initiatives, and generated a robust body of law that continues to redefine public entities’ responsibilities under the ADA. These cases have expanded the definition of segregation beyond psychiatric hospitals to include Intermediate Care Facilities for Persons with Intellectual and Developmental Disabilities (ICF/IDD),<sup>205</sup> nursing

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203. See, e.g., *Brown v. D.C.*, 928 F.3d 1070, 1082 (D.C. Cir. 2019) (citing FED. R. CIV. P. 23(b)(2)) (“Although the injunction must provide relief to each member of the class, the perfect need not be the enemy of the good. If a certain outcome is legally mandated and an injunction provides each member of the class an increased opportunity to achieve that outcome, Rule 23(b)(2) is satisfied.”); *Gray v. Golden Gate Nat’l Recreational Area*, 279 F.R.D. 501, 512 (N.D. Cal. 2011) (citing *Californians for Disability Rts. v. California Dep’t of Transp.*, 249 F.R.D. 334, 345–46 (N.D. Cal. 2008)) (finding class certification appropriate despite class members’ need for different reasonable accommodations, since the plaintiffs were “not seeking that the Court directly order and oversee the remediation of every non-compliant pedestrian feature throughout the state” and noting that “courts regularly order the remediation of discriminatory practices in class actions without presiding over the details of the application of such remediation to each and every affected facility or individual . . .”).

204. See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34 CARDOZO L. REV. 1, 32 (2012).

205. See *Ball v. Kasich*, 307 F. Supp. 3d 701, 704–05 (S.D. Ohio 2018).

facilities,<sup>206</sup> correctional facilities,<sup>207</sup> and segregated day programs like sheltered workshops,<sup>208</sup> and even been applied to those at risk of institutionalization in these facilities.<sup>209</sup> They have also made clear that public entities' responsibilities include not just the avoidance of discriminatory segregation, but the affirmative obligation to develop and administer integrated, community-based service systems that provide

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206. See *Steward v. Janek*, 315 F.R.D. 472, 476 (W.D. Tex. 2016); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1303–04 (W.D. Wash. 2015); *Thorpe v. D.C.*, 303 F.R.D. 120, 138 (D.D.C. 2014), *leave to appeal denied by In re* District of Columbia, 792 F.3d 96, 98 (D.C. Cir. 2015); *Rolland v. Cellucci*, No. 98-30208-KPN, 1999 U.S. Dist. LEXIS 23814, at \*6 (D. Mass. Feb. 2, 1999); *Rolland v. Patrick*, No. 98-30208-KPN, 2008 U.S. Dist. LEXIS 66477, at \*14 (D. Mass. Aug. 19, 2008) (refusing to decertify the class based upon alleged differences in the needs and conditions of persons in nursing facilities); *Van Meter v. Harvey*, 272 F.R.D. 274, 282 (D. Me. 2011); see also *State Office of Prot. & Advoc. for Persons with Disabilities v. Connecticut*, 706 F. Supp. 2d 272, 272–73 (D. Conn. 2010) (certifying a class of individuals with mental illness unnecessarily segregated in nursing facilities); *Long v. Benson*, No. 4:08cv26-RH/WCS, 2008 U.S. Dist. LEXIS 109917, at \*2–3 (N.D. Fla. Oct. 14, 2008) (certifying class of Medicaid-eligible adults with disabilities in nursing facilities “who could and would live in the community with appropriate community-based services.”); *Colbert v. Blagojevich*, No. 07 C 4737, 2008 U.S. Dist. LEXIS 75102, at \*2–3 (certifying class of Medicaid-eligible adults with disabilities needlessly segregated in nursing facilities); *Hutchinson ex. rel. Julien v. Patrick*, 683 F. Supp. 2d 121, 123 (D. Mass. 2010), *aff’d*, 636 F.3d 1, 6 (1st Cir. 2011) (affirming fee award); *Chambers v. City & County of S.F.*, No. 3:06-cv-06346-WHA (N.D. Cal. July 12, 2007) (discussing class of current and past Medicaid-eligible individuals unjustifiably institutionalized in nursing facilities); *Williams v. Blagojevich*, No. 05 C 4673, 2006 Dist. LEXIS 83537, at \*15 (certifying class of Medicaid-eligible individuals with mental disabilities unjustifiably institutionalized in nursing facilities).

207. See, e.g., *Holmes v. Godinez*, 311 F.R.D. 177, 186 (N.D. Ill. 2015) (discussing hearing impaired inmates in facilities operated by the Illinois Department of Correction); *Hernandez v. Monterey*, 305 F.R.D. 132, 139 (N.D. Cal. 2015) (discussing men and women in Monterey County Jail denied adequate medical and mental health care); *Henderson v. Thomas*, 289 F.R.D. 506, 508 (M.D. Ala. 2012) (citing 42 U.S.C. § 12101 (2021)) (certifying a class of eighty prisoners alleging discrimination claims based upon their HIV status).

208. See *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012) (citing FED. R. CIV. P. 23(a)) (certifying a class of persons with I/DD in segregated employment workshops, and rejecting defendants' claims that class members' different abilities, skills, needs, and preferences preclude certification.).

209. See, e.g., *Davis v. Shah*, 821 F.3d 213, 263–64 (2d Cir. 2016); *Steimel v. Wernert*, 823 F.3d 902, 914 (7th Cir. 2016) (holding that “the integration mandate is implicated where the state’s policies have . . . put [individuals with disabilities] at serious risk of institutionalization.”); *Pashby v. Delia*, 709 F.3d 307, 321–22 (same); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116–17 (9th Cir. 2011) (“An ADA plaintiff need not show that institutionalization is ‘inevitable’ or that she has ‘no choice’ but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization”), *amended by reh’g denied*, 697 F.3d 706 (9th Cir. 2012) (en banc); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003); *M.A. v. Norwood*, 133 F. Supp. 3d 1093, 1107 (N.D. Ill. 2015); *O.B. v. Norwood*, 170 F. Supp. 3d 1186, 1196 (N.D. Ill. 2016); *Oster v. Lightbourne*, No. C 09-4668 CW, 2012 U.S. Dist. LEXIS 28123, at \*6 (N.D. Cal. Mar. 2, 2012) (certifying a class of persons whose services will be “limited, cut, or terminated” under California’s home-care program.).

meaningful opportunities for independence, informed choice, self-determination, competitive employment, and inclusion in all aspects of community life.

By their nature, *Olmstead* cases challenge systemic policies or practices that unduly rely on institutions and other segregated settings for the delivery of services, denying people with disabilities the opportunity to live, work, or be educated in a community-based setting.<sup>210</sup> Class actions are uniquely appropriate for litigating *Olmstead* cases precisely because these cases typically arise out of a common course of conduct by public entities, require a resolution of structural deficiencies in the entity's service system, and pose common questions including whether the government's systemic policies and practices result in the unnecessary segregation of people with disabilities, in violation of the ADA's integration mandate. The Supreme Court's application of the fundamental alteration defense<sup>211</sup> and its creation of a new "plan" defense in *Olmstead*,<sup>212</sup> have also meant that virtually all litigation to enforce Title II's integration mandate since 1999 has been brought as a class action. When properly framed,<sup>213</sup> most class certification motions have succeeded, both before and after *Wal-Mart*.<sup>214</sup> But because a Title II integration mandate claim, as established in *Olmstead*, demands proof that individuals are appropriate for community-based services, do not

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210. Most *Olmstead* cases challenge a public entity's failure to reasonably modify a disability service system that: (1) unduly relies on institutions and other segregated settings to provide services; (2) does not offer opportunities to live, work, and/or be educated in integrated settings to a large number of qualified individuals with disabilities who are in, or at serious risk of entering, an institution or other segregated setting; (3) employs eligibility criteria and methods of administration that perpetuate and/or incentivize segregation. *See, e.g., Lane v. Kitzhaber*, 283 F.R.D. 587, 594 n.1 (D. Or. 2012).

211. *Olmstead v. L.C.*, 527 U.S. 581, 603–04 (1999).

212. The Court's analysis actually encouraged *Olmstead* cases to be litigated as class actions, expressing concern that an integration claim asserted by individual plaintiffs might result in a form of "line jumping." *Id.* at 605–06; *see also supra* Sec. II.B.

213. In almost every case of alleged noncompliance by government officials with Title II's integration mandate, courts have certified a class. *See* *Murphy v. Piper*, No. 16-2623 (DWF/BRT), 2017 U.S. Dist. LEXIS 160455, at \* 1 (D. Minn. Sept. 29, 2017) (certifying class of persons in segregated residential settings); *N.B. v. Hamos*, 26 F. Supp. 3d 756, 776 (N.D. Ill. 2014) (certifying class in action seeking relief for violations of Title II based on the denial of community-based services). *See, Selected ADA Cases, supra* note 6.

214. Class certification is seldom denied in Title II integration cases precisely because they focus on a common course of conduct by the State entity, and raise common questions including whether the government's systemic policies and practices result in needless institutionalization. In addition, relief can be afforded in a single injunction that modifies the public entity's program to end the offending policies or practices. Thus, the court can, "in a single stroke," correct the federal legal violations and provide class members the opportunity to receive services in the community rather than an institution. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011); *see also Parsons v. Ryan*, 754 F.3d 657, 679 (9th Cir. 2014).

oppose such services, and their placement can be reasonably accommodated<sup>215</sup>—all of which arguably suggest an individualized analysis—certifying *Olmstead* classes presents unique challenges, both in demonstrating compliance with Rule 23(a) and (b), as well as defining a homogeneous class.<sup>216</sup>

Using the required elements of an *Olmstead* claim, Section VI frames the strategic considerations involved in litigating class actions under Title II's integration mandate, and the ways in which recent *Olmstead* class certification decisions have been informed by evolving Supreme Court precedents. It then provides suggestions for the development of class definitions that satisfy both the procedural requirements of Rule 23 and the substantive demands of a successful *Olmstead* claim.

#### A. Satisfying *Olmstead*'s Appropriateness Requirement

The first *Olmstead* factor demands evidence that institutionalization is unnecessary and that community services are appropriate.<sup>217</sup> In effect, it asks whether the named plaintiff and class are qualified to receive services in an integrated setting. While the factor appears to suggest an individualized inquiry, courts have accepted four conceptual frameworks, each of which avoids the necessity to make person-specific judgments about the benefit of integrated services for each individual. First, the state's own eligibility criteria for its community service system is a proxy

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215. See *Olmstead*, 527 U.S. at 607.

216. Governmental entities sometimes argue that the plaintiffs must prove, at the class certification stage, that each *Olmstead* factor (appropriateness, opposition, and reasonable accommodation) is met for each and every class member in order to satisfy Rule 23. See *id.* at 600; FED. R. CIV. P. 23. To the extent that this argument requires a court to evaluate the strength of class members, *Olmstead* claims at this stage of the litigation, it is inconsistent with the Supreme Court's admonition in *Amgen* that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage." See also 568 U.S. 455, 466 (2013). Federal courts considering *Olmstead* claims have relied on *Amgen* to hold that, at the class certification stage, plaintiffs need not prove that they and all putative class members are unnecessarily segregated and would benefit from the proposed remedial services. See, e.g., *Kenneth R. v. Hassan*, 293 F.R.D. 254, 263 (D. N.H. 2013) (first citing FED. R. CIV. P. 23; and then citing *Amgen*, 568 U.S. at 466); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012).

217. The Court used the unfortunate term "handle and benefit" as a proxy for the appropriateness of transition. *Olmstead*, 527 U.S. at 600. The term has been read by some to suggest that the individual must demonstrate either a discrete benefit attendant to living in an integrated setting, or an individualized capacity to be able to live in the community and receive better services than in the institution. The former interpretation is inconsistent with Justice Ginsburg's oft quoted, two evident judgments about the stigma and systemic disadvantages of institutionalization. See *id.* The latter has no support in the text of the opinion and is contradicted by the Findings and Purposes of the statute. See *supra* Section II.A.1.

for whom the entity has pre-determined is appropriate for that system, and thus, who would benefit from its services.<sup>218</sup> This framework supports a general finding that all institutionalized persons who satisfy these criteria are appropriate for community living.<sup>219</sup>

Second, experts can conduct analyses that prove that most persons in the segregated facilities are appropriate for community living.<sup>220</sup> By conducting individualized evaluations of a random sample of the population of persons in facilities, or those at risk of institutionalization, an expert's findings can be generalized to the entire class. Courts generally have accepted these expert opinions as proof that the class is appropriate for community services, and that its members suffer common injuries that would benefit from a single remedial order.<sup>221</sup>

Third, the public entity's own treatment professionals often make determinations that a subgroup of institutionalized persons are appropriate for transition from a facility, through clinical processes that create discharge-ready or eligibility for placement lists.<sup>222</sup> These processes are mandated by disability professional accreditation standards that govern most institutions and require that discharge planning begin upon admission and continue throughout the period of institutionalization.<sup>223</sup> Fourth, and most simply, a determination by a

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218. This approach is particularly effective when the eligibility criteria for community services are broad, general, and not demanding, as is the case in many mental health or developmental disability community systems, such as Georgia's system at issue in *Olmstead*. See 527 U.S. at 587 (citing 42 U.S.C. § 12132 (2021)). There, individuals need only have a disabling condition (i.e., severe and persistent mental illness or an intellectual disability and a specific IQ score). Moreover, many home and community-based waiver programs funded by Medicaid are available to anyone who needs an institutional level of care, thus making placement in an institution the baseline criterion for appropriateness of community waiver services. 42 U.S.C. § 1396n (2021).

219. See *Steimel v. Wernert*, 823 F.3d 902, 913 (7th Cir. 2016) (citing *Radaszewski v. Maram*, 383 F.3d 599, 609 (7th Cir. 2004)) (concluding that the persons with disabilities who met the eligibility criteria for a comprehensive waiver program satisfied *Olmstead's* appropriateness prong).

220. Because *Wal-Mart* demands evidence that each element of Rule 23 is met, class-based discovery is often required, which can be time consuming and expensive, and at a minimum requires thoughtful planning and careful execution. 564 U.S. 338, 350 (2011) (first citing 42 U.S.C. § 12131(2) (2021); and then citing 42 U.S.C. § 12132); FED. R. CIV. P. 23.

221. See *supra* Section IV.A.

222. A version of this process was cited by the *Olmstead* court as compelling evidence of the appropriateness of transitioning LC and EW to the community. See 527 U.S. at 602 (discussing that professionals had determined that they met the "essential eligibility requirements" of the program).

223. See *Standards*, THE JOINT COMMISSION (last visited Apr. 20, 2021), <https://www.jointcommission.org/standards/>; see 42 C.F.R. § 483.400 (2021); see *Accreditation*, THE COUNCIL ON QUALITY AND LEADERSHIP (last visited Apr. 20, 2021), <https://www.c-q-l.org/accreditation/>.

federal court of the appropriateness of community placement can be avoided altogether, and instead deferred to an administrative service planning process that makes individual determinations on needed services and supports.<sup>224</sup>

### *B. Satisfying Olmstead's Choice Requirement*

It is well established that class members need not demonstrate that they are all injured in the same way by the public entity's conduct.<sup>225</sup> However, in *Olmstead* litigation public entities are quick to emphasize perceived differences in the preferences of individuals with disabilities including how and where they will be served.<sup>226</sup> By arguing that these preferences create potential conflicts and even antagonistic legal interests within the class, public entities seek to undermine the appropriateness of certification under both Rule 23(a) and Rule 23(b).<sup>227</sup> Public entities often highlight potential conflicts by attacking the class definition as overbroad, sweeping in individuals who are not injured by the entity's conduct because they prefer to enter or remain in segregated service settings.<sup>228</sup> If those individuals are represented by guardians, surrogates, or relatives who believe their family member cannot be safely served in the community, they may move to intervene as well as oppose class certification, or object at a Rule 23(e) fairness hearing challenging court approval of a class wide settlement agreement.<sup>229</sup>

There are at least two approaches persons with disabilities have taken in anticipation of these challenges. For many years, the default strategy was to craft injunctive relief which removes structural barriers to integration that affect *all* institutionalized persons with disabilities, thereby creating options that benefit the class as a whole. However, when some institutionalized persons or, more likely, their guardians, oppose

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224. See *supra* note 200–02.

225. See *supra* Section IV.A.

226. See *supra* Section IV.

227. See *supra* Section IV.A; FED. R. CIV. P. 23(a)–b.

228. See *infra* Section VI.D.

229. See, e.g., *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 952 (3d Cir. 2012) (vacating and remanding denial of intervention by guardians of ICF/MR residents alleging their interests were impaired by proposed *Olmstead* class action settlement); *Ligas v. Maram*, No. 05 C 4331, 2010 U.S. Dist. LEXIS 34122, at \*7–10 (N.D. Ill. Apr. 7, 2010) (describing history of litigation in which guardians opposed a class wide settlement agreement in an *Olmstead* case on behalf of individuals with intellectual and development disabilities in intermediate care facilities, prompting decertification of a class which included individuals who opposed community services, and were later granted intervention in conjunction with plaintiffs' renewed motion for class certification and second proposed consent decree.).

community integration, particularly in jurisdictions where individuals and guardians continue to rely heavily on segregated services, it has sometimes been necessary to incorporate into the class definition the second *Olmstead* factor of choice,<sup>230</sup> either by excluding individuals who “oppose” community services, or further limiting the class to those who affirmatively choose integrated options.<sup>231</sup>

Persons with disabilities in *Olmstead* class actions typically seek injunctive relief to eliminate the discriminatory segregation caused by over-reliance on institutions or other segregated settings, practices that perpetuate or incentivize segregation, and the failure to provide needed community services.<sup>232</sup> Once a court issues an injunction designed to dismantle barriers to integration, individuals with disabilities can engage in transition and treatment planning using the state’s existing, person-centered service planning process.<sup>233</sup> The process allows individuals to choose or decline community services without further judicial intervention, as part of implementation of the remedy.<sup>234</sup> This approach recognizes that individuals’ preferences may change over time as their needs and goals change, and that their choices may be influenced by new or expanded community service options ordered by the court.

Numerous courts have certified *Olmstead* classes seeking just this sort of relief, and have done so without requiring that individual preferences be incorporated into the class definition.<sup>235</sup> In *Kenneth R.*,

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230. See *Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

231. See *id.*

232. See *Kenneth R. v. Hassan*, 293 F.R.D. 254, 260 (D. N.H. 2013).

233. See *supra* Section IV.A. and note 200–22.

234. See *Kenneth R.*, 293 F.R.D. at 261.

235. See, e.g., *Steward v. Janek*, 315 F.R.D. 472, 492–93 (W.D. Tex. 2016) (certifying a class and finding class treatment was appropriate because the plaintiffs did not “ask[ ] the [c]ourt to order individualized relief,” but instead sought “injunctions targeted at the deficiencies that they allege exists within [d]efendants’ Medicaid service system”); see also *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012) (certifying an *Olmstead* class seeking supported employment services because, rather than requiring an analysis of individual class members’ circumstances, the type of relief sought by plaintiffs “focuses on the defendants’ conduct, not on the treatment needs of each class member.”); *Van Meter v. Harvey*, 272 F.R.D. 274, 276 (D. Me. 2011) (certifying class of all Maine residents who currently are or in the future will be:

(1) eligible for and enrolled in MaineCare, (2) age 21 or older, (3) have a related condition as defined at 42 C.F.R. § 435.1010, other than autism, and who do not have a diagnosis of Alzheimer’s or dementia, and (4) who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 et seq.

Class was certified because plaintiffs sought “relief from systemic barriers to proper treatment” rather than “individualized remedies.” *Id.* at 282. (first citing 42 U.S.C. § 1396r(e)(7) (2021); then citing 42 C.F.R. § 435.1010 (2021); and then citing 42 C.F.R. § 482.112 (2021)).

persons with serious mental illness alleged that their discriminatory segregation was a result of the State's pattern and practice of underfunding community services, and relying instead on institutional treatment.<sup>236</sup> After weighing the State's assertion that there was an inherent conflict concerning the preferences of persons institutionalized in two state facilities, the court concluded that argument "likely overstates the willingness of individuals with serious mental illness to accept needless institutionalization over services in the community."<sup>237</sup> Even so, the court explained that differences in preference did not defeat a (b)(2) class action:

[T]he existence of preference differences among class members does not change the fact that the [s]tate's practices with regard to community services have been shown, by substantial proof, to affect all class members . . . . And, because preferences can change, class members who today might prefer institutionalization, can reasonably be thought to also have an interest in the availability of community-based treatment options should their preferences change tomorrow.<sup>238</sup>

A similar challenge to the cohesiveness of an *Olmstead* class was rejected in *Lane v. Kitzhaber*, where the court certified a class of "[a]ll individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops" and "who are qualified for supported employment services."<sup>239</sup> In *Lane*, the State argued that "differences with respect to the needs and preferences of persons with disabilities" should preclude certification.<sup>240</sup> The court recognized that not all individuals with disabilities in segregated employment facilities were identically situated: "[f]or example, not all of the named plaintiffs work in sheltered workshops; some have worked in (or declined the opportunity to work in) integrated settings; and appropriate vocational training will differ for each individual," but "[a]s in other cases certifying class actions under the ADA and Rehabilitation Act . . . commonality exists even where class members are not identically situated" provided there is at least one common question of law or fact.<sup>241</sup>

As illustrated by these two decisions, an approach which focuses on the public entity's conduct, and the systemic relief that is most susceptible to a single injunction, should support a class definition that encompasses

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236. See 293 F.R.D. at 260.

237. *Id.* at 269.

238. *Id.*

239. 283 F.R.D. at 594.

240. *Id.* at 598.

241. *Id.* at 597-98.



all institutionalized individuals who are affected by the entity's conduct, and who *could* benefit from increased access to integrated community service options.<sup>242</sup> By deferring the expression of individual preference to the entity's individual service planning process, persons with disabilities are afforded the opportunity to accept or reject integrated services based on individualized information about their service options. Ultimately, potential differences in individual preference for community services are unlikely to alter the legality of the public entity's systemic practices, including whether it unnecessarily segregates individuals with disabilities or denies them access to integrated community services. For this reason, it is possible for persons with disabilities to state a common contention that is susceptible to a common answer, and for that answer—not the preferences of individual class members—to drive the resolution of the litigation.

When opposition to *Olmstead* class litigation is anticipated by groups that favor, or have otherwise become dependent on, institutional or other congregate service settings, a second approach is to proactively define class membership to incorporate the second *Olmstead* factor of choice—either by excluding those opposed to community services, or limiting the class to members who express an affirmative interest in them.<sup>243</sup> This more conservative approach can help to rebut specific challenges to class certification, including allegations that some class

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242. See Samuel Bagenstos, *Taking Choice Seriously in Olmstead Jurisprudence*, 40 J. LEGAL MED. 1, 5–25 (2020).

243. See *Thorpe v. D.C.*, 303 F.R.D. 120, 135 (D.D.C. 2014) (certifying a class of “[a]ll persons with physical disabilities who, now or during the pendency of this lawsuit:

receive DC Medicaid-funded long-term care services in a nursing facility for 90 or more consecutive days; (2) are eligible for Medicaid-covered home and community-based long-term care services that would enable them to live in the community; and (3) would prefer to live in the community instead of a nursing facility but need the District of Columbia to provide transition assistance to facilitate their access to long-term care services in the community.”)

*Pitts v. Greenstein*, No. 10-635-JJB-SR, 2011 U.S. Dist. LEXIS 60138, at \*4 (M.D. La. June 6, 2011) (certifying a class of Louisiana residents with disabilities “who are recipients or prospective recipients of Medicaid-funded services and who desire to continue to reside in the community instead of in a nursing facility; who can reside in the community with appropriate services; and who are at risk of being forced to enter a nursing home because Defendants plan to reduce the level of community-based services.”); *Ligas v. Maram*, No. 05 C 4331, 2010 U.S. Dist. LEXIS 34122, at \*21–22 (N.D. Ill. Apr. 7, 2010) (holding that proposed class action consent decree and motion for class certification limited to class members who “affirmatively requested to receive Community-Based Services or placement in a Community-Based Setting”).

members have not sustained a cognizable injury, or have interests that are not adequately represented by the identified named plaintiffs.<sup>244</sup>

Public entities still may contend that a proposed class lacks “cohesiveness,” even when those who oppose community services are excluded, since it will likely include some members who have not expressed a clear preference for or against community services.<sup>245</sup> At least one court has agreed.<sup>246</sup> However, the Supreme Court included those who were interested in, or undecided about, the possibility of community services when it defined who could state a claim for discrimination under the integration mandate.<sup>247</sup> And undecided class members may well, and often do, choose integrated community services if offered a meaningful and informed choice and access to feasible alternatives as part of a remedial order. As a result, class definitions that use objective criteria to determine class membership and include only those who do not oppose integration should be not be vulnerable to allegations of intra-class conflict. But the far better approach, at least in the absence of protests by those who insist on remaining institutionalized, is to avoid including issues of preference in the class definition.<sup>248</sup>

Finally, but quite separately, public entities sometimes argue that the nature or severity of class members’ conditions, and their ability to “handle and benefit” from community services, also precludes class-based proof with respect to the third *Olmstead* factor—reasonable

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244. *Ball v. Kasich*, 307 F. Supp. 3d 701, 712 (S.D. Ohio 2018) (certifying a class of “[a]ll Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, and, after receiving options counseling, express that they are interested in community-based services.”).

245. *See* Defendants’ Brief in Opposition to Plaintiffs’ Motion for Class Certification at 44–45, *Ball v. Kasich*, No. 2:16-CV-282-EAD-EPD (S.D. Ohio Aug. 18, 2017), 2017 WL 11545344 (arguing that plaintiffs’ proposed class—which excludes those who have expressly documented opposition to community services—undoubtedly captures other individuals with diverse interests and fails to show that Ohio acted or refused to act in a way that resulted in uniform harm).

246. *Ball v. Kasich*, No. 2:16-cv-282, 2018 U.S. Dist. LEXIS 207152, at \*23 (excluding class members who “may be interested in” community-based services from the class definition, since some of those who indicated that they “may be” interested in community-based services will decide that they prefer to stay in intermediate care facilities and will not be harmed by the Ohio Defendants’ failure to fund community-based services).

247. *See Olmstead v. L.C.*, 527 U.S. 581, 607 (1999).

248. This approach also avoids the argument that class membership is not ascertainable or definite, because individual preference is not yet determined or, even that such preference can and often does change over time. While only some circuits demand that the class be ascertainable, especially in civil rights cases certified under Rule 23(b)(2), avoiding even the possibility of this challenge is prudent. *See infra* Section VI.C.

accommodation.<sup>249</sup> But, as *Olmstead* makes clear, evaluation of this question inherently focuses on statewide practices regarding the availability of resources and the balancing of disability systems overall, and not the situations of individual class members.<sup>250</sup> If reasonable accommodation and fundamental alteration issues are relevant to the resolution of a class certification motion, it suggests additional common questions that may be resolved on a class-wide basis, including whether requested accommodations, like the expansion of integrated service options sufficient to avoid unnecessary institutionalization, will result in a fundamental alteration of the service system.<sup>251</sup> These inquiries are inherently class-wide and cannot be resolved without merits-based discovery and a fully developed record.

*C. Satisfying Olmstead's At Risk of Institutionalization Requirements*

People with disabilities need not be institutionalized, or even on the verge of admission to an institution, in order to have a viable claim under the ADA's integration mandate.<sup>252</sup> This principle has been solidified by the authoritative 2009 Statement of the Department of Justice on Enforcement of the integration mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.* ("Statement of the Department of Justice"),<sup>253</sup> and affirmed in numerous circuit courts of appeal and district

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249. See *Olmstead*, 527 U.S. at 607.

250. See *id.* at 597 ("In evaluating a State's fundamental-alteration defense, the District Court must consider, in view of the resources available to the State, not only the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities, and the State's obligation to mete out those services equitably.").

251. See *id.* at 605.

252. By its terms, the integration mandate imposes a broad obligation on states to "administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d) (2021). Those protections would be meaningless if plaintiffs were required to subject themselves to segregation by actually entering, or arriving at the doorstep of, an institution, before challenging an allegedly discriminatory law, policy, or practice. See *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1181 (10th Cir. 2003); see also *Steimel v. Wernert*, 823 F.3d 902, 912 (7th Cir. 2016).

253. The Department of Justice has interpreted the ADA and its Integration Mandate regulation as applying to persons "at serious risk of institutionalization or segregation," and not limited to individuals "currently in institutional or other segregated settings." *DOJ Statement*, *supra* note 82. Because the Department of Justice issued the ADA's integration regulation pursuant to an express delegation of authority from Congress, its interpretation of that regulation is entitled to deference. See *Steimel*, 823 F.3d at 911 (quoting *Olmstead*, 527 U.S. at 597–98) ("The DOJ's interpretation of the [integration] mandate 'warrant[s] respect' because Congress gave it the task of issuing the relevant regulation."); see also *Davis v. Shah*, 821 F.3d 213, 263 (2d Cir. 2016) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)) (DOJ's interpretation of the integration regulation is "controlling unless plainly erroneous or

court decisions concluding that persons at risk of unnecessary institutionalization, or other forms of segregation, may state a claim for discrimination under Title II's integration mandate.<sup>254</sup>

Successful "at risk" cases require a well-pled complaint which anticipates challenges to standing and the lack of subject matter jurisdiction. Public entities routinely oppose claims on behalf of persons at risk of institutionalization, arguing that the pleadings are insufficient to demonstrate the existence of a serious or imminent risk, the actual probability that unnecessary institutionalization will occur, and the causal connection between that risk and the systemic practices which allegedly violate the ADA.<sup>255</sup> To demonstrate a ripe *Olmstead* at risk claim, the complaint should describe in detail the nature, probability, and imminence of the risk of segregation, and the way in which the risk is causally connected to the public entity's discriminatory conduct.<sup>256</sup> For instance, when individuals in nursing facilities, or at serious risk of admission to these facilities, have asserted claims under the ADA's integration mandate, or similar Medicaid requirements, courts have certified classes almost without exception, and these rulings have been left undisturbed by four different courts of appeals.<sup>257</sup>

At the class certification stage, the definition of "at risk" is critical to satisfying Rule 23 requirements, and to persuading the court of its ability to order class wide relief. Although numerous courts have certified

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inconsistent with the regulation."); *M.R. v. Dreyfus*, 663 F.3d 1100, 1117 (9th Cir. 2011) (internal citations omitted) ("We also defer to an agency's reasonable interpretation of its own statutorily authorized regulations."); *Pashby v. Delia*, 709 F.3d 307, 322 (4th Cir. 2012) ("Because Congress instructed the DOJ to issue regulations regarding Title II, we are especially swayed by the DOJ's determination that 'the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or segregated settings.'").

254. See *Davis*, 821 F.3d at 263 ("Unsurprisingly, against this backdrop, courts of appeals applying the disability discrimination claim recognized in *Olmstead* have consistently held that the risk of institutionalization can support a valid claim under the integration mandate."); see also *Steimel*, 823 F.3d at 914 (holding that "the integration mandate is implicated where the state's policies have either (1) segregated persons with disabilities within their homes, or (2) put them at serious risk of institutionalization."); *Steward v. Abbott*, 189 F. Supp. 3d 620, 633 (W.D. Tex. 2016); *Pashby*, 709 F.3d at 321–22; *Kenneth R. v. Hassan*, 293 F.R.D. 254, 265 (D. N.H. 2013); *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012); *M.R.*, 663 F.3d at 1116–17; *Fisher*, 335 F.3d at 1182; *Makin ex rel. Russel v. Hawaii*, 114 F. Supp. 2d 1017, 1033 (D. Haw. 1999).

255. See, e.g., *Lane*, 283 F.R.D. at 594–95.

256. See *id.* at 602 (finding that the class definition is appropriately tied to the defendants' employment policies and practices).

257. See *Lane v. Kitzhaber*, 283 F.R.D. 587, 598 (D. Or. 2012) (citing FED. R. CIV. P. 23(a)) (certifying a class of persons with I/DD in segregated employment workshops, and rejecting defendants' claims that class members' different abilities, skills, needs, and preferences preclude certification.).

*Olmstead* cases involving at risk groups,<sup>258</sup> it is increasingly common for persons with disabilities to confront arguments that the proposed class definition is vague,<sup>259</sup> or that the class itself is not sufficiently ascertainable.<sup>260</sup> Public entities often claim that vagueness is fatal to including at risk groups in the class because their membership is inherently fluid, making it impossible for a court to identify all absent members.<sup>261</sup> However, this claim ignores well-established case law on class actions seeking prospective, injunctive relief under Fed. R. Civ. P. 23(b)(2). The presence of future, unnamed class members, such as those at serious risk of institutionalization should not be, in and of itself, a barrier to class certification. In fact, Rule 23(b)(2) has long been understood as the preferred vehicle for injunctive civil rights cases precisely because it is not possible to identify all affected class members individually.<sup>262</sup>

Many courts have applied a modified, more flexible standard of ascertainability in (b)(2) class actions, because their function is to “furnish broad injunctive or declaratory relief, and because notice is not required . . . .”<sup>263</sup> Several circuit courts have gone farther, holding that, “due to the unique characteristics of a Rule 23(b)(2) class, it is improper

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258. See *Kenneth R.*, 293 F.R.D. at 263 (certifying a class of persons with serious mental illness who are unnecessarily institutionalized or at serious risk of institutionalization as a result of defendants’ failure to provide adequate community-based services); *Lane*, 283 F.R.D. at 602 (certifying a class of persons with developmental disabilities in or referred to segregated workshops, where the plaintiffs challenge the defendants’ planning, funding, and administering of their employment service system).

259. See, e.g., *A.R. v. Dudek*, No. 12-60460-CIV-ZLOCH/HUNT, 2016 U.S. Dist. LEXIS 95432, at \*5 (S.D. Fla. Feb. 29, 2016). The plaintiffs challenged policies of the State of Florida that led children to be separated from their families and unnecessarily institutionalized in nursing facilities, including the reduction of private duty nursing and the failure to provide other community-based services. After several years of litigation and a twice-renewed Motion for Class Certification, the Magistrate Judge issued a report finding that Plaintiffs’ Renewed Motion for Class Certification satisfied the pre-requisites of Fed. R. Civ. P. 23(a) and (b)(2), but ultimately recommended denying the Motion, in part because the class definition was “too broad and over inclusive.” *A.R. v. Dudek*, No. 12-60460-CIV-ZLOCH/HUNT, 2015 U.S. Dist. LEXIS 179552, at \*22 (S.D. Fla. Aug. 8, 2015). The district court agreed, finding the proposed class definition lacked “objective measures by which to gauge the persons in the class.” *A.R.*, 2016 U.S. Dist. LEXIS 95432, at \*6.

260. Cf., *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 496 (7th Cir. 2012) (“class of unidentified but potentially IDEA-eligible disabled students is inherently too indefinite”).

261. See *id.* at 495–96.

262. FED. R. CIV. P. 23(b)(2) advisory committee’s note to subdivision (b)(2) (The paradigm cases for (b)(2) treatment are “various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration.”).

263. *Stewart v. Cheek & Zeehandelaar, LLP*, 252 F.R.D. 387, 391 (S.D. Ohio 2008); see also RUBENSTEIN ET AL., *supra* note 106, § 3:7 n.14.

to require ascertainability . . . ,”<sup>264</sup> while others still insist that a 23(b)(2) class be ascertainable.<sup>265</sup>

Despite the long line of ADA class actions that include individuals at serious risk of institutionalization, several circuits have yet to rule on this issue.<sup>266</sup> Because of this uncertainty, as well as the variation amongst the circuits on the ascertain-ability requirement, any *Olmstead* class that includes an at risk class group should be defined with as much precision as possible, avoid subjective terminology, focus class membership on those at serious and imminent risk of institutionalization or segregation, directly link alleged harm to governmental policies and practices, and include objective standards such as service definitions, eligibility criteria, screening procedures, or other proxies for serious risk of institutionalization.<sup>267</sup>

#### D. Developing the Definition

Developing the class definition is distinct from, but related to, pleading and proving compliance with each of the four requirements of Rule 23(a) and one of the prongs of Rule 23(b). At a minimum, it must describe the persons with disabilities who have a claim under the ADA. It may also include the basis and remedies for the alleged discrimination. In a Title II *Olmstead* case, it should describe the individuals who are

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264. *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1326 (W.D. Wash. 2015) (quoting *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 . . . .”); *Cole v. City of Memphis*, 839 F.3d 530, 541–42 (6th Cir. 2016) (holding that ascertainability is not an additional requirement for certification of a (b)(2) class because the focus of these cases “is more heavily placed on the nature of the remedy sought, and because a remedy obtained by one member will naturally affect the others, the identities of individual class members are less critical in a (b)(2) action than in an (b)(3) action.”), *cert. denied sub nom.*, *City of Memphis v. Cole*, 137 S. Ct. 2220 (2017).

265. *DeBreaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).

266. Six courts of appeals have held that the risk of institutionalization can support a valid claim under the integration mandate. *Waskul v. Washtenaw Cty. Cmty Mental Health*, No. 19-1440, 2020 U.S. App. LEXIS 34203, \*1, \*64–65 (6th Cir. 2020); *Davis v. Shah*, 821 F.3d 231, 263 (2d Cir. 2016); *Steimel v. Wernet*, 823 F.3d 902, 914 (7th Cir. 2016) (holding that “the integration mandate is implicated where the state’s policies have . . . put [individuals with disabilities] at serious risk of institutionalization.”); *Pashby v. Delia*, 709 F.3d 307, 321–22 (4th Cir. 2013); *M.R. v. Dreyfus*, 663 F.3d 1100, 1116–17 (9th Cir. 2011) (“An ADA plaintiff need not show that institutionalization is ‘inevitable’ or that she has ‘no choice’ but to submit to institutional care in order to state a violation of the integration mandate. Rather, a plaintiff need only show that the challenged state action creates a serious risk of institutionalization.”); *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1182 (10th Cir. 2003).

267. *Kenneth R. v. Hassan*, 293 F.R.D. 254, 271–72 (D.N.H. 2013) (defining those at serious risk of unnecessary institutionalization based on specific proxies including the number of prior admissions to a state psychiatric hospital with a given time period).

segregated, and could set forth the how or why they are segregated, as well as the accommodations needed to promote integration.

But there is a fundamental tension between adding precision or qualifications in an *Olmstead* class definition, and inviting subjectivity, ambiguity, or an individualized focus to the definition—precisely the factors that undermine class certification.<sup>268</sup> To avoid this conundrum, it is important to carefully balance the rationale for incorporating each of the elements of an *Olmstead* claim directly into the class definition, some of which involve individual determinants, with the systemic focus of the ADA. The class definition should be as broad and encompassing as possible, given prudential considerations on manageability and preclusion, and only include qualifications and limitations to the extent necessary to secure class certification. The Article concludes by analyzing this balance with respect to five elements of an *Olmstead* claim: unnecessary segregation, appropriateness for transition to the community, opposition to transition to the community, needed accommodations to live in the community, and risk of institutionalization

### 1. Unnecessary Segregation

As reflected in the ADA's Findings,<sup>269</sup> there is a professional consensus that virtually all individuals with disabilities can and should live in integrated settings in the community.<sup>270</sup> As a result, the simplest and most comprehensive definition of an *Olmstead* class contains no limitations and no reference to “unnecessary” segregation. For instance, in certifying a class of nursing facility residents in Texas, a court approved the following definition:

All Medicaid-eligible persons over twenty-one years of age with intellectual or developmental disabilities or a related condition in Texas who currently or will in the future reside in nursing facilities, or who are being, will be, or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 *et seq.*<sup>271</sup>

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268. See *supra* Section IV and V.

269. 42 U.S.C. § 12101(a)(2) (2021).

270. See Convention on the Rights of Persons with Disabilities art. 19, May 3, 2009, 2515 U.N.T.S. 3; *Mission*, AM. ASS'N ON INTELL. & DEV. DISABILITIES, (last visited Apr. 20, 2021), <https://www.aaid.org/about-aaid/mission#:~:text=AAIDD's%20Principles&text=Advance%20the%20assurance%20of%20all,dignity%2C%20choice%2C%20and%20respect>.

271. *Steward v. Janek*, 315 F.R.D. 472, 493 (W.D. Tex. 2016).

A similar approach was approved by another district court in another *Olmstead* nursing facility case, which certified a broad and unrestricted class comprised of:

All Massachusetts residents who now, or at any time during this litigation: (1) are Medicaid eligible; (2) have suffered a brain injury after the age of 22; and (3) reside in a nursing or rehabilitation facility or are eligible for admission to such a facility.<sup>272</sup>

Arguably, there are three conceivable rationales that may be proffered for “necessary” segregation: (1) legal determinations pursuant to statutes authorizing confinement, such as civil commitment laws;<sup>273</sup> (2) clinical determinations of inappropriateness for community living or, in the *Olmstead* court’s unfortunate words, the inability to “handle and benefit”<sup>274</sup> from life outside an institution; or (3) fiscal determinations that the cost of accommodating the individual’s needs in the community is untenable. Since the financial justification is the same as the government’s fundamental alteration argument, it has no place in the class definition and can only be asserted as a defense. The clinical justification essentially mirrors the first *Olmstead* factor on the appropriateness of placement.<sup>275</sup> This leaves only the legal justification, which mostly, if not entirely, applies to persons with mental illness and *Olmstead* cases involving psychiatric facilities. In those cases, it may be necessary to exclude from the class persons whose institutionalization is ordered by a state court, and whose release requires approval by that court.<sup>276</sup>

## 2. *Appropriateness for Transition to the Community*

Clinical determinations of an individual’s appropriateness for transition to the community are contextual, complex, and changing. As a result, such determinations are usually inconsistent with class certification requirements, precisely because they involve individualized evaluations and evolve over time.<sup>277</sup>

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272. Notice Regarding Comprehensive Settlement Agreement at 1, *Hutchingson v. Patrick*, No. 07-CV-30084-MAP (D. Mass. June 13, 2008).

273. See generally, *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974) (describing compulsory civil commitment and custody procedures); MASS. GEN. LAWS 123, §§ 7, 8 (2021).

274. *Olmstead v. L.C.*, 527 U.S. 581, 600 (1999).

275. *Id.* at 607.

276. *Kenneth R. v. Hassan*, 293 F.R.D. 254, 271–72 (D.N.H. 2013).

277. See *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 503 (7th Cir. 2012) (holding that the individualized assessments required by the remedial order constitute separate injunctions and thus preclude certification under Rule 23(b)).



The very purpose of an *Olmstead* suit is to compel the expansion or re-alignment of a public entity's services, programs, and activities. If the lack of integrated services was considered in determining who was appropriate for such services, and then incorporated in the class definition, the purpose of the integration mandate would be thwarted, and institutionalized persons who would benefit from the expansion of such services would be excluded from the class. Courts,<sup>278</sup> as well as the Department of Justice,<sup>279</sup> have noted this contextual contradiction and made clear that any clinical determination of "appropriateness" should not be driven by, or limited to, currently available services. Similarly, who renders these clinical determinations can be confusing, and often outcome-determinative. Courts, as well as the Department of Justice,<sup>280</sup> have expressed skepticism that the clinical judgments of the government's or facility's professionals are controlling, and have been unwilling to limit the class to persons deemed appropriate for community services by such clinicians. Moreover, because clinical conditions, physical needs, and capacities change periodically and often in response to positive interventions and supports, a determination of appropriateness is constantly shifting and evolving.<sup>281</sup> Excluding persons who are not, at a point in time, appropriate for transition renders the class definition inherently transitory. Finally, as noted above,<sup>282</sup> there already is a well-established clinical forum for making such determinations, through state-regulated individual service and discharge planning processes, which often permit appeals through state administrative procedures. This is the preferred and most efficient method for rendering clinical determinations of appropriateness, thereby avoiding the necessity for including any such factor in the class definition. Therefore, class definitions should avoid, at all costs, including a limitation to institutionalized persons who have been determined by facility staff to be appropriate for transition to the

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278. *Pashby v. Delia*, 709 F.3d 307, 324 (4th Cir. 2012) (holding that the ADA covers the risk of institutionalization, where such risk is likely due to reductions in in-home nursing services).

279. See *DOJ Statement*, *supra* note 82.

280. *Id.*

281. In *Rolland*, the district court agreed with the defendants that the concept of persons who "need" community services "may be susceptible to individualized interpretation" and should be stricken. No. CIV A 98-30208-KPN, 1999 WL 34815562, at \*1-2, \*5 (D. Mass. Feb. 2, 1999). It approved a revised definition that "eliminated the phrase from the proposed definition which most concerned the court. As explained, that phrase improperly emphasized individualized clinical determinations which could be part of a remedy but not the class definition." *Id.* at \*6. Finally, it rejected the defendants' objection that this revised definition improperly broadened the class. *Id.* at \*6-7.

282. See *supra* Section VI.A.

community or, conversely, excluding from the class definition those who have not.

### 3. *Opposition to Transition to the Community*

A similar analysis applies to the second *Olmstead* factor—opposition to transition to the community. An expression of opposition is contextual, often skewed heavily by the very fact of institutionalization.<sup>283</sup> It is complex, and highly dependent on the information and experiences provided to the institutionalized person, as well as the professional staff recording or interpreting the individual's preference.<sup>284</sup> Finally, tentative reluctance and even determined opposition to community living can change over time. And like appropriateness, the issue of choice is a central component of all service and discharge planning processes, making that the preferred forum for determining whether the individual opposes transition to the community.<sup>285</sup> Therefore, like appropriateness, class definitions should avoid, in so far as possible, including a limitation to institutionalized persons who have expressed a preference for transition to the community, or conversely, excluding from the class definition those who have not.<sup>286</sup>

### 4. *Accommodations Needed to Live in the Community*

Most *Olmstead* cases generally seek to compel public entities to provide services in the most integrated settings. As a result, there is no need to specify the amount, duration, or scope of the services that are needed to live in the community; the type or amount of funding required to provide those services; or the accommodations needed to allow individuals with disabilities to transition to the community. But in some cases, the relief sought is a particular type of program or services—such

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283. Steven Schwartz et al., *Realizing the Promise of Olmstead: Ensuring Informed Choice of Institutionalized Individuals with Disabilities to Receive Services in the Most Integrated Setting*, 40 J. LEGAL MED. 63, 80 (2020).

284. *Id.* at 80–81; see Bagenstos, *supra* note 242, at 20.

285. See *supra* Section VI.B.

286. When a vocal subset of institutionalized persons, or more likely their guardians, claim that institutionalization is their preferred option and insist that they refuse to consider community services, there may be no option but to include a limitation in the class definition to persons who do not oppose transition to the community. In that case, the class definition should explicitly reference the concept of informed choice and mechanisms to ensure it. For instance, in *Ball v. Kasich*, the court eventually revised the class definition, in response to opposition from intervenor guardians who preferred continued institutionalization for their wards, to: “All Medicaid-eligible adults with intellectual and developmental disabilities residing in the state of Ohio who, on or after March 31, 2016, are qualified for home and community-based services, and, after receiving options counseling, express that they are interested in community-based services.” 307 F. Supp. 3d 701, 718 (S.D. Ohio 2018).

as home-based, wrap-around services for children with Serious Emotional Disturbance—rather than all forms of a mental health treatment for youth and adults. In those cases, it may be appropriate to incorporate some description of the relief sought in the class definition. For instance, in an *Olmstead* case on behalf of adults with intellectual and developmental disabilities in segregated employment programs called sheltered workshops, it was useful to add a reference to integrated employment services in the class definition, so as to identify the integrated component of the State’s employment program that needed modification.<sup>287</sup> But absent a concrete and compelling rationale for incorporating an element of the relief directly in the class definition, restrictions on services sought or accommodations needed should be avoided, since they invite individualized inquiries that could defeat class certification.

#### 5. At Risk of Institutionalization

The inclusion of an “at risk” group in the class definition itself involves some risk, because the concept is arguably ambiguous, the alleged harm prospective and inherently speculative, and the class fluid and not easily identified.<sup>288</sup> Where the persons segregated in facilities are relatively static, there is less need and no convincing justification for including an at risk component in the class.<sup>289</sup> Where facilities have relatively transitory populations, including an at risk element allows for relief designed to avoid admission to these facilities, and significantly expands both the number of persons in the class and the scope of relief.<sup>290</sup> When the entire class is comprised of persons with disabilities who are not yet institutionalized, but are suffering the loss of community supports that create a significant likelihood that they soon will be forced into segregated facilities,<sup>291</sup> an at risk component in the class is unavoidable.

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287. The district court certified a class comprised of: “All individuals in Oregon with intellectual or developmental disabilities who are in, or who have been referred to, sheltered workshops” and “who are qualified for supported employment services.” *Lane v. Kitzhaber*, 283 F.R.D. 587, 602 (D. Or. 2012).

288. *See supra* Section VI.C.

289. Many segregated facilities, like state-operated ICFs/IDD, long-term nursing facilities, and sheltered workshops have a mostly stable population, with many persons institutionalized for years, if not decades. *See supra* Section VI.C.

290. For instance, psychiatric hospitals and jails often have short-term or acute units where hundreds of persons with mental illness cycle through a much smaller number of beds. *See supra* Section VI.C.

291. This is a common fact pattern when public entities decide to reduce services needed to support disabled persons in their homes and communities. *See supra* Section VI.C. and note 252.

If an at risk group is incorporated in the class definition, it should include both qualifiers<sup>292</sup> and objective reference points designed to support the rationale for the group and the nature, probability, and imminence of the risk. For instance, in an *Olmstead* case involving a state psychiatric facility, which served both voluntary and civilly committed patients, the court certified a class comprised of:

All persons with serious mental illness who are unnecessarily institutionalized in New Hampshire Hospital or Glencliff or who are at serious risk of unnecessary institutionalization in these facilities.

At risk of institutionalization means persons who, within a two-year period: (1) had multiple hospitalizations; (2) used crisis or emergency room services for psychiatric reasons; (3) had criminal justice involvement as a result of their mental illness; or (4) were unable to access needed community services.<sup>293</sup>

Finally, it is not uncommon for class definitions to evolve, both in response to litigation events post-filing as well as reactions from the court. When the *Kenneth R.* court expressed concern with the proposed class definition because it did not acknowledge that some state hospital residents were there because they met the criteria for involuntary admission, the definition was modified to include the concept of “unnecessary institutionalization.”<sup>294</sup> Therefore, qualification and limitations on class membership concerning unnecessary institutionalization, appropriateness, opposition, accommodations, and at risk can be subsequently incorporated or deleted from the initial class proposal, if there are concerns with a broader and comprehensive definition.<sup>295</sup>

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292. While still vague, adjectives like “serious” or “imminent” provide some comfort to courts concerned with the highly speculative nature of risk.

293. *Kenneth R. v. Hassan*, 293 F.R.D. 254, 271–72 (D.N.H. 2013).

294. *Id.*

295. In *Rolland*, the original proposed class definition was: “all adults with mental retardation and other developmental disabilities in Massachusetts who are, have been, or may be confined in nursing facilities, and who are not receiving medically necessary services in the most integrated setting consistent with their individual needs”. No. 98-30208-KPN, 1999 U.S. Dist. LEXIS 23814, at \*7 (D. Mass. Feb. 2, 1999). The court approved a class definition that deleted, among other things, the concept of “need.” *Id.* Specifically, it ordered a class comprised of: “all adults with mental retardation and other developmental disabilities in Massachusetts who reside in nursing facilities, who resided in nursing facilities on or after October 29, 1998, or who are or should be screened for admission to nursing facilities pursuant to 42 U.S.C. § 1396r(e)(7) and 42 C.F.R. § 483.112 et seq.” *Id.* at \*8.

## CONCLUSION

While many of the core definitions that frame the mandate of the ADA speak in terms of a person, like “disability,” “qualified individual,” or “reasonable accommodation,” the central goal of the statute, as set forth in its Findings and Purposes, is to address the structural barriers to full participation by disabled people in all aspects of our society and the rhythms of our communities. For litigation to effectively serve to this goal, it must demand systemic remedies that dismantle those barriers, which in turn are best achieved through class actions authorized under Fed. R. Civ. P. 23. ADA class actions, and particularly those brought to remedy discrimination by public entities under Title II, can satisfy the prerequisites of Rule 23 with carefully framed class definitions, common contentions, and remedies that focus on the systemic effect of the government’s exclusion of persons with disabilities from their services, programs, and activities, rather than the characteristics of the disabled members of the class. Courts have certified and should continue to certify these classes after *Wal-Mart* in order to achieve the promise of the ADA.