No. 24-____

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Derrick, by and with his parent and next friend Tina, et al.,

Plaintiffs-Petitioners,

v.

Glen Mills Schools, et al.,

Defendants-Respondents.

Petition for Review of an Order of the United States District Court for the Eastern District of Pennsylvania, Case No. 2:19-cv-01541-HB
The Honorable Harvey Bartle III, Presiding

PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Maura McInerney
Kristina A. Moon
Margaret M. Wakelin
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
(215) 238-6970

Marsha L. Levick
Katherine E. Burdick
Malik Pickett
Courtney M. Alexander
JUVENILE LAW CENTER
1900 JFK Blvd., Suite 1900B
Philadelphia, PA 19103
(215) 625-0551

Fred T. Magaziner
Michael H. McGinley
Clare Putnam Pozos
Caroline Power
Christopher J. Merken
Shane Sanderson
Luke D. Yamulla
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

INTRODUCTION

The District Court's order denying class certification warrants immediate review and reversal. The District Court fundamentally erred by: (1) employing a novel *per se* rule that the presence of a state-court action in which different plaintiffs assert different claims against different defendants means a federal class action can never satisfy superiority; (2) fundamentally misinterpreting binding precedents in evaluating commonality, typicality, and predominance; and (3) incorrectly applying this Court's rulings to Petitioners' proposed issue classes under Federal Rule of Civil Procedure 23(c)(4).

Petitioners' unique circumstances make this case an excellent candidate for class litigation. The class comprises youth who were adjudicated delinquent, involuntarily committed to Glen Mills Schools ("GMS"), and then suffered severe abuse and psychological harm due to Respondents' common policies and pattern of misconduct. Unless reversed, the order below will enable Respondents to evade class-wide responsibility for the "serious and pervasive . . . widespread abuse, inadequate education, and disability discrimination at the now closed [GMS]." A574. This Court should intervene now to correct the District

Court's fundamental errors and to ensure that the proposed class members' claims can be resolved in a fair, efficient fashion.

In denying certification, the District Court made three fundamental errors. ***First***, the District Court patently misapplied the law on superiority by relying on a state court action (the "State Action") in which different plaintiffs are asserting different claims against different defendants. The District Court's reasoning amounts to a *per se* rule that superiority fails whenever a state-court mass tort action exists—even if that action comprises different claims and parties than the federal class action and with only limited overlap among the claimants. That illogical rule inverts Rule 23's very purpose—favoring individualized state-court actions over more efficient federal class-action proceedings. There is no support for this view.

Second, the District Court fundamentally misapplied *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011). It failed to apply precedents from this and other Circuits explaining that by their very nature issues classes necessarily satisfy commonality, typicality, and predominance. And it ignored evidence that Respondents' policies and practices caused

immense, common harm to the class. Indeed, the parties *and the District Court* agreed on these points.

Third, the District Court denied certification of the issue classes by fundamentally misunderstanding the nine factors identified in *Gates v. Rohm & Haas Co.*, 655 F.3d 255 (3d Cir. 2011), and then clarified in *Russell v. Educ. Comm'n for Foreign Med. Graduates*, 15 F.4th 259 (3d Cir. 2021), a misunderstanding hardly isolated to this case. In the years since *Gates* and *Russell*, lower courts have struggled to apply the factors consistently. In some instances, different courts treated the same factors as pointing in opposite directions. Rather than allow confusion and inconsistency to persist, this Court should grant review to clarify the law on issue class certification.

These fundamental errors and doctrinal confusion warrant Rule 23(f) review. The District Court's order would require 1,600 youth who suffered "appalling incidents of widespread abuse, inadequate education, and disability discrimination," A583, based on common conduct to relieve these horrors by relitigating the same through hundreds of costly trials. Reversal of that erroneous order would instead provide them access to Rule 23's fair and efficient process.

QUESTIONS PRESENTED

1. Whether the District Court erroneously concluded class-action proceedings were not superior to individual proceedings by relying on the mere existence of a separate state-court action addressing different claims by different plaintiffs against different defendants.

2. Whether the District Court contravened Supreme Court and Third Circuit precedent by denying certification based on a misunderstanding of the law and facts governing commonality, typicality, and predominance.

3. Whether the District Court erred by misapplying the *Gates* factors to the 23(c)(4) issue classes.

BACKGROUND

A. GMS Policies And Practices Created And Fostered A Culture Of Violence And Abuse.

GMS was a juvenile justice placement facility that created and fostered an environment of abuse so pervasive that its licensor, the Pennsylvania Department of Human Services ("DHS"), eventually ordered a full evacuation and closure of the facility in March 2019, concluding youth were at imminent risk and their safety was in jeopardy. At its core, GMS' behavior-management policies were grounded in a self-

proclaimed "confrontation culture" in which *all* staff and students were required to enforce "norms" through threats, intimidation, and physical force.

Thousands of confrontations, many violent, occurred daily between GMS staff and students, and between students, consistent with GMS' uniformly applied policy. Abuse was ever-present, systematic, visible, and normalized. DHS confirmed this "pervasive culture of intimidation and coercion" when it belatedly removed youth from GMS' abusive grip. As DHS explained, GMS "failed to protect the youth entrusted to its care, placed youth at risk of serious physical injury, permitted youth to sustain physical injuries by their acts and failure to act[.]" Dist. Ct. ECF 188-3 at 7.

GMS leadership eschewed effective accountability mechanisms, instead relying on violence and intimidation. *Id.* at 5-6. GMS deliberately and willfully ignored staff violence toward youth in its care, failed to assess data regarding the abuses youth suffered, and never employed policies or protocols to document, review, or track employee discipline. *Id.*

B. DHS Failed To Meet Its Obligation To Inspect And Monitor GMS.

DHS, at the direction and under the exclusive control of Ted Dallas, Teresa Miller, and Cathy Utz (the "DHS Defendants"), failed to uncover or prevent this widespread abuse. DHS Defendants were statutorily obligated to license only institutions that kept youth safe and complied with federal and state laws and regulations. Consistent with this licensing authority, DHS Defendants were obligated – but woefully failed – to conduct ongoing monitoring. In its March 2019 Emergency Removal Order (the "ERO"), DHS acknowledged a "pervasive" "culture of intimidation and coercion." *Id.* at 7. DHS Defendants failed to take sufficient actions to protect youth at GMS before March 2019, and acted only *after* the *Philadelphia Inquirer* published a scathing expose.

C. GMS and PDE Failed To Ensure That Youth Committed To GMS Received An Appropriate, Legally Compliant Education.

GMS was required to provide educational services and instruction to youth—using public school funding in conjunction with a local educational agency ("LEA"). Although GMS received that funding, it failed to meet its basic obligations to provide a secondary education. Instead, it offered insufficient hours of a one-size-fits-all, self-paced,

asynchronous credit-recovery program devoid of teacher instruction or support. GMS also discriminated against youth with disabilities by failing to modify its educational program and behavior policies, resulting in disproportionate abuse and exclusion from learning.

The Pennsylvania Department of Education ("PDE"), tasked with ensuring GMS complied with federal and state education law, woefully failed GMS youth. PDE failed to: (1) oversee GMS' regular education program, including GMS' compliance with providing minimal instructional hours and access to a secondary school program and curriculum; and (2) conduct on-site monitoring related to its general education program. PDE instead only reviewed attendance data and public-funding reporting requirements.

PDE also failed to fulfill its obligations to students with disabilities. It failed to ensure the availability of a free appropriate public education and education free from disability discrimination. Discrimination was caused in part by the absence of any individualized placements or services and the computer modality's inability to offer differentiated instruction. PDE's lack of LEA oversight also resulted in the failure to conduct any legally compliant Individualized Education Program

process, including the absence of LEA representatives at IEP meetings. PDE's cursory monitoring of GMS (occurring only once every *six years*) was wholly deficient and failed to disclose the absence of a viable special education system. PDE also ignored excessive use of physical restraints on youth with disabilities.

D. This Lawsuit

Following DHS' belated March 2019 ERO, plaintiffs filed this class action asserting 18 claims under federal and state law. As the District Court noted, "[t]his massive litigation has progressed through four years of discovery, including significant document production and depositions of the individual Plaintiffs and a number of other fact witnesses. Lengthy expert reports were also produced." A582-83.

In September 2023, Petitioners moved to certify one 23(b)(3) damages class against DHS Defendants, along with numerous 23(c)(4) issue classes against GMS based on abuse and against GMS and PDE relating to education and disability discrimination. A153-247. On May 13, 2024, the District Court denied class certification of all proposed classes. A574-671.

ARGUMENT

Rule 23(f) grants this Court broad discretion to review class-certification decisions on an interlocutory basis. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162 (3d Cir. 2001). "[T]he court has the authority to grant . . . petitions 'on the basis of any consideration that [it] finds persuasive.'" *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 183 n.2 (3d Cir. 2001) (cleaned up). Rule 23(f) "provide[s] significantly greater protection against improvident certification decisions." *Microsoft Corp. v. Baker*, 582 U.S. 23, 31 (2017). Rule 23(f) review may be granted "on the basis of *any* consideration." *Id.* at 32-33 (cleaned up).

This Court has explained that it should grant Rule 23(f) review when, among other things: "an appeal implicates novel or unsettled questions of law"; "the district court's class certification determination was erroneous"; or "the appeal might facilitate development of the law on class certification." *Rodriguez v. Nat'l City Bank*, 726 F.3d 372, 376-77 (3d Cir. 2013) (cleaned up). Other courts have noted that class actions involving "a governmental entity, or [that] ha[ve] a strong public interest component, may also lend the issue particular importance and urgency."

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1275 (11th Cir. 2000). And this Court recently emphasized that it "exercises [its] 'very broad discretion' using a more liberal standard" than other Circuits when evaluating Rule 23(f) petitions. *Laudato v. EQT Corp.*, 23 F.4th 256, 260 (3d Cir. 2022).

I. The District Court's Superiority Analysis Employed A *Per Se* Approach That Flatly Ignored The Law And The Facts.

The District Court contradicted the law and facts by concluding that Rule 23's superiority requirement is not met because a state-court mass action involving different claims by different plaintiffs exists. For each proposed class, the District Court concluded that 803 individual proceedings in the State Action—*see* A602-03, A613-14, A628, A640, A649-50, A660—prevented class certification because they demonstrate "economic[] feasibil[ity]" of individual proceedings, A603; "overlap" with the putative class, A640, A660; and evidence a "willingness to seek individualized relief," A649-50. The District Court's reasoning treated the State Action's existence—involving different parties, facts, and claims—as automatically precluding superiority of a federal class action to adjudicate plaintiffs' claims against the defendants in this case.

This *per se* approach is legally unsupported and factually wrong. Rule 23(b)(3) superiority requires showing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." When a court takes a "close look" at superiority, it should consider, among other things, "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class," and "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 615-16 (1997). "The 'superiority requirement' was intended to refer to the preferability of adjudicating claims of multiple-parties in *one judicial proceeding* . . . rather than forcing each plaintiff to proceed by separate suit[.]" *Amalgamated Workers Union v. Hess Oil Virgin Islands Corp.*, 478 F.2d 540, 453 (3d Cir. 1973) (emphasis added). And district courts are obligated "to consider all relevant evidence and arguments" presented. *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 307 (3d Cir. 2008), *as amended* (Jan. 16, 2009). Where a district court "fails to resolve a genuine legal or factual dispute relevant to determining the requirements" of Rule 23, it errs as a matter of law. *Id.* at 320. "[F]ail[ure] to confront" a party's arguments or "to carefully

scrutinize the relevant, disputed testimony" may support vacatur of an order denying class certification. *Reyes v. Netdeposit, LLC*, 802 F.3d 469, 496 (3d Cir. 2015).

This Court has never endorsed the District Court's *per se* view that the mere existence of "overlapping" individualized proceedings in state court bars a finding of superiority. Indeed, courts in this Circuit have certified federal class actions despite the existence of *identical* state-court actions asserting *identical* claims. *See, e.g.*, *DeMarco v. Avalonbay Cmtys., Inc.*, 2017 WL 960355, at *2-3 (D.N.J. Mar. 13, 2017). In *DeMarco*, the court noted that class members in the federal class action could "simply send[] a notice requesting to opt out of the class action" and proceed in the state-court action, and that the existence of the identical state-court action did not defeat superiority. *Id.* The court also rejected objectors' argument that "many potential class members have shown that they would prefer to proceed with their own ongoing lawsuits" in state court and concluded that "[e]ach litigant who is currently proceeding in state court, has the right to participate in this potential class action." *Id.*; *cf.* A49-50 (reasoning that the State Action demonstrates a "willingness to seek individualized relief"); *see also C.P. v. N.J. Dep't of Educ.*, 2022

WL 3572815, at *13 (D.N.J. Aug. 19, 2022) (explaining that although "some putative class members have commenced individual actions based on the same alleged conduct . . . the Court *does not find that that should be a bar to a finding of superiority here*.") (emphasis added). Unlike *DeMarco* and *C.P.*, the overlap between Petitioners' claims and those in the State Action is minimal.

Likewise, the Second Circuit has affirmed class-certification orders over defendants' arguments that the mere existence of state-court litigation somehow indicates a lack of superiority. In *Sykes v. Mel S. Harris & Assocs. LLC*, 780 F.3d 70, 92-94 (2d Cir. 2015), as here, the federal class plaintiffs asserted different causes of action than the state-court plaintiffs—that is, the federal class plaintiffs asserted both federal and state causes of action. *See id.* at 93 ("While there has been state court litigation in this case, it is not state court litigation which advances the claims that plaintiffs advance now."). Ultimately, Rule 23 does not bow to defendants' "expression of a preference that their alleged widespread [misconduct] be dealt with in a piecemeal fashion." *Id.* at 92. Defendants' desire for plaintiffs "to have advanced their claims differently cannot make it a requirement under Rule 23(b)(3)." *Id.*

Moreover, the District Court's cursory analysis breezes over critical distinctions between this action and the State Action. Only a small portion of the factual allegations relevant to this case are presented in the State Action. The State Action includes only physical abuse claims. By contrast, the classes here assert claims under (i) the Eighth Amendment; (ii) Pennsylvania's right to a public education; and (iii) numerous federal statutes. A580-81. Those claims are not presented in the State Action. Although there is some overlap from a small subset of claims brought by a small subset of plaintiffs, that does not render the class-action mechanism inferior.

Indeed, most putative class members have not filed claims in the State Action. More than three-quarters of the 800 number on which the District Court erroneously relied do not overlap at all. A26:6-9. This overwhelming majority of class members has not filed in state court and is likely barred from bringing abuse claims in the State Action because Pennsylvania courts do not allow for tolling the statute of limitations for individual state-court claims based on a federal class-action complaint. *Compare Ravitch v. Pricewaterhouse*, 793 A.2d 939, 942, 944 (Pa. Super.

Ct. 2002), *with China Agritech., Inc. v. Resh*, 584 U.S. 732, 735 (2018).[1] This Court has concluded superiority is satisfied in light of "difficult, if not insurmountable" tolling issues faced by class members. *In re Cmty Bank of N. Va. Mortg. Lending Pracs. Litig.*, 795 F.3d 380, 409 (3d Cir. 2015).

Nor is the State Action a superior forum for the putative class members to pursue their many federal claims. Federal courts have original jurisdiction over civil actions arising under the "Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. As explained above, many claims at issue here arise from federal statutes and the U.S. Constitution. A federal forum's availability to adjudicate federal civil rights cases arises out of "a system in which there is sensitivity to the legitimate interests of ***both*** State and ***National*** Governments." *Johnson v. Kelly*, 583 F.2d 1242, 1250 (3d Cir. 1978) (cleaned up—emphasis added). The District Court's suggestion that the State Action is the

[1] In *Ravitch*, the Pennsylvania Superior Court clarified that although a Pennsylvania state court class action would toll the statute of limitations for other actions brought in Pennsylvania courts, a class action brought in federal court, or in other state courts, does not toll the statute of limitations. 793 A.2d at 944. Accordingly, this action—filed on April 11, 2019—will not toll the Pennsylvania statute of limitations for class members to bring claims in Pennsylvania state court, including in the State Action. The District Court's reliance on those proceedings is thus misplaced.

superior forum ignores Petitioners' "important interest in access to federal courts for vindication" of federal rights. *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 329 (3d Cir. 2001) (Mansmann, J., dissenting) (cleaned up). Because the State Action does not concern these federal claims, it can hardly be deemed superior to the classes proposed here.

By disregarding these distinctions (which Respondents did not rebut), the District Court failed to heed *Amchem*'s direction to "close[ly] look" at "the extent and nature of any litigation concerning the controversy." 521 U.S. at 616. The District Court's reliance on the mere existence of the State Action—which predominantly concerns *different* claims, *different* plaintiffs, and *different* defendants—is therefore wrong and inconsistent with other cases within this Circuit and beyond. At a bare minimum, it warrants this Court's review.

II. The District Court Clearly Erred By Ignoring Key Facts Supporting Predominance, Commonality, and Typicality.

The District Court distorted Petitioners' claims, the record evidence, and applicable law to wrongly find predominance, commonality, and typicality were unmet. For GMS and PDE, Plaintiffs sought to certify issue classes that easily satisfy predominance (a point on which the parties and the Court *all* agreed—until the Court's opinion),

commonality, and typicality. For DHS Defendants, the District Court ignored the two common policies and practices they implemented and executed which led to *all* the harm the class suffered. Both decisions were in error.

A. The District Court Improperly Rejected Petitioners' Predominance, Commonality, and Typicality Arguments For GMS and PDE.

When opposing class-certification, GMS conceded predominance. A327, A328. GMS acknowledged that Rule 23(c)(4) issue class claims "almost automatically" meet Rule 23(b)(3)'s predominance requirement because "once the issues to be certified are narrowed down to make them sufficiently 'common,' *it is virtually axiomatic that common issues will predominate*." *Id.* (citing *In re Marriott Int'l, Inc.*, 78 F.4th 677, 689 (4th Cir. 2023)). At oral argument, the District Court agreed, noting that for issue classes "we don't really deal with the predominance issue here," and agreeing with Petitioners' counsel that *Marriott*'s reasoning establishes predominance here. A69:1-14.[2]

[2] This Court has explained that "there is substantial overlap in the superiority and predominance inquires" and that "they have been described as the twin requirements of Rule 23(b)(3), which were both adopted to cover cases in which a class action would achieve economies of time, effort, and expense . . . without sacrificing procedural fairness." *Kelly v. RealPage Inc.*, 47 F.4th 202, 215 n.11 (3d Cir. 2022) (cleaned up). For the same reason that issue classes almost always satisfy predominance, so too do

Puzzlingly, despite Petitioners', Respondents', *and* the District Court's agreement that Petitioners' issue classes satisfy predominance, the District Court's opinion reversed course and concluded that "individual questions predominate on the issues of breach." A612; *see also* A627 (concluding that "Plaintiffs' eight Education Issue Classes implicate more individualized questions than common ones."); A640 ("If these issue classes were certified, this court would be required to make hundreds of individualized determinations[.]").

This conclusion is untethered from the issue classes Petitioners presented for certification. *See* A207. The District Court correctly noted that Petitioners "produced evidence that [GMS] Defendants maintained a culture of confrontation, permitted the excessive use of physical restraints, stifled reports of abuse from residents, failed to conduct background checks on prospective employees, and improperly trained employees." A609. These policies and practices clearly *support* a finding of predominance. And they fit squarely with the first GMS issue class: "[W]hether the policies and practices of the GMS Abuse Defendants subjected class members to a substantial risk of serious harm to which

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they almost always satisfy superiority: it is the most efficient and effective way to resolve common questions.

the GMS Abuse Defendants were deliberately indifferent in violation of the Eighth Amendment." A207. Yet, the District Court resisted that conclusion by erroneously suggesting that Petitioners "offer different theories of liability on their Eighth Amendment claim, including deliberate indifference, adverse conditions of confinement, failure to protect, use of excessive force, and inadequate access to medical care." A610. To the contrary, Petitioners specified a single Eighth Amendment theory: deliberate indifference to conditions based on common policies that pose a substantial risk of serious harm. A464.

The question of breach—another GMS issue class—likewise predominates. GMS' common policies and practices created a pervasively abusive environment impacting all youth, which is *evidence* of a common violation of the Eighth Amendment. Because the policies and practices were common to the class, a finding that any policy or practice violates the Eighth Amendment would flow to *all* class members. Thus, resolving the question of breach (whether GMS' policies and practices breached GMS' duty to the class) "resolve[s] an issue that is central to the validity of each one of the claims in one stroke." *Meilo v. Steak 'N Shake*

Operations, Inc., 897 F.3d 467, 489 (3d Cir. 2018) (quoting *Wal-Mart*, 564 U.S. at 349–50)).

Petitioners similarly identified issue classes relating to education and disability discrimination based on common GMS policies and practices and common breach of duty that deprived all youth of a secondary education, A105-06; 110-11, and discriminated against students with disabilities. A117. Issue classes based on PDE's policies, supervisory inaction, and breach of duty common to all GMS students also require no individualized analysis. A105-06, 114, 118-19, 122.

Rather than analyzing these issue classes based on the issues presented and the systemic misconduct challenged, the Court found predominance lacking because *ultimate* adjudication of plaintiffs' claims would require the court to "make over a thousand individualized determinations." A668. This incorrectly focused on resolution of *claims* and *remedies*, rather than the common *issues* presented in these Rule 23(c)(4) classes. As this Court has explained, Rule 23(c)(4) "does *not* require Plaintiffs seeking issue-class certification to prove that their cause of action *as a whole* satisfies a subsection of Rule 23(b)" but rather

demonstrate that the *issues* they seek to certify satisfy one of Rule 23(b)'s subsections. *Russell*, 15 F.4th at 271 (emphases added).

The District Court thus erred twice over. It misunderstood how predominance applies in Rule 23(c)(4) issue classes. And it refused to certify issue classes capable of class-wide treatment that would materially advance the resolution of hundreds of individual claims.

B. Despite Identifying Common Policies And Practices, The District Court Wrongly Concluded Petitioners Failed To Establish Commonality, Typicality, and Predominance.

Unquestionably, "[c]ommonality does not require perfect identity of questions of law or fact among all class members." *Reyes*, 802 F.3d at 486. "Rather, 'even a single common question will do.'" *Id. (*quoting *Wal-Mart*, 564 U.S. at 359). The bar for commonality "is not a high one." *Rodriguez*, 726 F.3d at 382.

Commonality and typicality are satisfied for *all* of Plaintiffs' classes. Every class member shares a common contention that DHS Defendants' policies and practices regarding licensing and complaint investigation violated the Eighth Amendment and is "capable of classwide resolution." *Wal-Mart*, 564 U.S. at 349-50. The District Court's conclusion otherwise is based on internally inconsistent analysis:

> Plaintiffs here have not identified a specific uniform behavior or policy of the DHS Defendants that is the cause of all of the disparate alleged injuries. . . . Instead, they broadly claim that the DHS Defendants ignored existing complaints of "abuse," failed to consider complaints cumulative, lacked procedures that encouraged residents to file complaints, implemented inadequate corrective action plans, and continually licensed Glen Mills.

A594. In one breath, the District Court both asserts that Petitioners do not identify common policies or practices and then identifies the *precise* common policies and practices underpinning Petitioners' claims. And Petitioners' briefing was clear that "DHS Defendants violated the class's constitutional rights in two specific ways: (1) the DHS Defendants maintained licensing policies and practices that failed to ensure the safety and wellbeing of GMS youth; and (2) the DHS Defendants maintained deficient complaint-review policies and practices that utterly failed to capture, track, or address years of complaints of abuse and mistreatment at GMS." A431.

Not only did Petitioners identify these two common policies and practices that caused the harm *all* class members suffered, they also identified common questions that "are 'of such a nature that [they] are capable of classwide resolution—which means that determination of [their] truth or falsity will resolve an issue that is central to the validity

of each one of the claims in one stroke.'" A434. (quoting *Wal-Mart*, 564 U.S. at 350). These are precisely the sort of "uniform behavior or polic[ies that] created an excessive risk to the class members' health or safety" that can establish commonality. *See* A594 (citing *Ross v. Gossett*, 33 F.4th 433 (7th Cir. 2022); *Wilson v. Cnty. of Gloucester*, 256 F.R.D. 479 (D.N.J. 2009)). The District Court fundamentally erred in concluding that DHS Defendants' policies and practices did not create that excessive risk to the class.

DHS Defendants' uniform policies and practices fit squarely within *Wal-Mart*'s requirements. In *Ross*, incarcerated plaintiffs claimed prison-wide shakedowns were carried out "pursuant to a common policy or practice implemented, overseen, and encouraged by" a state agency. 33 F.4th at 435. So too, here: the class claims rest on DHS Defendants' role in creating, implementing, and maintaining the two uniform challenged policies and practices.

For the same reasons, the District Court wrongly concluded that Petitioners failed to establish typicality and predominance. On typicality, the District Court simply equated failure to establish commonality as to DHS Defendants with failure to establish typicality.

A596. And on predominance, the District Court stated that, "[a]s previously discussed, Plaintiffs here have not identified any such uniform behavior or policy that violated all class members' Eighth Amendment rights." A601. But, the District Court disregarded common policies and practices Petitioners identified. *See* A34:22-35:2 (explaining that "the common questions associated with defendant's licensing and complaint investigation policies that I just read to the Court. They are common. There is no other set of policies that were different with respect to any one of the 1,600 children."). The District Court's reasoning is plainly wrong on both of these issues, too.

III. This Court Should Clarify The Law On Issues Classes And Application Of The *Gates* Factors

Following this Court's decisions in *Gates* and *Russell*, district courts, including the court below, have struggled to consistently apply the factors—resulting in confusing and inconsistent rulings on issue class certification. Although the *Gates* factors identify *which* factors courts should consider, district courts differ on *how* to consider them. As this Court acknowledged in *Russell*, although "the *Gates* factors construct a functional framework to aid the district courts tasked with resolving issue-class certification questions … *Gates* did not define which 'issues'

would be appropriate for class treatment or, more importantly, which would not." 15 F.4th at 268-69. Since *Russell*, courts, including the District Court, have addressed the *Gates* factors, often taking a conflicting approach.

Recent opinions greatly differ in interpreting the second *Gates* factor—a case's overall complexity. Although some courts view highly complex cases like this one as more suitable for issue-class treatment, the District Court took the opposite approach. For example, in *C.P.*, the district court concluded that "[g]iven the complex issues of law and fact that apply to all of the class members, it would be most prudent to marshal them in one action for determination." 2022 WL 3572815 at *15. Likewise, in *In re FieldTurf Artificial Turf Mktg. & Sales Pracs. Litig.*, the district court concluded that factor two "counsel[s] in favor of granting certification because of the complex issues of fact that apply to the class members." 2023 WL 4551435, at *10 (D.N.J. July 13, 2023). But, here, the District Court reached the *opposite* conclusion, reasoning that factor two counsels *against* certification because "this is a complex matter involving complex claims." A616.

Similarly, factor six—the proposed issue class's potential preclusive effect—has produced conflicting views. Some courts have found that potential for preclusion leans in favor of granting class certification; the District Court held that it cuts against certification. In *FieldTurf*, the court certified an issue class, noting that "[a]s to factor six, resolution of the proposed issue classes will allow for one trial with a single, preclusive determination regarding FieldTurf's conduct, rather than repeated trials regarding the same evidence of the alleged defect and deception." 2023 WL 4551435, at *10. Likewise, in *C.P.*, the district court certified the class "with the understanding that it would be efficient to resolve certain issues in the class action forum and leave damages issues to individual actions." 2022 WL 3572815 at *15 (cleaned up). But, the District Court noted that the potential preclusive effect *disfavors* certification, because "[i]f the court were to make a classwide determination on issues where common and individual evidence are comingled, the danger exists that it could have a preclusive effect on the individual claims of class members." A629. This factor's centrality calls out for this Court's clarification.

Even though *Russell* clarified that issue classes do *not* need to resolve liability, 15 F.4th at 270, it is unclear how much of a claim an issue class must resolve before it becomes "efficient." Accordingly, post-*Russell*, courts have noted that there is little indication of what "type[s] of claims and issues" warrant certification. *C.P.*, 2022 WL 3572815, at *15; *see also FieldTurf*, 2023 WL 4551435, at *10 (noting same concern). The *C.P.* and *FieldTurf* courts certified issue classes that left questions of damages for individual determination. *C.P.*, 2022 WL 3572815, at *15; *FieldTurf*, 2023 WL 4551435, at *10.[3] But the District Court took the opposite approach, concluding that "[a]ny efficiencies that would be gained from certification are dwarfed by the countless individualized determinations that would be required." A629.

Courts have also acknowledged the limited guidance regarding the meaning of the first *Gates* factor (the type of issue or claim). *C.P.*, 2022 WL 3572815, at *15 ("[T]here is not much gloss in the case law on how to weigh this factor . . . ."); *FieldTurf*, 2023 WL 4551435, at *10 (same).

[3] *FieldTurf* also left the question of *causation* for individual determination. *FieldTurf*, 2023 WL 3272407 at *10.

Courts are analyzing the *Gates* factors in drastically different ways, leading to drastically different results for issue class plaintiffs. Definitive guidance is needed to ensure consistent rulings regarding issues classes.

CONCLUSION

This petition should be granted.

Dated this 28th day of May, 2024.

Respectfully Submitted,

/s/ Michael H. McGinley

Maura McInerney
Kristina A. Moon
Margaret M. Wakelin
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
(215) 238-6970

Marsha L. Levick
Katherine E. Burdick
Malik Pickett
Courtney M. Alexander
JUVENILE LAW CENTER
1900 JFK Blvd., Suite 1900B
Philadelphia, PA 19103
(215) 625-0551

Fred T. Magaziner
Michael H. McGinley
Clare Putnam Pozos
Caroline Power
Christopher J. Merken
Shane Sanderson
Luke D. Yamulla
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

CERTIFICATE OF ADMISSION TO THE BAR

Pursuant to 3d Cir. L.A.R. 28.3(d), I hereby certify that Fred T. Magaziner, Michael H. McGinley, Care Putnam Pozos, Caroline Power, Christopher J. Merken, Maura McInerney, Margaret M. Wakelin, and Marsha L. Levick are members in good standing of the bar of the United States Court of Appeals for the Third Circuit.

Dated: May 28, 2024

/s/ Michael H. McGinley

Maura McInerney
Kristina A. Moon
Margaret M. Wakelin
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
(215) 238-6970

Marsha L. Levick
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Caroline Power
Christopher J. Merken
Shane Sanderson
Luke D. Yamulla
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 5(C)(1) AND 32(A).

I hereby certify that this petition complies with the type-volume limitations of Federal Rule of Appellate Procedure 5(c)(1) because it contains 5,181 words, excluding material exempted by Federal Rule of Appellate Procedure 32(f). I also certify that this petition complies with the typeface requirements of Federal Rule Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point font.

Dated: May 28, 2024

/s/ Michael H. McGinley

Maura McInerney
Kristina A. Moon
Margaret M. Wakelin
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
(215) 238-6970

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Caroline Power
Christopher J. Merken
Shane Sanderson
Luke D. Yamulla
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

CERTIFICATE OF COMPLIANCE WITH 3D CIR. LOCAL APPELLATE RULE 31.1(C)

I hereby certify that this petition complies with the electronic filing requirements of 3d Cir. L.A.R. 31.1(c) because the PDF containing this petition electronically filed with the Court using the electronic filing system was scanned for viruses using CrowdStrike Windows Sensor Version 7.14.18408.0 and no virus was detected.

Dated: May 28, 2024

/s/ Michael H. McGinley

Maura McInerney
Kristina A. Moon
Margaret M. Wakelin
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
(215) 238-6970

Marsha L. Levick
Katherine E. Burdick
Malik Pickett
Courtney M. Alexander
JUVENILE LAW CENTER
1900 JFK Blvd., Suite 1900B
Philadelphia, PA 19103
(215) 625-0551

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Michael H. McGinley
Clare Putnam Pozos
Caroline Power
Christopher J. Merken
Shane Sanderson
Luke D. Yamulla
DECHERT LLP
Cira Centre
2929 Arch Street
Philadelphia, PA 19104
(215) 994-4000

CERTIFICATE OF SERVICE

I, Christopher J. Merken, hereby certify that on May 28, 2024, I caused a copy of the foregoing Petition for Permission to Appeal and Appendix pursuant to Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 5, with all exhibits thereto, to be served by email and overnight Federal Express on the following parties:

STRADLEY RONON STEVENS & YOUNG, LLP
Joseph J. McHale
Daniel T. Fitch
Michael J. Wise
2005 Market Street
Suite 2600
Philadelphia, PA 19103
(215) 564-8000
jmchale@stradley.com
dfitch@stradley.com
mwise@stradley.com

Counsel for Defendants-Respondents Glen Mills Schools and Randy Ireson

BALLAD SPAHR LLP
Henry E. Hockeimer, Jr.
Kaitlin M. Gurney
Paul Lantieri, III
John W. Scott
Joseph J. Bailey
Kathryn J. Boyle
(215) 665-8500
hockeimerh@ballardspahr.com
gurneyk@ballardspahr.com
lantierip@ballardspahr.com

scottj@ballardspahr.com
baileyj@ballardspahr.com
boylek@ballardspahr.com

PENNSYLVANIA DEPARTMENT OF EDUCATION
Elizabeth A. Anzalone
333 Market Street
Harrisburg, PA 17126
(717) 787-5500
eanzalone@pa.gov

Counsel for Defendants-Respondents Teresa D. Miller, Theodore Dallas, Cathy Utz, Pedro A. Rivera, and the Pennsylvania Department of Education

Dated: May 28, 2024

/s/ Christopher J. Merken

Maura McInerney
Kristina A. Moon
Margaret M. Wakelin
EDUCATION LAW CENTER
1800 JFK Blvd., Suite 1900A
Philadelphia, PA 19103
(215) 238-6970

Marsha L. Levick
Katherine E. Burdick
Malik Pickett
Courtney M. Alexander
JUVENILE LAW CENTER
1900 JFK Blvd., Suite 1900B
Philadelphia, PA 19103
(215) 625-0551

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Clare Putnam Pozos
Caroline Power
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Shane Sanderson
Luke D. Yamulla
DECHERT LLP
Cira Centre
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