No. 21-2286

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF THE COUNTY OF KANAWHA,

Defendant-Appellant,

and

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

Defendants.

On Appeal from the United States District Court
for the Southern District of West Virginia
No. 2:20-cv-00057

APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND FEDERAL RULE OF APPELLATE PROCEDURE 35(b) STATEMENT

This petition presents a question of fundamental importance regarding Rule 23(a)(2)'s commonality requirement and its application to actions seeking to vindicate the rights of students with disabilities.

Plaintiffs contend that the Board of Education of the County of Kanawha ("Board") has failed to enact adequate policies that meet the requirements of the Individuals with Disabilities Education Act ("IDEA") for (1) identifying students with disabilities who need behavior supports, (2) implementing behavior supports, (3) monitoring those supports' efficacy, and (4) training staff responsible for providing behavior supports. The Board's failure has stark consequences: Kanawha County Schools ("County") suspends students with disabilities at a disproportionate rate as compared to students without disabilities, resulting in widespread denials of free appropriate public education ("FAPE") to, and unnecessary segregation of, students with disabilities.

The District Court certified a Rule 23(b)(2) class challenging the "policies" and "procedures that [the County] uses, or does not use, to develop and implement [behavior] supports," JA1589, but a divided panel of this Court reversed for lack of commonality. In a sweeping decision, the panel majority held that no class may be certified unless there is a "'single'" "'uniformly applied, official policy of the school district, or an unofficial yet well-defined practice,'" that "drives the alleged harm to

all class members." Opinion ("Op.") 18-19, 23 (citations omitted). In other words, the panel held there was no common contention central to the validity of each class member's claims because the class challenges *several* inadequate or nonexistent policies, not a single policy that injured all of them.

En banc review is warranted because the majority misconstrued settled law governing commonality in actions challenging deficient policies. As the Supreme Court and this Court have recognized, commonality is satisfied when adjudication of an issue drives the resolution of each class member's claim in one stroke. Here, commonality is satisfied because each failure to enact a policy that every class member is entitled to is a harm common to the entire class—regardless of whether class members experience different effects. It makes no sense to say that because the Board failed in numerous discrete areas, there is not a single common contention that can tie together all class members' claims and be addressed by a single injunction.

En banc review is also warranted because the majority departed from other circuits' precedent. The majority's suggestion that class litigation is only permissible when one inadequate or nonexistent policy has denied FAPE to every single class member would create "preposterous" impediments to IDEA class litigation, adding to the barriers that students with disabilities already face in seeking to access education and vindicate their rights. *DL v. District of Columbia*, 860 F.3d

713, 731 (D.C. Cir. 2017). And en banc review is needed to ensure that systemic violations of the IDEA and other civil rights statutes can be remedied through Rule 23(b)(2) class actions.

At a minimum, the panel should grant rehearing to clarify an ambiguous footnote that could be construed to suggest that the IDEA does not authorize prospective injunctive relief. Op. 24 n.9. The parties did not brief the contours of equitable relief available under the IDEA, and the majority's statement is in tension with settled precedent holding that traditional injunctive relief *is* available under the IDEA. This footnote should be revised to avoid sowing confusion in this Circuit.

BACKGROUND

A. The IDEA

In exchange for federal funds, States and Local Educational Agencies ("LEAs") such as the Board undertake affirmative legal obligations to establish "policies, procedures, and programs" for providing FAPE to students with disabilities in the "[l]east [r]estrictive [e]nvironment." 20 U.S.C. §§ 1412(a)(1)(A), 1412(a)(5)(A), 1413(a)(1); JA949, 1061.

The Board must establish system-wide policies to ensure that each student with a disability receives an Individualized Education Program ("IEP") that is "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances." *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist.*

RE-1, 580 U.S. 386, 403 (2017); 20 U.S.C. §§ 1412(a), 1413(a)(1). Four types of policies required by the IDEA are relevant here.

First, LEAs must identify students with disabilities who are eligible for special education and determine which of those students need "behavior supports" to receive FAPE. *Id.* §§ 1414(a)(1)(A), (b)(4), (d)(3)(B)(i), 1412(a), 1413(a)(1); JA193 n.3 (defining behavior supports). When a student with a disability engages in "behavior [that] impedes the [student]'s learning or that of others," IEP teams must "consider the use of positive behavioral interventions and supports, and other strategies." 20 U.S.C. § 1414(d)(3)(B)(i); *see also* JA193 n.3, 222-23, 283-84 (describing Functional Behavior Assessments and Behavior Intervention Plans that document why students with disabilities engage in challenging behaviors, ways to mitigate those behaviors, and criteria for monitoring progress).

Second, if a behavior support is necessary to provide FAPE to a student with a disability, the Board must implement that support in the student's IEP. 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *see also* JA565.

Third, the Board must establish uniform policies for monitoring the progress of students with disabilities, including those who need behavior supports, toward the goals set in their IEPs. *See* 20 U.S.C. § 1414(d)(4)(A)(i) (requiring annual IEP review); *id.* § 1414(d)(4)(A)(ii) (the Board "shall ensure" the IEP Team "revises the IEP as appropriate to address . . . any lack of expected progress").

Fourth, the Board must "ensure that personnel necessary to carry out [the IDEA] are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities." 20 U.S.C. § 1412(a)(14)(A); *see also id.* §§ 1412(a)(14)(D), 1413(a)(3); JA1006.[1]

B. This Litigation

This litigation challenges the County's system-wide failure to satisfy its affirmative legal obligations under the IDEA. Plaintiffs G.T. and K.M. are two of many students with disabilities in the County who have been subject to disciplinary removals. JA26-27, 285, 302. Plaintiffs allege that the County's disproportionate rate of disciplinary removal for students with disabilities is a symptom of "the [Board's] systemic policies, practices, and procedures that violate federal and state law," including the IDEA. JA860; *see also* JA27, 29, 37, 62.

After pursuing relief on behalf of themselves and similarly situated students through the administrative process, Plaintiffs sued and moved to certify a Rule 23(b)(2) class of "[a]ll [County] students with disabilities who need behavior supports and have experienced disciplinary removals from any classroom." JA858. Plaintiffs proposed several common questions regarding the inadequacy or

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[1] Plaintiffs also brought claims under the Americans with Disabilities Act, 42 U.S.C. § 12132, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794(b)(2)(B), and state law. Op. 10. As with the District Court and panel opinions, this petition addresses Plaintiffs' IDEA claims. Dissenting Op. 28 n.1.

nonexistence of the Board's "systems," "procedures," and "'practices'" in several areas subject to the IDEA's affirmative obligations, including: "identifying students with disabilities who need behavior supports"; "implementing IEPs . . . for students with disabilities who need behavior supports"; "monitoring" the academic and disciplinary progress of "students with disabilities who need behavior supports"; and "training" staff "so that they can provide behavior supports." JA879 (citation omitted). Plaintiffs contended that each one of the Board's inadequate or nonexistent "systemic policies . . . and practices place[s] the class members at significant risk of harm for denials of FAPE in the [least restrictive environment]." JA881; *see also* JA1409-11.

C. The District Court's Decision

The District Court granted Plaintiffs' motion. JA1595. As relevant here, the court held that class members' "claims . . . depend upon a common contention" that "is capable of class wide resolution." JA1585 (citation omitted). The court recognized that Plaintiffs were challenging "the procedures that [the County] uses, or does not use, to develop and implement [behavior] supports," not the "behavioral supports that should be provided to the individual students." JA1589. The Board's inadequate or nonexistent policies and practices have system-wide consequences, such as "a failure to consistently implement [behavior intervention plans]," "a lack of evaluation and adjustment to plans over time to reflect the responses and changing

needs of students," and "a lack of oversight and training at the district level." JA1588. Because Plaintiffs are subject to "multiple inadequa[te]" policies, "[o]ne single policy change would not be sufficient to resolve the Plaintiffs' claims," JA1594—but the court observed that "district-wide policies, procedures, and resources" that meet the IDEA's legal requirements "would resolve the claims for the class as a whole," JA1589.

D. The Majority's Decision And Judge Wynn's Dissent

In a published opinion, a divided panel reversed and remanded. The majority concluded that the certified class did not satisfy Rule 23(a)(2)'s commonality requirement. Op. 3. The majority acknowledged that IDEA classes can be certified if plaintiffs "identify a 'uniformly applied, official policy of the school district, or an unofficial yet well-defined practice, that drives the alleged violation.'" *Id.* at 18 (citation omitted). Though Plaintiffs challenged several of the Board's policies or practices, the majority held that commonality was lacking because "Plaintiffs' claims are 'vastly diverse,' as their alleged harms involve different practices at different stages of the special education process." *Id.* at 20 (citation omitted). The majority applied the same reasoning to Plaintiffs' argument that the Board failed to enact policies required by law, concluding that no common contention bridged the claims of a plaintiff who "never had behavioral supports implemented" and a plaintiff who "had behavior supports implemented . . . but their efficacy was not

monitored because of a lack of training." *Id.* at 26. According to the majority, class members did not suffer the "'same injury'" despite being "subject to the same inadequate policies . . . because their individual claims of harm stem from different alleged policy failures." *Id.* (citation omitted).

In dissent, Judge Wynn explained that the majority misapprehended Plaintiffs' claims and the commonality requirement. In Judge Wynn's view, Plaintiffs sought class certification to challenge the "common risk that derives from a discrete set of policy failures" regarding identification, implementation, monitoring, and training. Dissenting Op. 28, 41. Judge Wynn noted that "all class members share a common risk of harm that would be addressed by an injunction pertaining to any of the Board of Education's relevant policy failures." *Id.* at 57. This was so "even if some class members would benefit more from an injunction than would others." *Id.* Judge Wynn would have vacated the class certification order with instructions to address G.T.'s and K.M.'s standing as to each challenged "policy failure[]." *Id.* at 29; *see id.* at 52-56.

ARGUMENT

I. EN BANC REVIEW IS NEEDED TO CORRECT THE MAJORITY'S FLAWED COMMONALITY ANALYSIS

A. The Majority Contradicts Settled Precedent Governing Rule 23(a)(2)'s Commonality Requirement

1. "[Q]uestions of law or fact common to the class" for purposes of Rule 23(a)(2) are ones that "generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349-50 (2011) (citations omitted). The claims of each class member must "depend upon a common contention," the "truth or falsity" of which "will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 350. The existence of "'[e]ven a single [common] question'" ensures "all" class members' "claims can productively be litigated at once." *Id.* at 350, 359 (alterations in original) (citation omitted).

Commonality requires class members to show that they "have suffered the same injury." *Id.* at 349-50. An allegation that "all" class members "suffered a violation of the same provision of law" such as Title VII is insufficient, but an "assertion of discriminatory bias on the part of the same supervisor" is a "common contention" capable of advancing several Title VII claims at once. *Id.* at 350; *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982) ("same injury" requirement ensures "the individual's claim and the class claims will share common questions of

law or fact"). This Court has likewise recognized that commonality may be satisfied through proof that class members were subject to the uniform, unlawful "conduct of the *defendant*." *Berry v. Schulman*, 807 F.3d 600, 609 (4th Cir. 2015); *Brown v. Nucor Corp.*, 785 F.3d 895, 917 (4th Cir. 2015) (commonality satisfied by "ample evidence" of "a common, racially-biased exercise of discretion throughout [steel] plant"); *see also Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 117 (4th Cir. 2013) (alleged "uniform corporate policies" and "high-level corporate decision-making" were "substantively different" from local discretion allegations in *Wal-Mart*). And commentators agree that commonality is often satisfied when "the proposed class was subjected to the same alleged root conduct by the same parties, and that putative class members were harmed in the same way, even if potentially to different degrees." 1 *McLaughlin on Class Actions* § 4:7 (20th ed., 2023 update); *see also* 1 William B. Rubenstein, *Newberg and Rubenstein on Class Actions* § 3:20 (6th ed., 2024 update); 7A Charles Alan Wright et al., *Federal Practice and Procedure Civil* § 1763 (4th ed., 2024 update). Questions regarding a defendant's conduct serve the core purpose of Rule 23(a)(2): failure to prove that conduct is illegal "end[s] the case for one and for all," while success advances every class member's claim. *Amgen Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 468 (2013).

2. These principles, applied here, demonstrate that Plaintiffs have satisfied the commonality requirement.

Plaintiffs' claims turn on policies mandated by the IDEA to ensure the provision of necessary behavior supports to students with disabilities and avoid unnecessary segregation. *Supra* at 3-7. As the District Court noted, the Board has inadequate or nonexistent policies with respect to identifying students who need behavior supports, preparing "[functional behavior assessments] or [behavior intervention plans] for [members of the] IEP teams to refer to," overseeing "each school's behavior policies and administration of discipline," monitoring "IEPs or data related to student outcomes," and conducting "training related to [functional behavior assessments] or implementing behavior supports." JA1572-73; JA675-83 (deposition testimony of former County assistant superintendent). These policies and practices constitute the Board's uniform, allegedly unlawful conduct toward the class as a whole.

Whether the Board has policies that meet the IDEA's legal requirements is central to the validity of Plaintiffs' claims. As Judge Wynn explained, such questions are "objective" and "can be proved through [common] evidence." Dissenting Op. 44-45 (quoting *Amgen*, 568 U.S. at 467). If the Board's policies and practices comply with the IDEA's affirmative obligations, *see* Op. 25 n.11; Dissenting Op. 39 n.7, then every class member's claim will fail. But if Plaintiffs

are right, that answer would apply class-wide, drive the ultimate resolution of this case, and provide the basis for a single injunction mandating correction of the Board's illegal policies. "[D]ifferences between class members" only matter under Rule 23(a)(2) if they "impede the discovery of common answers." *Brown*, 785 F.3d at 909. Here, any individualized differences in the effects of the Board's policies or practices on particular students do not prevent class-wide resolution of whether class members have been "exposed" to policies and practices that do not meet the IDEA's requirements. Dissenting Op. 42 (citation omitted).

3. In reaching the opposite conclusion, the majority misunderstood the commonality requirement.

The majority held that commonality was not satisfied because the "alleged harms involve different practices at different stages of the special education process." Op. 20; *id.* at 24-26 (rejecting challenge to "the Board's failure to enact policies the IDEA requires" on the "same" ground).[2] That is incorrect. Alleging multiple breakdowns in a defendant's centralized policies is not a barrier to class treatment. *See, e.g.*, *B.K. ex rel. Tinsley v. Snyder*, 922 F.3d 957, 965, 972 (9th Cir.

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[2] According to the majority, Plaintiffs forfeited a challenge to "the Board's failure to enact policies the IDEA requires." Op. 24-25 & n.10. But, as Judge Wynn noted, that conclusion rests on a cramped reading of the record. Before the District Court and on appeal, Plaintiffs have contended that the Board "has failed to enact four legally required policies." Dissenting Op. 39-41 & n.8.

2019) (challenging nine allegedly deficient practices). Here, for example, inadequate staff training has harmed and continues to harm the educational progress of students with disabilities who need behavior supports at the identification, implementation, and monitoring stages of the special education process.[3] All class members are entitled to assert on the merits that the Board failed them as to *all* the areas of deficiency.

Indeed, the majority did not appear to foreclose certification of a class based *exclusively* on a training violation. Op. 26 & n.12. But if that is so, then the majority's rejection of training as a common question does not follow; the same class would be bringing the narrowed challenge, and a class cannot have *less* in common simply because it is challenging *more* policies.

The majority's error appears to rest on a misunderstanding of *Wal-Mart*'s requirement that class members show the "same injury." Op. 26 (quoting *Wal-Mart*, 564 U.S. at 349-50). Class members suffer the "same injury" without experiencing identical effects, so long as their claims flow from a common act or practice *by the defendant*. *Supra* at 9-10. *Wal-Mart* "did not hold that named class plaintiffs must prove at the class-certification stage that all or most class members were in fact

[3] The majority stated that Plaintiffs conceded at oral argument that the Board's identification policy does not pose a common question. Op. 20 & n.8. As Judge Wynn aptly explained, Plaintiffs' counsel made no such concession, and identification is a common question. Dissenting Op. 45 n.9.

injured to meet [the commonality] requirement." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015). And the fact that a student with a disability is "luck[y]" and receives FAPE after overcoming a cascade of policy failures is not a reason to insulate the Board's system-wide policies from system-wide challenges in IDEA cases. Dissenting Op. 51.

At bottom, the majority mistook this case for "a suit challenging hundreds of individualized special education decisions." Op. 18. As Judge Wynn recognized, however, this action challenges *the Board's* "*systemic failures*" in the form of nonexistent and deficient "policies and procedures" regarding behavior-support-related identification, implementation, monitoring, and training. Dissenting Op. 50 (first quoting JA858; then quoting JA1403). Those district-wide policies are root causes of class-wide harm, and whether those courses of conduct are illegal is a common contention central to the validity of every class member's claim.

B. The Majority Conflicts With Other Circuits' Precedent

1. The majority breaks with *DL v. District of Columbia* ("*DL II*"), 860 F.3d 713 (D.C. Cir. 2017) (citation omitted). There, the D.C. Circuit affirmed certification of three subclasses, each of which challenged a deficient or poorly implemented "uniform policy or practice" regarding identification of students with disabilities. *Id.* at 724 (citation omitted). The D.C. Circuit held that commonality was satisfied even though each challenged "uniform policy or practice" did not deny

FAPE to every single subclass member. With respect to a subclass of "toddlers denied smooth and effective transitions to preschool," for example, the D.C. Circuit held that commonality was satisfied based on "evidence that the District failed to provide smooth transitions to 30 percent of toddlers" and upheld "a single injunction requiring annual improvement." *Id.* at 724-25. In other words, an IDEA plaintiff need only establish that a "harm is *likely* to have similar causes (the policy) and effects (denial of services appropriate to that individual student) across the class." *Parent/Pro. Advoc. League v. City of Springfield*, 934 F.3d 13, 29 (1st Cir. 2019) (emphasis added). By contrast, the majority held that being "subject to the same inadequate policies is insufficient" if a policy does not injure "all class members." Op. 25-26. Making universal injury a prerequisite for showing commonality threatens to push challenges to inadequate or nonexistent policies away from "class actions cured through structural remedies" and toward individual cases "handled one-by-one"—a result the D.C. Circuit correctly rejected as "preposterous." *DL II*, 860 F.3d at 730-31.

2. The majority also conflicts with *Elisa W. v. City of New York*, 82 F.4th 115 (2d Cir. 2023). The plaintiffs challenged "systemic deficiencies" in New York City's foster care system, such as the defendant's (1) lack of processes for placing foster children with agencies and appropriate families, and (2) failure to establish "robust training requirements" for agencies' caseworkers. *Id.* at 124. In vacating

the denial of certification, the Second Circuit recognized that whether the defendant had processes and whether its training requirements were unlawfully deficient could be addressed "in one stroke," regardless of plaintiffs' individual circumstances. *Id.* at 125-26. Here, too, deciding whether the Board has policies that meet the IDEA's affirmative obligations does not require individualized determinations. But the majority's approach disregards these common contentions binding the class's claims.

C. The Majority Undermines Class Actions As Means Of Correcting Systemic Failures

En banc review is also warranted in light of this decision's exceptional importance for IDEA class actions and potential impact on class actions seeking to vindicate other civil rights. "[C]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of Rule 23(b)(2) class actions. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997). If plaintiffs cannot challenge multiple policy failures simultaneously, it will incentivize bad behavior and make it practically impossible to swiftly end unlawful government policies and practices that harm students with disabilities. As the amicus briefs submitted on initial hearing underscore, the commonality requirement should not be construed to undercut the availability of relief for systemic violations of the IDEA and other civil rights protections. *See generally* ECF Nos. 30, 31, 33, 35.

II. PANEL REHEARING IS WARRANTED TO REVISE AN UNNECESSARY STATEMENT REGARDING EQUITABLE RELIEF UNDER THE IDEA

In a footnote, the majority stated that "[n]either statutory text nor precedent authorizes federal courts to order relief under the IDEA based on the 'risk that [a student] will be denied their right to' a FAPE." Op. 24 n.9 (alteration in original) (quoting Dissenting Op. 36). This Court should revise or eliminate this unnecessary sentence, which has the potential to sow significant confusion on a merits question about equitable relief under the IDEA.

This statement is arguably dicta because it addresses a "merits" issue that "wanders far afield from the parties' certification arguments" in their briefing. Op. 24 n.9. But nonetheless, this statement could cause great confusion and disruption within this Circuit's law. Settled precedent confirms that Plaintiffs in IDEA cases may "seek traditional injunctive relief pursuant to the court's authority under 20 U.S.C. § 1415(i)(2)(C)(iii), which broadly authorizes the court to 'grant such relief as the court determines is appropriate.'" *Davis ex rel. Davis v. District of Columbia*, 80 F.4th 321, 329-30 (D.C. Cir. 2023); *Honig v. Doe*, 484 U.S. 305, 326-27 (1988) (IDEA "empowers courts to grant any appropriate relief," including "injunctive relief"). As this Court explained, when a family seeks a "preliminary injunction changing [their child's] placement," that request may be made under the IDEA's general grant of equitable power and is subject to "the standards generally governing

requests for preliminary injunctive relief." *Wagner v. Bd. of Educ. of Montgomery County*, 335 F.3d 297, 302-03 (4th Cir. 2003); *see also Johnson v. Charlotte-Mecklenburg Schs. Bd. of Educ.*, 20 F.4th 835, 845 (4th Cir. 2021) (IDEA authorizes "prospective correction of a deficient IEP"). This statement should be revised to avoid suggesting that even when the traditional criteria for injunctive relief are met, the IDEA does not authorize prospective relief to prevent future harm.

CONCLUSION

For the foregoing reasons, rehearing is warranted.

Dated: September 19, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(g)

Counsel for Appellees hereby certifies that:

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2)(A). The petition contains 3,898 words (as calculated by the word processing system used to prepare this document), excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

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

Dated: September 19, 2024

s/ Samir Deger-Sen
Samir Deger-Sen

Counsel for Appellees

CERTIFICATE OF SERVICE

I, Samir Deger-Sen, hereby certify that on September 19, 2024, the foregoing Appellees' Petition For Panel Rehearing And Rehearing En Banc was filed with the clerk's office for the United States Court of Appeals for the Fourth Circuit and served on counsel of record via the Court's CM/ECF system.

s/ Samir Deger-Sen
Samir Deger-Sen

Counsel for Appellees