In the Wisconsin Court of Appeals

DISTRICT IV

JANE DOE 4,
PLAINTIFF-APPELLANT,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
DEFENDANT-RESPONDENT,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL, and GENDER SEXUALITY ALLIANCE OF ROBERT M. LA FOLLETTE HIGH SCHOOL,
INTERVENORS-DEFENDANTS-RESPONDENTS

On Appeal from the Dane County Circuit Court,
The Honorable Frank D. Remington, Presiding,
Case No. 2020-CV-454

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Ordinances

Other Authorities

Rules and Regulations

ISSUES PRESENTED

1. Whether parents have standing to preemptively challenge a school district policy that not only violates parents' constitutional rights on its face, but also requires school staff to hide the violation from them when it is occurring?

The Circuit Court held that Jane Doe 4 does not have standing to challenge the District's policy.

2. Whether the Circuit Court erred by failing to enjoin a significant, and currently ongoing, violation of parents' rights?

The Circuit Court denied Jane Doe 4's preliminary injunction motion by instead dismissing the case, even though the injunction motion was the only motion pending.

3. Whether the work-product doctrine and/or Wisconsin's discovery statutes protect, from discovery, an attorney's mental impressions, conclusions, opinions, legal theories, and the like, reflected in emails and drafts exchanged with an expert? Whether the Circuit Court erred by ordering Plaintiff to pay attorneys' fees for a motion to compel, even though Plaintiff's opposition was "substantially justified," Wis. Stat. § 804.12(1)(c)1? Whether the Court erred by retroactively striking Plaintiff's expert's affidavit, after the case had been dismissed and Plaintiff had appealed, based on a "moot" order that was only entered after it was mooted by the dismissal?

The Circuit Court ordered Plaintiff to produce communications and drafts between Plaintiff's counsel and expert, regardless of whether those materials contain attorney work product, even though no Wisconsin law or precedent authorizes discovery of such materials, and contrary to the text of Wisconsin's statutes, the Wisconsin Supreme Court's decision in *Dudek*, and federal practice, and then required

Plaintiff to pay Defendants' attorneys' fees on a motion to compel. Plaintiff indicated she was planning to appeal that order, but before that order was even entered, the Court dismissed the case, holding that the order was "moot" as a result of the dismissal. Nevertheless, after Plaintiff had appealed, the Court issued an order striking Plaintiff's expert's affidavit for not having not yet complied with a "moot" order that she had already indicated she was appealing.

4. Whether the Court erred by sealing Dr. Leibowitz's deposition transcript?

After Plaintiff appealed, the Court entered an order sealing the transcript of the deposition of Defendants' expert, even though their expert has publicized his affidavit and participation in this case.

INTRODUCTION

Last summer, the Wisconsin Supreme Court remanded this case to the trial court, directing it to rule on the parents' long-outstanding preliminary injunction motion. Instead, the Court dismissed the case for lack of standing, in conflict with well-established precedent on standing, even though Defendants had raised and lost the same standing argument in a motion to dismiss two years earlier, and even though the only motion pending was Plaintiff's injunction motion.

Worse yet, there is now evidence that the District is *currently* violating parents' constitutional rights. The District admits that it has and is facilitating gender transitions at school without the parents' awareness for students under eighth grade, though even it claims not to know how often it has done so or is currently doing so. And Defendants' expert [redacted]

[redacted]

A preemptive lawsuit is the only way to prevent lifelong harm to minors and preserve parents' constitutional rights, because parents cannot be expected to know either the future or what the District is hiding from them. No professional organization recommends that untrained school officials secretly facilitate gender transitions without involving parents and experts; [redacted] This Court should reverse on all issues presented in this appeal.

ORAL ARGUMENT AND PUBLICATION

This case warrants both oral argument and publication.

STATEMENT OF THE CASE

A. Procedural History

Because this case was already before this Court, Plaintiff assumes the Court's familiarity with the background and provides mostly updated background material since the Wisconsin Supreme Court's decision last summer. *Doe v. Madison Metro. Sch. Dist.*, 2022 WI 65, 403 Wis. 2d 369, 976 N.W.2d 584 (hereafter "*Doe I*").

Briefly, however, the District's Policy challenged in this case provides that students (without any age limit) may change gender identity at school by selecting a new "affirmed name and pronouns" to be used at school "regardless of parent/guardian permission to change their name and gender in [the District's] systems." App. 64. All teachers and staff must "refer to students by their affirmed names and pronouns" (as opposed to their actual legal names); failure to do so is "a violation of the

[District's] non-discrimination policy." App. 64. Staff are prohibited from "disclos[ing] any information that may reveal a student's gender identity"—including the new "affirmed name and pronouns" being used at school—"to others, *including parents or guardians* … unless legally required to do so or unless the student has authorized such disclosure." App. 60. The Policy then directs staff to actively deceive parents, by "us[ing] the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family," App. 62, so as not to "out students while communicating with family," App. 61. The District directs its staff to record a student's new "affirmed" name and pronouns in a form that the District instructs should be "ke[pt] … in your confidential file, not in student records," App. 65–66, to evade (and in violation of) state law that gives parents the right to access their children's school records. Wis. Stat. § 118.125. *See Doe I*, 2022 WI 65, ¶3.

Fourteen parents with children in the Madison School District filed this case nearly three years ago and immediately moved for a preliminary injunction. R.2, 28, 30. The Circuit Court, however, declined to hear that motion until after a subsequently filed motion to dismiss, based on an erroneous interpretation of Wis. Stat. § 802.06(1)(b). R.118:5–22. After the Court denied the motion to dismiss, it still would not consider the outstanding injunction motion until after resolution of the parents' appeal of the anonymity issue, R.95:25–31, even though Wis. Stat. §§ 808.07 and 808.075 provide that courts may "grant an injunction" "whether or not an appeal is pending"—suggesting that parties are entitled to be heard if they have asked for one.

Plaintiffs then moved for an injunction pending appeal, which the Circuit Court partially granted, preventing District staff from lying to parents in response to direct questions (that limited injunction is no longer in place). R.157. Plaintiffs moved for broader injunctive relief at this Court—both a preliminary injunction and injunction pending

appeal—but this Court denied their motion because, in this Court's view, the harms were too "speculative" to warrant an injunction. R.159. When the case reached the Wisconsin Supreme Court, Plaintiffs also asked that Court for broader, temporary injunctive relief.

In its decision last summer, a majority of the Court declined to reach the question of whether the District's policy should be temporarily enjoined while this case proceeds, finding that a request for an injunction pending appeal was moot once the appeal as to anonymity was resolved, and that Plaintiffs' request in the alternative for a preliminary injunction was not properly before the Court because the original preliminary injunction motion that Plaintiffs filed back in February 2020 remained pending before the Circuit Court. *Doe I*, ¶¶30–40.

While the four-Justice majority did not address the merits of Plaintiffs' injunction request one way or the other, three dissenting Justices not only would have reached the question, they also would have enjoined the District's Policy. *Doe I*, ¶¶67–95, 97–98 (Roggensack, J., dissenting). The dissenting Justices (again, the only three to comment on the injunction question) recognized that the District's Policy "deprive[s] parents of their constitutional rights without proof that parents are unfit, a hearing, a court order, and without according parents due process," by "affirmatively exclud[ing] [parents] from decision-making unless their child consents." *Id*. ¶89. Under the District's Policy, "[p]arents will not be told that their child is socially transitioning to a sex different from that noted at birth without the child's consent, yet social transitioning is a healthcare choice for parents to make." *Id*. ¶92. The dissenters emphasized that, "[w]ithout an injunction, the parents have no way of becoming involved in such a fundamental decision." *Id*. Finally, "the parents will suffer irreparable harm, [because] [t]he MMSD Policies are on-going and continue to invade parents' constitutional right to parent their children." *Id*. ¶93.

The Court issued its decision on July 8, 2022, and the majority remanded to the Circuit Court with instructions "to proceed with the adjudication of the parents' claims," emphasizing that it "expect[s] the circuit court will address the pending motion" for a preliminary injunction. *Id.* ¶¶35, 41.

Shortly thereafter, Jane Doe 4 (the only plaintiff that remains of the original fourteen[1]) identified herself, and on July 26, 2022, submitted a letter to the Circuit Court asking the Court to set a prompt briefing schedule and hearing date for her long-outstanding motion, as the Wisconsin Supreme Court directed, and indicating that she would stand on her original filings. R.195. The Circuit Court set a scheduling conference for two weeks later, and then set a lengthier briefing schedule with a hearing for October 13, 2022. R.217, 226.

In their response brief, Defendants[2] argued briefly that Jane Doe 4 lacked standing, R.232:22–26,[3] an argument identical to one they raised in a motion to dismiss two years earlier that the Circuit Court had already rejected, *compare id. with* R.48:8–11; R.79; R.95:39–42.[4]

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[1] Most of the other fourteen parents withdrew from the case when their children stopped attending the District, for one reason or another, over the past three years. *E.g.* R.107, 149, 174. If Jane Doe 4's child leaves the District before this case is resolved, Plaintiff's counsel expects to add other parents as plaintiffs.

[2] "Defendants" throughout refers collectively to the District and Intervenors.

[3] Page number references are to the court-stamped page numbers at the top, not to the parties' page numbers at the bottom of documents.

[4] In their brief, Defendants relied on Jane Doe 4's statements during her deposition that she has no indications that her child is currently dealing with gender dysphoria or otherwise struggling with gender identity—at least that she is aware of. R.232:22–26*; see infra* pp. 27–29 (a more detailed discussion of Plaintiff's deposition). Plaintiffs had openly acknowledged the same during the motion to dismiss hearing two years earlier, explaining they were not relying, for standing purposes, on any

During a hearing on September 29 (unrelated to Plaintiff's injunction motion), the Circuit Court, *sua sponte*, floated the idea of dismissing the case if it agreed with Defendants' argument as to standing. R.260:21–22. Plaintiff strenuously objected, pointing out that the only motion pending was Plaintiff's preliminary injunction motion, that Defendants had already raised (and lost) the exact same argument on standing in their motion to dismiss, and that it would be premature to rule on summary judgment because the parties were still in the midst of discovery. R.259; 260:24–25, 28–33.

During the hearing on October 13—ostensibly on Plaintiff's preliminary injunction motion—the Circuit Court asked only about standing, R.288:21–58, and would not allow Plaintiff to make oral arguments on the factors for a preliminary injunction (likelihood of success, harm, etc.), R.288:58. Plaintiff continued to object that Defendants had not filed any motion, that whatever-it-was could not be a motion to dismiss, because Defendants had already filed one, including an argument on standing, and lost, R.288:51, and because the Court was considering things "outside the pleadings," R.288:28. Plaintiff further argued that a summary judgment ruling would be premature because Plaintiff had not finished developing the record she would want for purposes of any summary judgment ruling, including on standing. R.288:23–25, 29–30, 32–33, 51. The Circuit Court stated that it viewed the posture as something "between a motion to dismiss and motion for

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argument "that their children a[re] presently dealing with gender dysphoria," R.95:21, but instead on the fact that "the issue of gender dysphoria can come up for [a] child at any time," that parents "have no way to know in advance whether their children will deal with this issue or not," and that parents *must* sue preemptively given the District's policy to conceal things from them, R.95:27–31. During her deposition, Plaintiff likewise testified that she does not know what the future holds for her child, would not necessarily know if her child began struggling with gender identity, and would not know what the District is concealing from her. *Infra* pp. 27–29.

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summary judgment," R.288:29, but also put Plaintiff "on notice" that it might revisit its decision on the motion to dismiss, R.288:51–52. The Court rejected Plaintiff's objections to the process, but allowed her to file a supplemental brief on standing, R.288:31–32, which she did, R.290.

During another hearing on November 7 (on an unrelated discovery dispute), the Court asked whether the parties agreed that there were no disputed facts for purposes of standing. R.310:43–52. Plaintiff disagreed, emphasizing that there were disputes between the experts that were potentially relevant to standing, and that Plaintiff was still in the midst of discovery, R.310:47–48, 48–49. Plaintiff also continued to object to the process. *Id*. The Court directed the parties to file statements as to which facts they thought were relevant to standing by November 17.

On November 11, Plaintiff deposed Defendants' expert, Dr. Leibowitz, and during that deposition, Dr. Leibowitz [redacted] (see *infra* Background Part II.C). In her statement on November 17, Plaintiff referred to Dr. Leibowitz's deposition, Dr. Levine's affidavits, and discovery Plaintiff was seeking from the District as facts that all might be relevant to standing (more below). R.307.

Nevertheless, a few days later, the Circuit Court issued a decision and final order dismissing the case on standing. App. 4–36. Although the Court's decision begins by stating that "The sole issue in this case is whether a parent has standing…," App. 4, this Court should treat this decision as a denial of Plaintiff's injunction motion, for multiple reasons: (1) Plaintiff's injunction motion was the only motion pending before the Court; (2) the Circuit Court assured that its decision would be a ruling on Plaintiff's injunction motion, R.288:35 ("I'm going to rule on your motion for preliminary injunction"); R.288:36 ("[I]f I conclude that Jane Doe [4] doesn't have standing, then I'm gonna deny the preliminary injunction, and I probably very well would conclude that the case should

be dismissed."); (3) the Circuit Court framed its decision in the context of Plaintiff's injunction motion, App. 7–10 ("Jane Doe asks the Court for an injunction … [and] must show a 'reasonable probability of ultimate success,' … [b]ut a party with no standing cannot succeed.").

The procedural background specific to the discovery rulings also appealed (issues 3, 4) is included in the relevant sections below.

B. Additional Support for Plaintiff's Claims

1. The District is Currently Violating Parents' Rights and Causing Harm to Children

There is now evidence that the District *is currently violating parents' rights and causing harm to children*. Plaintiff submitted discovery requests to the District, asking how many students in the District have a "Gender Support Plan" without at least one parent or guardian's awareness, and, separately, how many students in the District are being addressed by staff using a different name and pronouns without at least one parent or guardian's awareness.[5] R.254:17–18, 19–20.

With respect to the former category, the District admitted to at least two situations, *below 8th Grade*, in which it has implemented a Gender Support Plan "where the District is not certain whether either parent is currently aware." R.254:18. And the District admitted that it implements Gender Support Plans for students as young as 4k. R.254:17.

[5] These are different categories, since, under the District's Policy, students can change their name and pronouns at school, in secret from their parents, without a Gender Support Plan. App. 64. As further proof of this, in their discovery responses, the District claimed that there are no students above eighth grade with a "Gender Support Plan," R.254:17, yet the Intervenors introduced affidavits from high school students testifying to multiple other students being addressed at school by opposite-sex name and pronouns without their parents' awareness. R.60 ¶¶13–14; R.61 ¶¶11–12; R.62 ¶¶11–12.

There may be many more such situations in the District. The District's response stated that "the District is still locating records," without any indication of how far along it was in the process of "locating records," R.254:17, and the Circuit Court cut off the discovery process before Plaintiff could get to the bottom of this, so the actual number may be substantially higher. Worse yet, if teachers follow the District's direction to keep any Gender Support Plan in their "confidential file" rather than in central student records, App. 65, the District *itself* may not even know how many students have a Gender Support Plan without polling every single teacher in the District.

With respect to the latter category—how many students are being addressed by teachers and staff using a different name and pronouns without their parents' awareness—the District responded that it does know the answer because it "does not maintain a record of" that. R.254:18. *That the District itself does not even know how many students have secretly transitioned with its help further underscores the need for a preemptive lawsuit and injunction*. The Intervenors have established that this is happening regularly—they submitted affidavits from students at just three District high schools, and each testified knowing about other students being treated as the opposite sex while at school without their parents' awareness. R.60 ¶¶13–14; R.61 ¶¶11–12; R.62 ¶¶11–12. The most recent youth survey conducted by Dane County found that nearly 2% (1 out of 50) youth in Dane County identify as transgender, and another 2.5% were "not sure," so the numbers of youth dealing with this significant mental health issue are high.

2. Increasing Concern from Experts About Social Transition

When Plaintiff filed this case nearly three years ago, she invoked two leading practitioners in the field who have expressed concern that an "affirmed" social transition—i.e., treating a child or adolescent as the

opposite-sex by addressing them using a different name and pronouns[6]—can have profound, long-term, and harmful effects on the young person. Plaintiff's expert, Dr. Stephen Levine, who has decades of experience with gender dysphoria, who was the chairman of the Standards of Care Committee that developed the 5th version of the WPATH guidelines, and who was the *court-appointed* expert in the first major case in the country to reach a federal court of appeals about surgery for transgender prisoners,[7] writes in his expert report that "therapy for young children that encourages transition cannot be considered to be neutral, but instead is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy." R.31 ¶69.

Dr. Kenneth Zucker, who for decades led "one of the most well-known clinics in the world for children and adolescents with gender dysphoria,"[8] has argued that, in his view, "parents who support, implement, or encourage a gender social transition (and clinicians who

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[6] In an attempt to distance the District's policy from all of what follows, Defendants have argued, citing their expert, Dr. Leibowitz, that a change of name and pronouns at school is not necessarily a social transition. *E.g.*, R.141 ¶22. Yet in the literature, the phrase "social transition" is used as a shorthand for, primarily, name and pronoun changes. WPATH, for example, describes a change of name and pronouns *at school* as a "complete[ ]" (as opposed to partial) "social transition." R.11:23. When confronted with this during his deposition, Dr. Leibowitz [redacted]

[7] R.31 ¶¶1–7; *Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014).

[8] Singal, Jesse, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016), https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html.

recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence."[9]

Plaintiff also noted that *even* the World Professional Association for Transgender Health (WPATH), which Defendants have endorsed, R.141 ¶14, acknowledges that "[s]ocial transitions in early childhood" are "controversial," that there is insufficient evidence "to predict the long-term outcomes of completing a gender role transition during early childhood," and that professionals should *defer to parents* even if they "do not allow their young child to make a gender-role transition." R.11:24.

Since this case was filed three years ago, many additional experts have expressed similar concerns. The U.K.'s NHS is currently reconsidering its model of transgender care,[10] and the doctor in charge of the review, Dr. Hilary Cass, wrote in her interim report last February: "[I]t is important to view [social transition] as an *active intervention because it may have significant effects on the child or young person in terms of their psychological functioning*. There are different views on the benefits versus the harms of early social transition. Whatever position one takes, it is important to acknowledge that *it is not a neutral act*, and

[9] Zucker, K., *The myth of persistence: Response to "A critical commentary on follow-up studies and 'desistance' theories about transgender and gender non-conforming children" by Temple Newhook et al.*, 19(2) International Journal of Transgenderism 231–245 (2018), available at https://www.researchgate.net/publication/325443416; *see* R.30:3–4; R.31 ¶¶ 63–64, 67.

[10] *See Independent review into gender identity services for children and young people*, NHS England, https://www.england.nhs.uk/commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/gender-dysphoria/independent-review-into-gender-identity-services-for-children-and-young-people/.

better information is needed about outcomes" (emphasis added).[11] Based on her report, "Britain now appears to be changing tack," moving away from the "affirmative approach" and the "hurry to affirm gender identity," instead recognizing that "gender incongruence ... may be a transient phase" for young people.[12]

Another well-known practitioner, Dr. Erica Anderson, who is transgender herself, was recently on the board of WPATH, and was the president of U.S. PATH (the U.S. branch of WPATH), has publicly spoken out against "schools depriving parents of the knowledge of what's going on with their children," arguing that such policies are "a terrible idea,"[13] and that "cutting [parents] out" of this decision is "misguided," "unethical," and "irresponsible."[14]

Yet another group of researchers wrote that "early-childhood social transitions are a contentious issue within the clinical, scientific, and broader public communities. [citations omitted]. Despite the increasing occurrence of such transitions, we know little about who does and does

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[11] Cass, H., *Independent review of gender identity services for children and young people: Interim report* (February 2022), https://cass.independent-review.uk/publications/interim-report/.

[12] *Britain changes tack in its treatment of trans-identifying children*, The Economist (Nov. 17, 2022), https://www.economist.com/britain/2022/11/17/britain-changes-tack-in-its-treatment-of-trans-identifying-children.

[13] Brown, Jon, *Trans psychologist files brief against Md. school district hiding transitions from parents: 'Terrible idea'*, Fox News (November 28, 2022), https://www.foxnews.com/us/trans-psychologist-files-brief-md-school-district-hiding-transitions-parents-terrible-idea.

[14] Davis, Lisa Selin, *A Trans Pioneer Explains Her Resignation from the US Professional Association for Transgender Health*, Quillette (Jan. 6, 2022) , https://quillette.com/2022/01/06/a-transgender-pioneer-explains-why-she-stepped-down-from-uspath-and-wpath/.

not transition, the predictors of social transitions, and whether *transitions impact children's views of their own gender*."[15]

There is also growing awareness of adolescents who come to "regret gender-affirming decisions made during adolescence" and later "detransition," which many find to be a "difficult[ ]" and "isolating experience."[16] In one recent survey of 237 detransitioners (over 90% of which were natal females), 70% said they realized their "gender dysphoria was related to other issues," and half reported that transitioning did not help.[17] One poignant example is Chloe Cole, who recently shared her personal experience on Fox News.[18] *See* R.31 ¶102 (explaining that one of the harms of "supporting social transition" is that it "put[s] the child on a pathway" that often leads to irreversible medical procedures).

This Court does not need to (and in any event cannot) resolve the debate about the harms versus benefits of minors socially transitioning, but the important point is that this is a serious and contentious health-related decision, with long-term implications, exactly the sort of decision

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[15] Rae, James R., et al., *Predicting Early-Childhood Gender Transitions*, 30(5) Psychological Science 669–681, at 669–70 (2019), https://doi.org/10.1177/0956797619830649.

[16] *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, WPATH, 23 International J. Trans. Health 2022 S1–S258, at S47 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644

[17] Vandenbussche, E., *Detransition-Related Needs and Support: A Cross-Sectional Online Survey*, 69(9) Journal of Homosexuality 1602–1620, at 1606 (2022), https://doi.org/10.1080/00918369.2021.1919479.

[18] Carnahan, Ashley, *Detransitioned teen wants to hold 'gender-affirming' surgeons accountable: 'What happened to me is horrible'*, Fox News (Nov. 11, 2022), https://www.foxnews.com/media/detransitioned-teen-hold-gender-affirming-surgeons-accountable.

that parents must be involved in. A parent's role is sometimes to say "no" to protect their children from their own—often short-sighted and misguided—desires.

3. *Defendants' Expert* [redacted][19]

[redacted]

[19] Plaintiff redacts this section because, before transferring the record on appeal, the Circuit Court ordered Leibowitz's deposition to be sealed. R.359:33–35. This order was entirely unwarranted, as explained below, *infra* Part IV, and this Court can and should unseal Dr. Leibowitz's deposition transcript on appeal.

[20] To allow for precision in citations, for purposes of Dr. Leibowitz's and Plaintiff's depositions, this brief cites to the page and line numbers from the transcripts, rather than the court-stamped page numbers.

4. Plaintiff's Testimony

As explained in more detail below, *infra* Part I, Plaintiff's argument on standing is based on the fact that the District's Policy is to *hide* from parents when it is violating their rights and harming their children, and the obvious point that parents cannot know what the District is concealing from them. Plaintiff's expert, Dr. Levine, explains that a child's struggle with gender-identity issues can arise suddenly and seemingly "out of the blue" to parents, R.31 ¶78, R.142 ¶13, as another parent who went through this also testified, R.32 ¶¶2–3, 6–9. Dr. Leibowitz

Consistent with this basis for standing, Plaintiff Jane Doe 4 testified that she is challenging the District's Policy because she does not want the District "conceal[ing]" information from her. JD4 Dep. (R.231) 129:13–18; 181:7–9; 186:11–14; 195:6–196:2; 224:11–14. She explained

that, if her child's "gender expression [at school] w[ere] concealed from [her] purposely," *id.* 181:7–9, it would "prohibit [her] from … helping [her] child … if [she's] not aware of what's going on at school," *id.* 211:18–20. And, while she "would like to think" her child would tell her, she was "not sure" that her child would, because her child "knows [her] beliefs on [this topic]." *Id.* 110:13–111:6. She also testified that she "d[idn't] know" whether she would recognize the signs if her child started struggling with this, because "kids hide things well." *Id.* 132:1–133:5. After all, she herself "was pretty good at hiding a lot of things." *Id.* 226:1–6. She acknowledged that *"to [her] knowledge*," she has no reason to believe her child is currently dealing with gender identity issues, *id.* 109:2–14, but she of course cannot know what the District "conceals from [her] purposely," *id.* 181:7–9, 195:9–196:2, and she also "do[esn't] know" whether her child will struggle with this (or if so when), because she "can't really predict where [her child will] be at in the future." *Id.* 109:15–110:8. Dr. Leibowitz [redacted]. As noted above, the District has admitted that it *has successfully* facilitated a social transition at school, without the parents' awareness, in multiple situations—so the District may even be *currently concealing* things about her child from Jane Doe 4 herself.

Jane Doe 4 explained that, if her child ever seeks to change name and pronouns, she would expect the District to "[n]otify the parents and allow them to take the lead," JD4 Dep. (R.231) 128:18–20; 101:15–16, because there might be "other root issues," and transitioning "could potentially cause problems," *id.* 118:20–119:13; 189:16–21. She would want to be involved to obtain a "psychological evaluation … by medical professionals," *id.* 198:13–20, and to provide "therapy and counsel," because "getting more people involved to help [ ] would be in [her child's] best interest." *Id.* 193:21–25; 196:14–20; 226:22–227:3. As she recognized, "a child is a child and may[ ] not [be] sure what's best for

them." *Id*. 193:21–22. She accurately described the policy, *id*. 117:9–21; 195:20–196:2, and how it violates her and other parents' constitutional rights, *id*. 183:1–14; 212:3–9. She explained that if she's "not aware of what's going on at school," she would be prevented from "helping [her] child." *Id*. 211:16–212:9. Even parents who "may have no issue with their children expressing different genders … should have a right to be informed about their child's upbringing." *Id*. 183:11–14. Indeed, she was "really surprised" when she heard about the policy, because "it just seemed unconstitutional." *Id*. 186:11–14.

STANDARD OF REVIEW

The Circuit Court's odd process makes the standard of review somewhat confusing. In a normal summary judgment posture, the Court treats any disputed facts "in the light most favorable to … the parties opposing summary judgment [here Plaintiff], and draw[s] all reasonable inferences from those facts in their favor." *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶8, 385 Wis. 2d 86, 921 N.W.2d 714. Here, because the Circuit Court short-circuited the usual summary judgment and discovery process, this Court should also treat any unresolved discovery-related disputes, disputes about the experts' testimony, characterizations of Plaintiff's deposition, or facts Plaintiff was in the middle of attempting to discover (to the extent this Court believes any of these are relevant to standing), in the same way, in the light most favorable to Plaintiff, because the Court cut off the usual process.

Whether a party has standing is a legal question that this Court reviews de novo. *McConkey v. Van Hollen*, 2010 WI 57, ¶12, 326 Wis. 2d 1, 783 N.W.2d 855. Likewise, the discovery issues are all legal questions subject to de novo review. *See State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 59, 582 N.W.2d 411 (Ct. App. 1998). This Court reviews the grant or denial of an injunction for an abuse of discretion. *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 428, 293 N.W.2d 540 (1980).

ARGUMENT

I. Parents Have Standing to Preemptively Challenge a Policy to *Hide* a Violation of Their Constitutional Rights From Them

The Wisconsin Supreme Court has long held that "a plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief." *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626. The Declaratory Judgment Act's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Wis. Stat. § 806.04(12). In other words, the Act "is *primarily* anticipatory or preventative in nature." *Lister v. Bd. of Regents of Univ. of Wisconsin Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976) (emphasis added). It is expressly designed to "allow courts to … resolve identifiable, certain disputes between adverse parties … *prior to the time that a wrong has been threatened or committed*." *Putnam* 2002 WI 108, ¶43 (citations omitted, emphasis in original).

Given that a declaratory judgment action "is *primarily* anticipatory or preventative in nature," *Lister*, 72 Wis. 2d at 307 (emphasis added), the ripeness required in a declaratory action is, "[b]y definition," "different from the ripeness required in other actions." *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶41, 244 Wis. 2d 333, 627 N.W.2d 866; *Putnam*, 2002 WI 108, ¶44. The facts must be "sufficiently developed to allow a conclusive adjudication," *Milwaukee Dist. Council 48*, 2001 WI 65, ¶41, but "this does not mean that all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694–95, 470 N.W.2d 290 (1991). Instead, what matters is that the facts *relevant to the legal question* are not so "shifting and nebulous," or "so contingent and uncertain," that the dispute is effectively an "abstract

disagreement[ ]." *Id*. at 694–95, 697; *Putnam*, 2002 WI 108, ¶44. Here, the District's Policy is undisputed. It is neither shifting nor nebulous. The only question is the legal one—can school district staff begin treating a minor child as the opposite sex, while at school, without parental notice and consent? There is nothing abstract about this dispute; schools either can or cannot exclude parents from this major decision.

Milwaukee District Council 48 illustrates how standing and ripeness are applied in declaratory judgment actions. In that case, a union sought a preemptive declaration that employees were entitled to a due-process hearing before Milwaukee County could deny vested pension benefits if an employee were terminated for cause. 2001 WI 65, ¶¶2–3. The Court held that the union had standing, and that its claim was ripe, because "the vast majority of individual employees," who the union represented, would also have standing and ripe claims, even though "[v]ery few individuals [were] in a position to assert that their termination for 'cause' [was] imminent and that their loss of pension [was] imminent." *Id*. ¶¶45–46. "Waiting until both events actually occur," the Court explained, "*would defeat the purpose of the declaratory judgment statute*." *Id*. ¶46 (emphasis added). The goal of the lawsuit was to provide "'relief from uncertainty and insecurity with respect to rights, status and other legal relations' of its members on … a broad and important legal issue," *id*. ¶45 (quoting the Declaratory Judgment Act), and both "judicial economy and common sense dictate[d]" that the union could seek a declaration preemptively to avoid the "potential denial of [its members'] pensions," *id*. ¶¶45, 47 (emphasis added).

Plaintiff seeks "a declaration about the decision-making process," *id*. ¶44, so that if her child begins to struggle with gender identity issues—or if her child is *currently* struggling with this and the District is concealing it from her—she will be notified and allowed to decide whether a transition is in her child's best interests.

In fact, Plaintiff's basis for standing here is much stronger than it was for the "vast majority of employees" in *Milwaukee District Council 48*, who the Court held would have standing and ripe claims. Due to the District's policy of secrecy from parents, Plaintiff *will not know* when the District is violating her constitutional rights and harming her child. It should go without saying, but parents cannot be expected to know what the District is concealing from them. Thus, unlike in *Milwaukee District Council 48*, Plaintiff *cannot* wait, because the District's secrecy policy prevents her from learning when her rights have been violated and harm done to her child. Indeed, as noted above, the District has now admitted that it has treated children *under 8th grade* as the opposite sex at school without either parent's awareness (how often it has done this or is doing this, the District itself claims not to know). *Supra* Background Part B.2.

Dr. Levine, who has decades of experience with this, explained that a child's desire, experience, or assertion of a different gender identity can arise suddenly and seemingly "out of the blue" from a parent's perspective. R.31 ¶78; *id*. ¶¶26, 62 (describing the phenomenon of "rapid onset gender dysphoria"); R.142 ¶13. Defendants' expert, [redacted]

Plaintiff also submitted testimony from a parent who experienced this with his child. R.32. During middle school, his daughter suddenly, and without her parents' awareness, decided that she was a boy and transitioned at school, in secret from her parents, despite previously having shown "no discomfort whatsoever with being a girl or any interest in being a boy." *Id*. ¶¶2–3, 6–10. After they found out, they consulted "over 12 mental health professionals," and the "consensus" among them was that his daughter's "sudden beliefs about being transgender were

driven by her underlying mental health conditions." *Id.* ¶14. Multiple of those professionals told them that "affirm[ing]" her belief "would be against [her] long-term best interest," and he believes that the school, by doing so anyway, did "significant harm to [his] daughter." *Id.* ¶¶15, 19.

As described in more detail above, Plaintiff testified that she would be prevented from "helping [her] child," if she's "not aware of what's going on at school," JD4 Dep. (R.231) 211:16–212:9, and does not want the District "conceal[ing]" information from her, *id.* 129:13–18; 181:7–9; 186:11–14; 195:6–196:2; 224:11–14. She is "not sure" she would be aware if her child struggled with this, because her child "knows [her] beliefs on [this topic]," *id.* 110:13–111:6, and because "kids hide things well," *id.* 132:1–133:5, as she herself did, *id.* 226:1–6. She also cannot know what the District "conceals from [her] purposely," *id.* 181:7–9, 195:9–196:2, or what the future holds for her child, *id.* 109:15–110:8, an obvious point [redacted]

Given that any child may begin to struggle with gender identity at any time, and be a "complete surprise" to the parents, and given that the District will hide the fact that they are treating the child as the opposite sex from the parents, the substantial risk of harm in this case is "imminent" at all times, in the sense that it may be occurring currently for any given parent, including Plaintiff herself (and is, beyond dispute, currently happening for some parents in the District), and it may occur at any time. The District may have been concealing information about Plaintiff's child at the time of her deposition—all of her answers were based on *her knowledge*, as she stated. E.g. JD4 Dep. at 109:2–4. Or her child may have begun struggling with this since her deposition, or may soon in the near future. Only a preemptive lawsuit and injunction can ensure that the District will defer to her if and when this issue arises for

her child, the timing of which is unknowable. And the severity of the harm is quite serious, as explained below.

Even setting aside that the District will conceal the constitutional violation when it occurs, and the relaxed standing requirements for declaratory judgment actions, the Supreme Court has long recognized that a *threatened* injury is sufficient for standing, which Defendants have conceded. R.292:3 (admitting that "potential future injuries" qualify). There are only two basic requirements for standing—"plaintiffs must show [1] that they suffered *or were threatened with* an injury [2] to an interest that is legally protectable." *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112. (And it is well-established that, unlike in federal courts, standing is "not a matter of jurisdiction," *McConkey*, 2010 WI 57, ¶15.)

There is no question that Plaintiff invokes a "legally protectable interest." *Id*. Plaintiff asserts her constitutional right to be the primary decision-maker with respect to her minor child, and courts have recognized that a school violates parents' constitutional rights if it usurps their role in significant decisions. *See infra* Part II.

The District's Policy also "threaten[s]" Plaintiff with multiple types of injury. *Marx*, 2019 WI 34, ¶35. First, and most importantly, the District's policy directly threatens to harm Plaintiff's child. As explained in detail below, many mental-health professionals believe that transitioning during childhood can do lasting harm by causing a child's experience of gender incongruence to become self-reinforcing, which, in turn, can have long-lasting negative ramifications on a child's physical, mental, and psychological well-being, ramifications that are described extensively in Dr. Levine's affidavits. R.31, ¶¶60–69; 142, ¶¶7–10, 16–19, 30–32; JD4 Dep. 118:20–119:13; 189:16–21. Even Defendants' expert

[redacted]

Second, the Policy directly threatens infringement of Plaintiff's constitutional right to participate in major decisions involving her child. JD4 Dep. 183:1–14; 198:8–10; 211:16–212:9. The constitutional violation is an injury in itself, as courts have regularly found. *Infra* pp. 51–52. Third, the District's Policy threatens to prevent Plaintiff from learning that her child is dealing with feelings of gender incongruence and provide professional help for her child. *Infra* p. 53; R.142 ¶¶11–15; JD4 Dep. 196:14–20; 211:16–212:9; 226:22–227:3. Fourth, the District's Policy threatens to prevent Plaintiff from choosing a treatment approach that does not involve an immediate transition. *Infra* pp. 52–53; JD4 Dep. 195:6–11; 196:14–20; 198:13–199:1; 226:22–227:3. Fifth, the Policy threatens to interfere with the integrity of Plaintiff's relationship with her child by facilitating a secret "double life" at school. R.142 ¶¶31–32.

Wisconsin courts have regularly found standing based on threats of injury far more remote, and much less severe, than in this case. In *Norquist v. Zeuske*, 211 Wis. 2d 241, 249, 564 N.W.2d 748 (1997), the Court held that an agricultural land-owner had standing to bring a uniformity-clause challenge to a freeze on property assessments because his "property values *may* decrease resulting in higher real property taxes relative to other agricultural land." *Id.* ¶12 (emphasis added). In *Putnam*, 2002 WI 108, the Court held that Time Warner customers had standing to challenge a late-fee provision even though "late-payment fees might never be imposed on these customers, because the customers themselves control whether they will be late in paying their monthly cable bills." *Id.* ¶45. And in *State ex rel. Parker v. Fiedler*, the Court of Appeals held that a neighbor to a halfway house had standing to challenge the early release of a parolee even though "one cannot say for

certain that [the parolee] will harm either the individual relators or others in the community." 180 Wis. 2d 438, 453, 509 N.W.2d 440 (Ct. App. 1993), *reversed on other grounds by* 184 Wis. 2d 668, 517 N.W.2d 449 (1994). More recently, the Wisconsin Supreme Court emphasized that "a century's worth of precedent makes clear that *threatened*, as well as actual, pecuniary loss can be sufficient to confer standing." *Fabick v. Evers*, 2021 WI 28, ¶ 11 n.5, 396 Wis. 2d 231, 956 N.W.2d 856.

The Circuit Court held that Plaintiff lacked standing based on legal and factual errors. First, the Court emphasized that Plaintiff did not submit "evidence of *past* individual harm" to her or her child from the Policy, App. 7–8, 29, which, as just explained, has never been the basis of her claim and is not required for a declaratory judgment action or for standing generally. And, again, Plaintiff cannot know what the District is concealing from her.

Second, the Court relied on its view, directly contradicted by the record, that Plaintiff "present[ed] no evidence that she predicts [or] anticipates [that she] will actually suffer any individual harm." App. 4. That is simply false. As just explained, Plaintiff submitted expert testimony that children can begin struggling with gender identity issues at any time, and this can come as a complete surprise to the parents—[redacted]—and Plaintiff herself testified that she cannot know what the District conceals from her, what the future holds for her child, and would not necessarily know if her child began struggling with this.

A simple analogy illustrates the point. If the District's policy toward bee stings were to administer an experimental drug, with potentially long-term effects, without parental notice or consent, no court would require a parent to wait until their child had been stung and the drug administered before they could challenge that policy, nor to prove that their children was particularly likely to be stung by a bee in the

future. The harm is imminent at all times, and by the time the violation occurs, the harm has been done. That hypothetical is equivalent to Plaintiff's claim here: a child's experience of gender incongruence is a serious issue that requires "the assistance and support of a skilled mental health professional," R.31, ¶73, the first manifestation could come at school, without the parents' awareness, R.31, ¶¶26, 62, 78, R.32, *as it already has*, in multiple situations in the District. Indeed, the survey statistics cited above, *supra* p.18, suggest that in recent years a child is considerably *more* likely to suffer gender confusion or distress than to suffer a bee sting at school. Yet the District's policy allows schools to secretly facilitate a controversial and experimental form of "psychosocial treatment" with, at best, unknown long-term implications and, at worst, significant harm. R.31, ¶¶60–69.

Plaintiff, like all parents, can challenge this Policy preemptively to protect her constitutional rights and children from harm. She *has no other option*, since the District will hide the violation and harm from her.

II. This Court Should Order a Temporary Injunction

The Circuit Court effectively denied Plaintiff's preliminary injunction motion by instead dismissing the case on standing, even though there was no motion pending other than Plaintiff's motion, and even though the Court had already rejected the same standing argument two years earlier. The Court's standing analysis is wrong for the reasons already explained, *supra* Part I, and its bizarre process, considering some things outside the pleadings, but short-circuiting the usual summary judgment procedure, was an abuse of discretion in and of itself. The District's Policy to hide from parents serious and difficult decisions about their own children is a clear violation of parents' rights and causes irreparable harm to parents' role as parents, to their children, and to the parent-child relationship. And the District now admits that it has and is currently applying this Policy. This Court should not only reverse the

dismissal on standing, but also direct the entry of a temporary injunction to avoid these harms and preserve parents' role while this case proceeds, which is the "usual" result in this procedural posture. *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 102, 146 N.W.2d 447 (1966).

A. The District's Policy Violates Parents' Rights

1. Parental Rights Include Decision-Making Authority

One of the most fundamental and longest recognized "inherent rights" protected by Article 1, § 1 of the Wisconsin Constitution (and the Fourteenth Amendment) is the right of parents to "direct the upbringing and education of children under their control." *See, e.g.*, *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶15, 387 Wis. 2d 1, 927 N.W.2d 486; *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) (listing cases); *Wis. Indus. Sch. for Girls v. Clark Cty.*, 103 Wis. 651, 79 N.W. 422, 428 (1899).[21]

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[21] Plaintiff submits that the Wisconsin Constitution's protection of parental rights has long been settled. *E.g.*, *Jackson*, 218 Wis. 2d at 879 ("This court has embraced this principle for nearly a century."); *Wis. Indus. Sch. for Girls*, 79 N.W. at 428 (recognizing the "right delegated to parents as the natural guardians of their children"); *see also Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.) ("the oldest of the fundamental liberty interests recognized by th[e] [Supreme] Court"); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("established beyond debate as an enduring American tradition"). That said, an originalist and historical review supports this fundamental right.

Since it was ratified in 1848, the text of Article I, Section I, of the Wisconsin Constitution has provided that Wisconsin citizens "have certain inherent rights." One of those "inherent rights" was parents' authority over their own children. In 1836, the Wisconsin Territory adopted Michigan law, including "all the rights, privileges and immunities heretofore granted and secured to the territory of Michigan." *See* Organic Act of 1836 (Oct. 25, 1836), Section 12. By that time, Michigan had already implicitly recognized the natural, inherent rights of parents over their own children. *See* Laws of the Territory Michigan (1833, printed by Sheldon M'Knight) at 305 (Act of June 26,

Parents also have a right under Article 1, § 18, to raise their children in accordance with their religious beliefs, *see*, *e.g.*, *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971); *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 42–43, 426 N.W.2d 329 (1988). This right is similar to, but distinct from, parents' right under Article 1, Section 1, in that it protects parental decision-making authority over significant decisions that implicate religious beliefs. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S.

1832) (allowing courts to appoint a guardian over minor children "to perform the duties of a parent," but only if the parents were "unfit" by reason of "insanity" or "excessive drinking"); *id.* at 330 (Act of April 23, 1833) (requiring the "consent of [a] parent or guardian" for marriage under 18). That inherent right had also been universally recognized in the common law. *People ex rel. Nickerson v.* _____, 19 Wend. 16, 1837 WL 2850 (N.Y. Sup. Ct. 1837) ("The father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court, such as ill usage, grossly immoral principles or habits, want of ability, &c., is entitled to their custody, care, and education. *All the authorities concur on this point*.") (emphasis added) (listing cases). The Supreme Court of the Territory of Wisconsin had also recognized parents' inherent duty to their children, which is based on their natural guardianship. *See McGoon v. Irvin*, 1 Pin. 526, 1845 WL 1321, at *4 (Wis. Terr. July 1845) ("By every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children, who are of tender years and helpless."). In 1849, shortly after statehood, the Wisconsin Legislature codified and recognized parents' inherent rights in Wisconsin's guardianship statute, providing that "The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education." Wis. Rev. Stat. (1849), Title XXI, Ch. 80, § 5, p. 399.

In 1955, the Wisconsin Legislative Council produced a "Child Welfare Research Report" that included an historical overview of the parent-child relationship, explaining that "[this] relationship is recognized in the law as a status … [and] the rights of the parents are summed up in their right as *natural* guardians of their child." Wisconsin Legislative Council, Research Report on Child Welfare, Vol. 5, Part 2, Wis. Leg. Council Reports, at p. 17 (August, 1955). The report explained that "the most complete rights are those belonging to the parent of the child," and that parents' "natural guardianship" (i.e. inherent) rights include "not only the right to custody, *i.e.*, to the everyday care, education, and discipline of the child, but also *the right to make major decisions* such as consenting to adoption of the child, to marriage, to major surgery." *Id.* pp. 18–19.

510 (1925) (where children go to school); *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972) (whether children attend school past eighth grade). In *Yoder,* the Supreme Court emphasized that the parental role is especially important "when the interests of parenthood are combined with a free exercise claim." *Yoder*, 406 U.S. at 233; *see also Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (noting that "[parental] consultation is particularly desirable" for issues "rais[ing] profound moral and religious concerns."). Any "interference with" parents' rights under Article I, § 18, is also subject to strict scrutiny, *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶62, 320 Wis. 2d 275, 768 N.W.2d 868.

This line of cases establishes four important principles with respect to parents' rights. *First,* parents are the primary decision-makers with respect to their minor children—not their school, or the children themselves. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Jackson*, 218 Wis. 2d at 879; *Yoder*, 406 U.S. at 232. Parental decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602, and that parents are "in the best position and under the strongest obligations to give [their] children proper nurture, education, and training" because parents "hav[e] the most effective motives and inclinations" towards their children, *Jackson*, 218 Wis. 2d at 879 (quoting *Wis. Indus. Sch. for Girls*, 103 Wis. 651); *Parham*, 442 U.S. at 602. As any parent knows, parenting sometimes requires saying "no" to protect a child's best interests.

Second, parental rights reach their peak, and thus receive the greatest constitutional protection, on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d

Cir. 2005) (calling this "the heart of parental decision-making authority"); *Yoder*, 406 U.S. at 233–34. One such area traditionally reserved for parents is medical care, as the United States Supreme Court recognized long ago: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603; R.31 ¶¶134–38. Indeed, the "general rule" in Wisconsin "requir[es] parents to give consent to medical treatment for their children." *See In re Sheila W.*, 2013 WI 63, ¶¶16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). Another category of decisions at "the heart of parental decision-making authority" are those "rais[ing] profound moral and religious concerns." *Bellotti*, 443 U.S. at 640; *C.N.*, 430 F.3d at 184.

Third, a child's disagreement with a parent's decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 603–04. *Parham* illustrates how far this principle goes. That case involved a Georgia statute that allowed parents to voluntarily commit their minor children to a mental hospital (subject to review by medical professionals). *Id.* at 591–92. A committed minor argued that the statute violated his due process rights by failing to provide him with an adversarial hearing, instead giving his parents substantial authority over the commitment decision. *Id.* at 587. The Court rejected the minor's argument, confirming that parents "retain a substantial, if not the dominant, role in the [commitment] decision" because "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 602–04. Thus, "[t]he fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority." *Id.*

Fourth, the fact that "the decision of a parent is not agreeable to a child or … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603. Likewise, the unfortunate reality that some parents "act[ ] against the interests of their children" does not justify "discard[ing] wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602–03. The "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is "statist" and "repugnant to American tradition." *Id.* at 603 (emphasis in original). Thus, as long as a parent is fit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69 (plurality op.).

In accordance with these principles, courts have recognized that a school violates parents' constitutional rights if it usurps their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), a high school swim coach suspected that a team member was pregnant, and, rather than notifying her parents, discussed the matter with others, eventually pressuring her into taking a pregnancy test. *Id.* at 295–97, 306. The mother sued the coach for a violation of parental rights, arguing that the coach's "failure to notify her" "obstruct[ed] the parental right to choose the proper method of resolution." *Id.* at 306. The court found the mother had "sufficiently alleged a constitutional violation" and condemned the "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Id.* at 306–07.

Since this case was filed, at least one federal district court has recognized that a similar policy to the District's likely violates parents' constitutional rights and granted a preliminary injunction to allow a teacher to communicate openly with parents. *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). The Court found that parents' right to "raise their children as they see fit" necessarily "includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred." *Id.* The Court added, "[i]t is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns." *Id.*

Yet another federal court recently denied a motion to dismiss a parents' rights claim against a teacher that repeatedly taught her first grade students about her views of gender and gender identity and "encouraged their children 'not to tell their parents about her instruction.'" *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185, at *3 (W.D. Pa. Oct. 27, 2022). The court recognized that the parents pled a sufficient parents' rights claim, because "[t]eaching a child how to determine one's gender identity at least plausibly is a matter of great importance that goes to the heart of parenting," *id.* at *17, and a school must at least provide "realistic notice and the practical ability for parents to shield their young children from sensitive topics the parents believe to be inappropriate," *id.* at * 20. To be clear, Plaintiff in this case does not challenge the District's curriculum or teaching around gender identity. But the violation here is much more egregious than in *Tatel*—here the District will secretly facilitate a gender identity transition at school and conceal from the parents that it is treating their child as the opposite sex while at school.

2. The Policy Violates Parents' Rights in Multiple Ways

The District's Policy violates parents' constitutional rights by taking a major, controversial, psychologically impactful, and potentially life-altering decision, R.31 ¶¶29–44, 60–69, 98–120, out of parents' hands and placing it with educators, who Respondents have conceded have no expertise whatsoever in diagnosing and treating gender dysphoria, R.48:11, and with young children, who lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602. The District is effectively making a treatment decision without legal authority and without informed consent from the parents. *See Sheila W.*, 2013 WI 63, ¶¶16–24 (Prosser, J., concurring); R.31 ¶¶65 (explaining that transitioning is "a form of psychosocial treatment"), 121–39 (discussing informed consent).

Even WPATH, which Defendants' expert endorses, acknowledges that "[s]ocial transitions in early childhood" are "controversial" and that that "health professionals" have "divergent views," that the "long-term outcomes" are unknown, and recommends deferring to parents about whether to "allow their young children to make a social transition to another gender role." R.11:24. And Defendants' expert [redacted]

Notably, throughout this case, Defendants have failed to cite *even a single source* or professional association endorsing childhood social transitions without parental involvement or a careful assessment by a medical professional, or suggesting that transition is right for *every* minor or adolescent who might request it, or advocating that schools should conceal this from parents. [redacted]

[redacted] Instead, the sources Defendants do invoke (WPATH) recommend *the opposite*—deferring to parents. R.11:24.

Parents' also must be involved because each child is different and must be considered individually. As Dr. Levine explains, "[t]here is no single pathway of development and outcomes governing transgender identity," so it is "not possible to make a single, categorical statement about the proper treatment." R.31 ¶¶54–59. Parents must be involved for "accurate and thorough diagnosis," R.31 ¶¶71–79, for "effective psychotherapeutic treatment and support," R.31 ¶¶80–82, and to provide informed consent, R.31 ¶83–84. Defendants' own expert [redacted]

To reiterate, this Court does not need to (and cannot, in any event) resolve the debates in this area. The important point is that, when a child begins to wrestle with his or her gender identity, there is a critical fork in road: Should the child immediately transition? Or could therapy help the child identify the source of the dysphoria and learn to embrace his or her biological sex? Defendants' own expert [redacted] There are no easy answers, but the fact that there is a debate and competing alternatives is why parents must be involved. No one else can provide the child with the professional help the child may need and no one else has the authority under the law to make such a decision on behalf of the child.

The Policy further violates parents' rights by prohibiting staff from notifying or communicating with parents about a serious issue their children are facing, effectively substituting District staff for parents as the primary source of input for children navigating difficult waters. R.183:2 ("The Guidance provides that teachers should not volunteer information."); *see H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "presumptively include[ ] counseling [their children] on important decisions"). In no other context do schools *prohibit* teachers from communicating openly with parents about serious issues with their children that arise at school.

By hiding such a major issue from parents, the Policy also directly interferes with parents' ability to provide professional assistance their children may urgently need. Gender dysphoria can be a very serious psychological issue that requires support from mental health professionals, R.31 ¶¶57, 78–79, as even Respondents have conceded, R.94 ¶17. And children experiencing gender dysphoria frequently face other co-morbidities, including depression, anxiety, suicidal ideation and attempts, and self-harm, and so should be evaluated. R.31 ¶¶57, 78–79, 114. District staff lack legal authority to provide children with professional support, as they admit. R.48:11. Even parents who would allow a transition presumably would want to be involved.

The District's policy also violates parents' rights by "undermining the family unit," as one parent recounts from personal experience. R.32, ¶19. Facilitating a "double life" at school, kept secret from parents, not only harms the family but is also "psychologically unhealthy in itself, and could readily lead to additional psychological problems." R.31 ¶82.

The District's Policy also violates state records laws. Parents have a statutory right to access "all records relating to [their child] maintained by a school," Wis. Stat. § 118.125(1)(d), (e), (2). There is a narrow exception for "[n]otes or records maintained for *personal use* by a

teacher" *if* "not available to others." *Id*. §118.125(1)(d)1. The District's "gender support plan" form directs staff to "keep this interview in your confidential file, not in student records," App. 65—a blatant abuse of the exception in order to evade parents' statutory right; the form obviously is *not* solely for a teacher's "personal use," it is designed to record how *all teachers and staff* will be *required* to refer to the student going forward.

Finally, for many parents, including Jane Doe 4, these issues also implicate their religious beliefs about how personhood and identity is defined—whether as a gift from God or by self-declaration. R.23:2–4. The Policy directly interferes with parents' right both to choose a treatment approach and to guide, advise, and support their children in a manner consistent with their religious beliefs.

And all this without any finding of parental unfitness—a well-established process in Wisconsin, with statutory clarity, transparency, and procedural safeguards, the very opposite of a secret, unilateral action by unaccountable District employees. *E.g.*, Wis. Stat. §§48.981(3)(c); 48.13; 48.27; 48.30.

3. The District's Policy Fails Strict Scrutiny.

The Policy's primary stated justification is protecting children's privacy, App. 60, but this is not a compelling interest because children do not have privacy rights *vis-à-vis their parents*. *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013); *see also Bellotti*, 443 U.S. at 634, 638–40; *e.g.*, Wis. Stat. § 118.125 (parents' right to access their children's records).

The Policy also suggests that it is necessary to keep students safe *from their parents*, App. 62, but this does not provide a compelling justification for a number of reasons. First, the state "has no interest in

protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1019 (7th Cir. 2000). In other words, the District cannot *assume* that parents will do harm. Doing so directly violates the "presumption that fit parents act in their children's best interest." *Troxel*, 530 U.S. at 58 (plurality op.); *see also Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (finding a violation of parents' rights where state actors "not only failed to presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite."). Nebulous, subjective conclusions that a family may not be "supportive" do not rise to this stringent standard.

Second, the Policy does not require any evidence *or even any allegation of* harm from parents before excluding them from the decision about how staff address their child at school; it allows secrecy from parents solely at the child's request, as the District has conceded, effectively treating school like Las Vegas. R.232:4 ("[T]he Guidance allows a student to insist that MMSD not disclose their gender identity to their family."). Indeed, the Gender Support Plan form simply asks "Will the family be included" and whether the family is "support[ive]" of a transition, without any further criteria before concealing this from parents. App. 65. In other words, unless the parents agree with the approach the District believes is best, critical facts about their child's mental health and the school's interaction with their child will be concealed from them. Parents' decision-making authority includes the right to decide that a social transition is not in their child's best interests, even if that is what their child wants. The District cannot usurp parental authority merely because it believes it knows better or concludes parents are not "supportive" enough, as the District defines "support." The Supreme Court has made clear that is not a sufficient basis for excluding parents: "Simply because the decision of a parent is not agreeable to a

child or because it involves risks does not automatically transfer the power to make that decision from the parents to … the state." *Parham*, 442 U.S. at 603.

Even if the District's Policy to exclude parents *were* limited to situations involving "imminent safety risks" (it is not), the Policy does not provide parents with any process or opportunity to respond before excluding them, as the District not only concedes, but openly advocates for. R.232:53 ("Jane Doe 4's suggestion that there be notice, hearing and a finding to justify non-disclosure would act to eradicate the Guidance's confidentiality."). In *A.A.L.*, the Wisconsin Supreme Court addressed the "standard of proof required for a grandparent to overcome the presumption that a fit parent's visitation decision is in the child's best interest," and held that the parents' decision may be supplanted only with "clear and convincing evidence that the [parents'] decision is not in the child's best interest." 2019 WI 57, ¶¶1, 37. The Court explained that this "elevated standard of proof is necessary to protect the rights of parents" and to prevent lower courts from "substitut[ing] its judgment for the judgment of a fit parent." *Id.* ¶¶35, 37; *see also Troxel*, 530 U.S. at 69 (plurality op.). In the visitation context, parents receive "notice" and a "hearing." *See A.A.L.*, 2019 WI 57, ¶13 (quoting Wis. Stat. § 767.43 (3)).

There is already a system in place in Wisconsin to address those rare situations involving "imminent safety risks" from parents, namely Wisconsin's Child Protective Services program. *See generally* Wisconsin Department of Children and Families, *Wisconsin Child Protective Services (CPS) Process*.[22] Indeed, teachers and other school staff are mandated CPS reporters, Wis. Stat. § 48.981(2)(a)(14)–(16). Unlike the District's policy, the CPS process sets a high standard for displacing

[22] https://dcf.wisconsin.gov/cps/process

parents ("abuse or neglect"), *id.* § 48.981(2), and provides robust procedural protections, such as notice and a hearing and, ultimately, court review. *E.g.*, Wis. Stat. §§ 48.981(3)(c); 48.13; 48.27; 48.30.

The District's Policy, by contrast, does not contain any of the procedural protections that are legally required to displace a parent. It does not give parents any opportunity to weigh in, nor defer in any way to their judgment about what is best for their child. A school district simply does not have power to act as an ad hoc family court, litigating family law issues and awarding itself parental authority, independent of any court process.

The District has also attempted to justify the policy as deferring to students. But schools are not legally entitled to "defer to students" at the expense of parental authority. Schools may not and do not "defer to students" on other major decisions, (e.g., name changes in school records,[23] medication (even aspirin) at school[24]) or even much less significant ones (e.g. athletics,[25] field trips[26]); all typically require parental consent. The reason, of course, is that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." *Parham*, 442 U.S. at 603. That rationale has scientific support: "[A]dolescents chronically fail to appropriately balance short term desires against their longer term interests as they make decisions … [thus] the consent of parents or legal guardians is almost invariably required for even minor medical or psychiatric interventions." R.142 ¶28.

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[23] Under FERPA, only parents or adult students can make changes to education records. 34 CFR §§ 99.3; 99.4; 99.20(a).

[24] https://www.madison.k12.wi.us/health-services (Medication at School tab)

[25] District Athletic Code, Madison Metropolitan School District, at III.2 (Sept. 2019), https://resources.finalsite.net/images/v1620653062/madisonk12wius/ohmai4mkfnixr5svuikg/2019-20_district_athletic_code_final_92019.pdf

[26] https://www.madison.k12.wi.us/families/district-policy-guides (Field Trips Tab)

Defendants' expert [redacted]

Ultimately, the premise of the District's Policy is that the District knows better than parents how to respond when a child struggles with gender identity. That idea is, as the Supreme Court put it, "statist" and "repugnant to American tradition." *Parham*, 442 U.S. at 603.

B. The Policy Is *Currently* Causing Harm

There is now evidence that the District *is currently violating parents'* constitutional rights—which alone is sufficient harm for an injunction. The District admits that it has implemented Gender Support Plans for young children (under 8th grade) without involving their parents (the District is "not certain whether either parent is currently aware") in at least two situations, and possibly many more. R.254:18; *supra* pp. 17–18. And the affidavits from Intervenors establish that there are other students, without a Gender Support Plan, that the District secretly treats as the opposite sex while they are at school without their parents' knowledge or consent. R.60 ¶¶13–14; 61 ¶¶11–12; 62 ¶¶11–12. The District apparently does not know how many such students there are, because it "does not maintain a record of" that fact, R.254:18, only reinforcing the need for temporary, injunctive relief.

A violation of constitutional rights is itself sufficient harm to warrant an injunction, because, "[w]hen an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. §2948.1 (3d. ed.); *e.g.*, *Vitolo v. Guzman*, 999 F.3d 353, 360, 365 (6th Cir. 2021) ("When constitutional rights are threatened or impaired, irreparable injury is presumed."). Thus, "[i]n constitutional cases, the [likelihood of success] factor is typically dispositive." *Vitolo*,

999 F.3d at 360; *see also Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) ("the decisive factor."); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) ("[T]he analysis begins and ends with the likelihood of success on the merits.").

Even setting aside the constitutional violation, the magnitude of the harm from a secret "affirmed" transition at school is enormous, R.31 ¶69 ("changing the life path of the child"); R.32 ¶¶14–19 (parent describing opinions from mental health professionals that "it would be against [his daughter's] long-term best interest to 'affirm' her sudden belief that she was transgender," and his belief that her school did "significant harm" to her by ignoring those opinions). Respected psychiatric professionals believe that "affirming" or facilitating a gender-identity transition during childhood is a powerful psychotherapeutic intervention that can become self-reinforcing, causing gender dysphoria to persist, with long-term consequences. R.31 ¶¶60–69; *supra* Background Part B.2.

There are many lifelong consequences if a child's gender dysphoria persists as a result of school staff secretly facilitating a transition at school. First and most obvious is the inherent difficulty of feeling trapped in the wrong body, which is often associated with psychological distress. R.31 ¶¶57, 78, 91, 95, 99, 112–14. There are also many long-term physical challenges, given that it is not physically possible to change biological sex. *Id.* ¶¶102–07. Additional risks include isolation from peers, fewer potential romantic partners, and other social risks. *Id.* ¶¶108–114. A growing number of "detransitioners" are speaking out who deeply regret transitioning while minors. *Id.* ¶¶115–20; *supra* p. 22. Defendants' expert [redacted].

The Policy also directly harms parents' ability to choose a treatment approach that does not involve an immediate transition, such as "watchful waiting" or therapy to help children identify and address the underlying causes of the dysphoria and hopefully find comfort with their biological sex. R.31, ¶¶29–44. It also prevents parents from providing professional support their children may urgently need. R.142 ¶¶11–15. And a "double life" at school is "psychologically unhealthy in itself" and can lead to "additional psychological problems." R.31 ¶82.

Even WPATH acknowledges that "[s]ocial transitions in early childhood" are "controversial," that there is insufficient evidence "to predict the long-term outcomes of completing a gender role transition during early childhood." R.11:24. And Defendants' expert [redacted] In other words, this is a psychosocial experiment on children, in secret from parents, without their consent.

Given the District's secrecy policy, an injunction is *the only way to prevent these harms*. Parents cannot know if or when their children will deal with this, nor can they be expected to know what the District is hiding from them. The requested injunction is conditional and perfectly tailored to the harm; it merely requires the District to obtain parental consent before staff treat their child as the opposite sex while at school. In other words, it only applies in situations where the risk of the constitutional violation and thus harm is 100%—where the District would otherwise exclude the parents.

C. The Other Factors Support an Injunction

There is no harm to the District from an injunction (especially a conditional, perfectly tailored injunction); it will merely require the District to defer to parents before treating children as the opposite sex

while at school. Any harm the District may assert *from parents* is directly at odds with the "traditional presumption that a fit parent will act in the best interest of his or her child," *Troxel*, 530 U.S. at 69 (plurality op.), and will be far more zealous in doing so than anyone else, including teachers and government bureaucrats, *Wis. Indus. Sch. for Girls*, 79 N.W. at 428 (parents "hav[e] the most effective motives and inclinations and [are] in the best position and under the strongest obligations to give to such children proper nurture, education and training").

The public interest heavily favors an injunction, since "it is always in the public interest to prevent violation of a party's constitutional rights." *See*, *e.g. Vitolo*, 999 F.3d at 360; *Doe I*, 2022 WI 65, ¶94 (Roggensack, J., dissenting).

Finally, an injunction will preserve the status quo. It will protect the names that parents thoughtfully and lovingly gave to their children at birth and the sexual identities they were born with. That "status quo" both predates the District's recent, anomalous Policy, and far exceeds it in importance. The District simply must defer to parents before facilitating a major change to their minor children's identities. Nothing could be more directly related to "preserving the status quo." An injunction is also necessary to preserve parental decision-making authority over minor children, a "status quo" that preceded the District's policy by well over a century. *See Yoder*, 406 U.S. at 232 (an "enduring American tradition"); *Troxel*, 530 U.S. at 65 (plurality op.) ("the oldest of the fundamental liberty interests recognized by th[e] [Supreme] Court").

D. The Circuit Court's Bizarre Process Warrants This Court Ordering an Injunction

Defendants may argue the Circuit Court did not decide Plaintiff's preliminary injunction motion and therefore this Court should not decide the question either. This Court should reject any such argument.

This Court should treat the Circuit Court's decision as a denial of Plaintiff's temporary injunction motion for multiple reasons. First and most concretely, it did deny it: Plaintiff's motion for a preliminary injunction was *the only motion pending*, and the court did not enter an injunction. Second, the Circuit Court stated that its decision would be a decision on Plaintiff's injunction motion. R.288:35 ("I'm going to rule on your motion for preliminary injunction"); R.288:36 ("[I]f I conclude that Jane Doe [4] doesn't have standing, then I'm gonna deny the preliminary injunction, and I probably very well would conclude that the case should be dismissed."). Third, the Court framed its decision in the context of Plaintiff's injunction motion, App. 9–10 ("Jane Doe asks the Court for an injunction … [and] must show a 'reasonable probability of ultimate success,' … [b]ut a party with no standing cannot succeed.").

Furthermore, the Wisconsin Supreme Court expressly directed the Circuit Court to rule on Plaintiff's long-outstanding preliminary injunction motion (filed nearly three years ago). *Doe I*, 2022 WI 65, ¶35 ("[W]e expect the circuit court will address the pending motion"); *id.* ¶41 ("We … remand to the circuit court to proceed with the adjudication of the parents' claims."). If this Court were to conclude that the Circuit Court *did not* rule on Plaintiff's motion (even though it was the only motion pending), then the Circuit Court violated the Wisconsin Supreme Court's instructions on remand, which alone would warrant a ruling from this Court on the injunction question, rather than sending it back to the Circuit Court for further delay. It would also be a violation of Supreme Court Rule 70.36, which generally requires trial court judges to "decide each matter submitted for decision within 90 days of the date on which the matter is submitted to the judge in final form" (with one possible 90-day extension "if a judge is unable to do so.").

Even putting that point aside, the Supreme Court has explained that ordering an injunction is the "usual" result in this procedural

posture: "Under usual circumstances, where the plaintiff has asked for an injunction and the trial court has determined that his complaint states no cause of action, we would, upon reversing, if the facts made such action appropriate, direct the entry of an injunction." *Fromm*, 33 Wis. 2d at 102.

Fromm recognized that remand can sometimes be appropriate where "further fact finding [is] necessary" for purposes of the preliminary injunction request, but here no "further fact finding" is needed. At Defendants' request (and over Plaintiff's objection), the Circuit Court granted a lengthier briefing schedule on the injunction motion precisely so that Defendants could do some "fact finding," and they did so. *Supra* p. 14; R.195, 198, 226:15–33. Thus, Defendants had the opportunity to, and have already done, all the fact-finding that they believed was necessary for purposes of Plaintiff's motion. The motion was fully briefed, argued, and ready for decision from the Circuit Court; the Court simply dismissed the case instead, over Plaintiff's repeated objection, even though there was no other motion pending. R.259; 260:24–25, 28–33; 288:23–25, 29–30, 32–33, 51; 310:47–48, 48–49.

Even more importantly, this case involves the current and ongoing violation of parents' constitutional rights—the District now concedes it has and is applying its Policy to facilitate transitions at school without parental notice or consent. *Supra* Background Part A. And many well-respected experts view this as a psycho-social experiment on minors, with long-term implications to their future development, an experiment that is being concealed from their parents. *Supra* Background Part B.2; Argument Part II.C. Thus, an injunction is urgently needed to protect parents' constitutional rights and their children from lifelong harm. Remanding would only cause further delay and allow these harms to continue unchecked.

Finally, even if this Court concludes, for any reason, that the injunction question is not presented by this appeal, that alone would justify an exercise of the Wisconsin Supreme Court's superintending authority. That authority is warranted when "an appeal from a final judgment is inadequate and [ ], grave hardship will follow a refusal to exercise the power." *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶48, 374 Wis. 2d 26, 892 N.W.2d 267; *Koschkee v. Evers*, 2018 WI 82, ¶42, 382 Wis. 2d 666, 913 N.W.2d 878) (Bradley, J., concurring in part, dissenting in part) ("The court's supervisory authority is ordinarily exercised when a party asserts error by the circuit court causing 'great and irreparable' 'hardship.'"). The District's policy is causing the ongoing violation of parents' rights and harm to children. Plaintiff filed her injunction motion three years ago and the Wisconsin Supreme Court directed the Circuit Court to rule on it. And the Court's decision to instead dismiss the case on standing, without any motion pending, was clear error, legally, factually, and procedurally. *Supra* Part I.

Thus, if this Court believes the injunction question is not presented due to the Circuit Court's abnormal procedure below, it follows, *a fortiori*, that "an appeal from [the] final judgment is inadequate and [ ], grave hardship will follow." *Universal Processing*, 2017 WI 26, ¶48. The "superintending authority" is the "exclusive" province of the Wisconsin Supreme Court, *In re Commitment of Thiel*, 2001 WI App 52, ¶10 n.6, 241 Wis. 2d 439, 625 N.W.2d 321, so if this Court believes it cannot resolve the injunction question, it should certify this question to the Wisconsin Supreme Court. Wis. Stat. § 809.61.

III. The Circuit Court Erred in Many Ways in its Discovery Orders

A. Background Relating to Discovery Issues

During discovery, Defendants requested "all communications with Dr. Levine" (Plaintiff's expert), including "between WILL and ADF attorneys and Dr. Levine." R.277:4. Plaintiff responded that she herself "has had no correspondence with Dr. Levine." R.277:6. As to communications between Plaintiff's counsel and Dr. Levine, Plaintiff responded, first, that Wisconsin's discovery statute pertaining to experts does not generally authorize discovery of communications between an expert and attorney. R.277:6, 8–9. Plaintiff further objected that most of Plaintiff's counsel's communications with Dr. Levine contain counsel's "mental impressions, conclusions, opinions, or legal theories" and therefore are privileged by the work-product doctrine. The remainder, Plaintiff explained, "involv[e] minor scheduling / administrative details [that] are not relevant to the issues in this case." R.277:9; 310:18.

Defendants did not narrow or limit their request in any way, but instead moved to compel all communications between Plaintiff's counsel and Dr. Levine, without regard to whether any of those communications contain work-product, on the theory that the work-product doctrine automatically does not apply once an expert submits testimony in a case. R.276. Defendants filed their motion on October 11, shortly before the hearing on Plaintiff's temporary injunction motion on October 13. R.276, 277. During that hearing, the Circuit Court stated that it "[was] prepared to rule" on the motion to compel. R.288:13. Plaintiff's counsel objected that they had not filed a response, having only received the motion two days before, and wanted the opportunity to do so. R.288:13–14. The Court initially directed counsel to respond orally on the spot, but eventually agreed to allow a written response. R.288:13–17. The Court threatened counsel, however, that, "if I ruled now, I probably wouldn't,

due to the efficiency of which I dispatch the issue, award fees and costs," but if Plaintiff's counsel chose "to prolong this issue with an unnecessary elaboration of the law," the "consequence[ ] … would be the likelihood I would, in granting the motion to compel, order the plaintiff to pays the fees and costs." R.288:18–19. Notwithstanding the threat of fees, Plaintiff's counsel opted to file a written response, and the parties then briefed the issue. R.289, 293, 294.

The Circuit Court held a hearing on November 7 and ruled orally in Defendants' favor, instructing Defendants to submit a proposed written order. App. 46. The Circuit Court also followed through with its warning and awarded fees. App. 47–49. In their motion and during that hearing, Defendants did not ask, and the Court did not order, Plaintiff to produce those emails by any particular date. R.310.

Plaintiff filed a motion to reconsider the very next day, because the Court had not applied the statutory standard for fees under Wis. Stat. § 804.12(1)(c)1, which requires courts to find that the party's position was not "substantially justified." R.295. The Court did not rule on that motion before it dismissed the case. App. 38.

After the oral ruling, Plaintiff was contemplating, and then ultimately decided to, pursue an appeal of the discovery order, but was waiting for the Court to enter a written order that she could appeal, as is required to appeal,[27] and she communicated this to Defendants and to the Court, as early as November 9. R.297 (noting that "Defendants have yet to send Plaintiff or the Court a proposed order"); 354:10–11; 355:5, 7.

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[27] *See* Wis. Stat. § 809.50(1)(d) (requiring parties to attach "[a] copy of the judgment or order sought to be reviewed"); *State v. Alston*, 92 Wis. 2d 893, 899, 288 N.W.2d 866 (Ct. App. 1979) ("To be appealable the order must be in writing and filed in the office of the clerk of court. … A notation in the judgment roll of the oral pronouncement is not sufficient. Neither is the oral pronouncement's appearance in the transcript.").

Defendants, however, waited until November 11 to submit a written order to the Court. R.300. Plaintiff also indicated that, once there was an order to appeal, she would seek a stay of the order pending appeal, since the appeal would be meaningless otherwise; once the documents were produced the privilege would be destroyed and the appeal would be pointless. R.355:7.

Notwithstanding Plaintiff's indication on both November 9, R.297, and November 15, R.355:5, that she was waiting for the written order to appeal, Defendants, on November 16, filed a motion to "enforce" the order that was not yet in place (and that they had delayed submitting to the Court). R.302. Plaintiff never had an opportunity to respond to that motion before the Court dismissed the case. R.354:10.

On Nov. 23, the Court issued a final order dismissing Plaintiff's claims. App. 4–36. Just five minutes before entering the order dismissing the case, the Court signed and filed Defendants' proposed order on their motion to enforce (again, on an order that still had not been entered).[28] Then, a minute after the dismissal order, the Court entered its order on the original motion to compel, App. 37–38, holding that "the order previously entered [on the motion to enforce, App. 39–40] is now moot as well as any other pending discovery dispute." App. 38.

Plaintiff promptly appealed all three orders on November 28, 2022. R.318–320. Because the Court had held that both its orders to compel were "moot[ed]" by the simultaneously entered dismissal order, Plaintiff did not seek a stay of the order(s) to compel.

A week after Plaintiff appealed, Defendants moved to strike Plaintiff's expert's affidavits for having not yet produced the documents.

[28] This order indicates that it was signed on November 22, but is stamped as being filed on Nov. 23. Plaintiff received it five minutes before the dismissal order.

R.334. Plaintiff responded that it would be inappropriate to strike her expert's affidavit after she had appealed, based on an order that the Court held was "moot," given that she never had an opportunity to appeal or seek a stay of that order before it was "moot[ed]" by the dismissal order. R.354–55. Nevertheless, on December 12, after a hearing, the Court entered an order purporting to strike the affidavits. App. 50–51; R.359.

During that same hearing, the Court also heard Plaintiff's motion to reconsider the fees ruling and denied the motion. The Court admitted that it had not applied the statutory standard for fees, but concluded after the fact that Plaintiff's position was not "substantially justified." App. 52–53, 57–59. The Court acknowledged that it "d[idn't] know of a case directly on point either" to support Defendants' position, and, even though Plaintiff had cited substantial legal authority in support of her position (R.289, 294), the Court relied entirely on his personal practice decades earlier to conclude Plaintiff's position was not "substantially justified," while acknowledging that "this is really a pretty poor basis of a circuit court's decision." App. 58.

B. The Circuit Court's Order Requiring Disclosure of Work Product Communications Between Counsel and an Expert Witness Conflicts with *Dudek*, § 804.01, and Federal Practice

In *State ex rel. Dudek v. Cir. Ct. for Milwaukee Cnty.*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967), the Wisconsin Supreme Court adopted a "broad definition of lawyer's work product," holding that "anything reflecting the mental impressions and professional skills of the lawyer should be protected from disclosure." *Id.* at 589–90. With respect to experts, the Court recognized that "the work of an expert is *often reflective* of the mental processes of the attorney under whose direction he works." *Id.* at 597. On other hand, given that an "expert's testimony"

can be "admissible evidence," *id*., the Court recognized that *some* "pretrial discovery of the other side's experts" is necessary, "*at least of the reports* of those experts." *Id*. at 599. At same time, the Court reiterated that "unlimited discovery of the reports of experts could lead to inadequate preparation, concealment and other sharp practices." *Id*. To balance these competing considerations, the Court held that discovery of experts should generally involve "an exchange of experts' reports" and "the taking of depositions after the exchange of experts' reports." *Id.* at 599–600. But any materials that contain "the attorney's mental observations and trial strategy [ ] should not be the subject to pretrial discovery, without a strong showing of good cause." *Id*. at 597–98.

Importantly, since the Court emphasized in the middle of its discussion that "the expert's testimony, including his opinions by way of conclusion, is admissible evidence," *id*. at 597, the clear implication is that the work-product rule discussed in *Dudek* applies to *both* testifying and non-testifying experts. Indeed, the Court gave, as examples of things that would *not* be discoverable, items that would often be produced by a testifying expert: "Those portions of experts' reports that are designed only to assist the attorney in preparation of pleadings, in the manner of the presentation of his proof, and cross examination of opposing expert witnesses"; and materials generated "in preparation for direct examination, and cross examination of opposing expert witnesses." *Id*.

Wisconsin's current rules of civil procedure, which were adopted in 1976, reflect *Dudek*'s careful balance; indeed, the Judicial Council Committee's Note (1974) on Wis. Stat. § 804.01 states that "Subs. (2)(c) and (2)(d) will not change the state practice under *State ex rel. Dudek v. Circuit Court* (1966)." *See* Wis. Stat. § 804.01 (1975). With respect to testifying experts, Wis. Stat. § 804.01(2)(d) provides that parties may discover *only* the "*facts known and opinions held* by experts," and, in the usual case, may discover these in two, and only two, ways: through

"written interrogatories … to identify each person whom the other party expects to call as an expert witness at trial" and through a "depos[ition] [of] any person who has been identified as an expert whose opinions may be presented at trial." Any discovery beyond this requires a motion, and usually requires fees *to other side*. *Id*. § 804.01(2)(d)1, 3. Defendants never filed such a motion.[29] Thus, Plaintiff correctly objected that the statute "does not generally permit discovery of email exchanges between counsel and a retained expert." R.277:8–9.

Wis. Stat. § 804.01(2)(d) also provides that parties may only discover "facts known and opinions held by experts" that are "*otherwise discoverable under par. (a).*" This limitation applies to both testifying and non-testifying experts, since the language quoted is part of the introductory text in § 804.01(2)(d) that applies to both sub. 1 (testifying experts) and sub. 2 (non-testifying experts). The limiting subparagraph of § 804.01(2)(a), in turn, authorizes discovery only of "*nonprivileged* matter that is relevant to any party's claim or defense," and one privilege is the work-product doctrine, as reflected in both *Dudek* and the statute: "[T]he court *shall protect against* disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.* § 804.01(2)(c).

Likewise, the Federal Rules of Civil Procedure explicitly exclude from discovery "communications between the party's attorney and any [expert] witness," and "drafts of any [expert] report." Fed. R. Civ. Pro 26(b)(4)(B)–(C). The official Advisory Committee Notes to the 2010

[29] Defendants' motion to compel under § 804.12 (a sanction for violating the discovery rules) was not a motion under the last sentence of § 804.01(2)(d)1 for permission to take expert discovery beyond the default. *See* R.276. Such a motion would require, as *Dudek* held, a "strong showing of good cause," 34 Wis. 2d at 598, which Defendants did not even attempt in their motion. R.276. Rather, their (incorrect) legal theory was that all communications with a testifying expert are automatically discoverable. *Id.*

Amendments that adopted these provisions emphasize the same principles the Wisconsin Supreme Court emphasized a half century ago in *Dudek*—that "discovery into attorney-expert communications and draft reports has [ ] undesirable effects," such as "imped[ing] effective communication" and "interfer[ing] with [experts'] work." The notes conclude that the Amendments were "designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery."

Plaintiff gave Defendants far more than they were entitled to by default under Wisconsin's statute pertaining to experts (the identity of their expert and a deposition). Plaintiff's expert provided Defendants with lengthy reports containing the entire basis for the "facts known and opinions held" by him, with numerous citations to provide the bases for his opinions. R.31; 142. And Plaintiff offered, early on, to make him available for a deposition. R.244:8 (email in August); 354:2–3 (outlining the history).

The Circuit Court's *intuition* about how the work-product doctrine applies to testifying experts was the entire basis of its decision, which the Court later acknowledged was "a pretty poor basis of a circuit court's decision." App. 58. That intuition was likely based on his *personal* experience in federal courts during what proved to be a short-lived aberration in federal practice—a practice under the *federal* rules that has no relevance to Wisconsin law. "Prior to 1993, there was general agreement that Federal Rule of Civil Procedure 26 excluded categorically the discovery of attorney opinion work product, even when provided to testifying experts." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 713 (6th Cir. 2006). In 1993, however, the federal rules were amended to require an expert's reports to include any "other information considered by the witness" (language that has *never* been present in Wisconsin's rule, which was adopted before that 1993 change). *See*

generally id. at 713–17 (describing this history). Based on that change, some federal courts held that attorney-expert communications and draft reports are automatically discoverable, even if they contain attorney work-product. *See id.* at 714. But many others strongly disagreed, notwithstanding the 1993 amendment. *Id*. at 714 (listing cases); *Nexxus Prod. Co. v. CVS New York, Inc.*, 188 F.R.D. 7, 9 (D. Mass. 1999) (listing more cases). Indeed, one district court during that period held that "Draft versions of expert reports are also opinion work product. Opinion work product enjoys *almost absolute immunity* and can be discovered only in very rare and extraordinary circumstances." *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 662 (S.D. Iowa 2000) (citations omitted, emphasis added).

In any event, the 2010 amendments resolved this dispute within the federal courts (a dispute never present in Wisconsin), in favor of the view that attorney-expert communications and draft expert reports *are* covered by the work-product doctrine and are *not* discoverable, precisely because "discovery into attorney-expert communications and draft reports has [ ] undesirable effects," such as "imped[ing] effective communication" and "interfer[ing] with [experts'] work." This is exactly the concern the Wisconsin Supreme Court expressed in *Dudek* when discussing the application of the work-product doctrine to experts, even if their opinions become "admissible evidence": "[U]nlimited discovery of the reports of experts could lead to inadequate preparation, concealment and other sharp practices." 34 Wis. 2d at 597, 599.

Thus, the uniform rule in federal courts before 1993 and since 2010 has always been the rule in Wisconsin under *Dudek* and the text of the Wisconsin statute. That the Circuit Court, during his years as a practicing attorney, may have internalized the practice in some federal courts between 1993 and 2010 does not change that fact. And, to repeat, as the Circuit Court acknowledged, it was not aware of any case

authorizing such an intrusion into work product communications between counsel and an expert witness, because Defendants did not cite any.

Thus, the Circuit Court's ruling that the work-product doctrine does not protect attorney-expert communications and drafts exchanged between a testifying expert and counsel conflicts with *Dudek*, the Wisconsin statute, and federal practice, and was clearly erroneous.

C. The Fees Award Clearly Violates the Statutory Standard

Under Wis. Stat. § 804.12(1)(c)1, a court may only award fees for a motion to compel if the losing party's position was not "substantially justified." *Id*. ("the court shall … [award] fees, *unless* the court finds that the opposition to the motion was substantially justified."). By logical necessity, it cannot be that a position is not "substantially justified" unless it prevails, *see Traynor v. Thomas & Betts Corp.*, 2003 WI App 38, ¶21, 260 Wis. 2d 345, 659 N.W.2d 158—otherwise this language would be meaningless. In a related context, this Court has favorably cited the Seventh Circuit for the proposition that "substantially justified" means a "reasonable basis in law and fact." *Id*.

Plaintiff's arguments above, *supra* Part III.B, as well as the Circuit Court's open acknowledgment, on the record, that it "d[idn't] know of a case directly on point either" in support of Defendants' position (because they could not identify one), App. 57, proves the point that Plaintiff's position was "substantially justified," *even if* this Court concludes that it is ultimately incorrect. The Circuit Court appeared to believe that Wisconsin statute establishes an absolute "loser pays" rule. It does not, and the award of fees was clear error.

D. The Order to Strike Dr. Levine's Affidavits, Entered After Plaintiff Had Appealed, Was Improper for Many Reasons

Defendants are likely to argue that Plaintiff cannot rely on Dr. Levine's affidavit for purposes of her arguments in Parts I and II above, because the Circuit Court entered an order striking his affidavits—*after* Plaintiff appealed. That argument is meritless because the Circuit Court's strike order was improper, for multiple reasons.

The Circuit Court's strike order was wrong because the underlying order to compel was wrong, for the reasons explained above in Part III.B. But even putting that point aside, the Circuit Court's strike order was also procedurally improper in multiple ways.

First, neither Defendants nor the Circuit Court have identified any authority that permits a trial court to retroactively strike materials from the record, after an appeal has been filed—effectively attempting to censor the record on appeal. The Circuit Court had *and considered* Dr. Levine's affidavits when it issued its decision dismissing this case, even citing his affidavit at one point in its decision, App. 9. Because Dr. Levine's affidavits were in the record at the time of the dismissal and appeal, they necessarily are part of the appeal as well.

Second, the strike order was also an unwarranted sanction given that, when Defendants filed their motion to strike, the underlying order to compel was "moot" and no longer operative and therefore Plaintiff was not in violation of anything. App. 38. As noted above, in their original motion to compel, Defendants did not ask the Circuit Court to order Plaintiff to produce the documents by any particular date, in either their motion or their arguments on November 7. R.276, 310:7, 43. Nor did the Court, in its oral ruling, order Plaintiff to produce them by any particular

date. App. 41–47.[30] Plaintiff was considering, and then decided to, pursue an appeal of the order to compel—as she has a right to do—and would have sought a stay pending appeal after she appealed, but was waiting for the written order to appeal, and as she communicated to Defendants and the Court. R.297; 302:2, 355:5, 7. But before the order was even entered, the Court dismissed the case and "moot[ed]" the order. Thus, Plaintiff was never in violation of any written order.

As to the Circuit Court's oral ruling, had the Circuit Court orally ordered Plaintiff to produce the materials by some particular date, she would have sought a stay before that date. But because there was no deadline from the Court (or requested by Defendants), there was no reason to seek an emergency stay, and a stay pending appeal would not have made sense until there was an appeal (and regardless, Plaintiff was evaluating *whether* to appeal, as she communicated to the Court and Defendants, R.297; 302:2, 355:5, 7). It was deeply unfair to sanction Plaintiff for waiting for the written order to appeal when Defendants themselves did not ask for a specific deadline and then prevented Plaintiff from appealing or seeking a stay pending appeal by delaying submitting the written order to the Court. R.300 (proposed order submitted on November 11, after Plaintiff indicated on November 9 that she was waiting for the written order).[31]

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[30] The proposed order that the Circuit Court signed on Defendants' *second* motion to "enforce" the not-yet-entered order appears to direct Plaintiff to produce the documents "by November 23," App. 40, but Plaintiff never had an opportunity to respond to that motion before the Circuit Court dismissed the case, and the Circuit Court did not file that order *until on* November 23, and then "moot[ed]" it six minutes later, before Plaintiff could do anything. App. 38.

[31] On November 16, in their motion to "enforce" the not-yet-entered order, Defendants for *the first time* asked the Court to impose a deadline. Defendants filed this motion notwithstanding Plaintiff's representations on November 9 and 15 that

For these reasons this Court should reject any arguments that this Court should not rely on Dr. Levine's affidavits in this appeal.

IV. The Court's Order Sealing Dr. Leibowitz's Deposition Transcript Was Improper and This Court Should Unseal It on Appeal

Defendants have submitted, in public filings, the expert testimony of Dr. Scott Leibowitz, R.142, and have quoted and cited that testimony in their publicly accessible briefs. *E.g.*, R.292:4, 6; 330:10–12. The ACLU has also publicized his affidavit on their website, *to this day*.[32]

Notwithstanding his voluntary, public participation in this case, Defendants moved to seal his entire deposition transcript after Plaintiff appealed. R.344–45. They did not point to any particular portion of the transcript that contained sensitive information—none of it related to any confidential information about a patient, for example—but simply asked to seal all of it (or all but eight pages). R.345:7. Their main argument was that the questions were not relevant, R.345:8–10, even though they [redacted]. *Supra* Background Part B.3. They also argued that sealing was necessary to protect Dr. Leibowitz, R.345:10–11, but they could not point to a single threat, or even a hostile telephone call or online posting, relating to Dr. Leibowitz's public participation in this case—which, again, was his own voluntary choice. *See* R.345.

The Circuit Court rejected Defendants' argument that sealing was necessary to protect Dr. Leibowitz, given that he has already identified

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she was considering appealing and was waiting for the written order, R.297, 302:2, 355:5 (email from Plaintiff's counsel to Defendants' counsel on November 15). Plaintiff never had an opportunity to respond to that motion before this Court dismissed this case, "moot[ing]" their request. App. 38.

[32] https://www.aclu.org/legal-document/doe-v-mmsd-expert-affidavit-dr-scott-f-leibowitz.

himself in connection with this case. R.359:30–31. Nevertheless, the Court still ordered his entire deposition transcript to be sealed, solely because the parties have not yet litigated evidentiary objections. R.359:31–35. This rationale is irrelevant to whether the transcript should be sealed, and in any event was due to the Court short-circuiting the usual summary judgment process, as explained above.

Last time this case was on appeal, the Supreme Court held that there is a "strong presumption in favor of openness for judicial proceedings and records." *Doe I*, 2022 WI 65, ¶ 19. Defendants did not come anywhere near overcoming that presumption.

The seal order is also deeply unfair. Defendants have, and likely will on appeal, rely on his affidavit, and the ACLU has presented it to the public on their website. Yet during his deposition, Dr. Leibowitz [redacted]. *Supra* Background Part B.3. Defendants simply do not want the public to see the many ways [redacted]. Since Defendants will publicly quote his affidavit, it is only fair that Plaintiff be permitted to quote from his deposition. This Court can and should unseal Dr. Leibowitz's deposition transcript on appeal.

CONCLUSION

The decisions of the Circuit Court should be reversed.

Dated: January 23, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief, except as to length. Plaintiff has simultaneously filed a motion to exceed the word limit. The length of this brief is 19,579 words.

Dated: January 23, 2023.

Electronically signed by Luke N. Berg

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