In the Supreme Court of Wisconsin

JANE DOE 4,
PLAINTIFF-APPELLANT-PETITIONER,

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 Judge Frank D. Remington, Presiding,
Case No. 2020-CV-454

COMBINED MEMORANDUM IN SUPPORT OF BYPASS AND AN INJUNCTION PENDING APPEAL

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INTRODUCTION

Last summer, this Court remanded this case to the trial court, directing it to rule on the parent-plaintiffs' long-outstanding preliminary injunction motion. Instead, the Court dismissed the case for lack of standing, in conflict with this Court's well-established precedents, 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 preliminary 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].

This Court should take this case, again, on bypass, and grant an injunction pending appeal, for many reasons that are outlined below. But most importantly, an injunction from this Court 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; even Defendants' expert [redacted].

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.

BACKGROUND

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

A. Procedural History After This Court's Decision

In this Court's decision last summer, the majority 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. The Court remanded to the Circuit Court "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. This Court issued its decision on July 8, 2022. *Id.*

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 this 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. 20–22 (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 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. 20–22.

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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 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 B.3). 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, on November 23, the Circuit Court issued a decision and final order dismissing the case on standing. R.312. Although the Court's decision begins by stating that "The sole issue in this case is whether a parent has standing…," *id*., 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, R.312:6–7 ("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.").

Plaintiff promptly appealed on November 28 and immediately moved for an injunction pending appeal, incorporating her arguments from her prior filings as to all of the factors for an injunction. R.317. Plaintiff cited *Waity v. LeMahieu*, 2022 WI 6, ¶¶ 48–49, 400 Wis. 2d 356, 969 N.W.2d 263, for the standard for relief pending appeal, and flagged for the Circuit Court, both during a short scheduling hearing on

November 29, and in her reply brief, that *Waity* requires trial courts to consider "the possibility that appellate courts may reasonably disagree with its legal analysis." *Id.* ¶ 53; R.356:48–49; 369:1.

A week *after* Plaintiff appealed, Defendants moved to strike Plaintiff's expert's affidavits, R.334, based on a discovery ruling that Plaintiff had indicated, both to the Court and to Defendants, that she was planning to appeal (and was waiting for the order to appeal), R.297; 354:10–11; 355:5, 7, but that order was "moot[ed]" before it was even entered, by the Circuit Court's dismissal order. R.313. Nevertheless, although Plaintiff was never in violation of any order, the Court issued another order—after the case had been dismissed and Plaintiff had appealed—purporting to retroactively strike Plaintiff's expert's affidavits. R.357. That strike order was erroneous for multiple reasons, some of which are discussed below, *infra* Part I.C; II.D, and addressed more thoroughly in Plaintiff's opening brief on appeal. Opening Br. Argument Part III.

On January 20, 2023, the Circuit Court denied Plaintiff's motion for an injunction pending appeal. App. 4–16. The Court failed to apply any of the factors, instead accusing Plaintiff of waiver, even though Plaintiff had expressly incorporated her prior, extensive briefing on each factor (from her preliminary injunction motion and briefs on standing), noting that "[t]he grounds for relief pending appeal mirror those for a preliminary injunction," R.317:1–2, as both the Circuit Court and the Court of Appeals previously recognized in this very case. R.153:32; 159:6. The Court also made the very error this Court identified in *Waity*. Although Plaintiff flagged that holding, R.356:48–49; 369:1, the Court failed to consider the likelihood that its decision(s) would survive appellate review—solely because Plaintiff incorporated her prior briefing on both the injunction question and standing. App. 8 ("Jane Doe cannot ignore this required demonstration then expect a court to vaguely reflect on its own decisions and somehow reach a different conclusion about how another judge could decide this case."). The Circuit Court also relied on

its erroneous strike order. App. 9. Finally, the Court relied on its own abnormal and improper process below—dismissing the case on standing when the only motion pending was Plaintiff's injunction motion—to conclude that it could not grant an injunction pending appeal because that would "exceed[ ] the scope of [Plaintiff's] appeal." App. 10.

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 4. R.254:17. 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,"

[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.

R.254:17, and the Circuit Court cut off the discovery process before Plaintiff could pursue this further, 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, R.10:39, 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.[6]

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

[6] 2021 Dane County Youth Assessment Survey, Dane County Youth Commission, at 12, https://www.dcdhs.com/documents/pdf/Youth/DCYA-2021-Overview-Report.pdf

opposite-sex by addressing them using a different name and pronouns[7]—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,[8] 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,"[9] has argued that, in his view, "parents who support, implement, or encourage a gender social transition (and clinicians who

[7] 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]

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

[9] 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."[10]

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,[11] 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 better information is needed about outcomes" (emphasis added).[12] Based

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[10] 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.

[11] *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/.

[12] 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/.

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.[13]

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,"[14] and that "cutting [parents] out" of this decision is "misguided," "unethical," and "irresponsible."[15]

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 not transition, the predictors of social transitions, and whether *transitions impact children's views of their own gender*."[16]

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[13] *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.

[14] 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.

[15] 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/.

[16] 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.

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."[17] 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.[18] One poignant example is Chloe Cole, who recently shared her personal experience on Fox News.[19] *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 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.

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[17] *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

[18] 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.

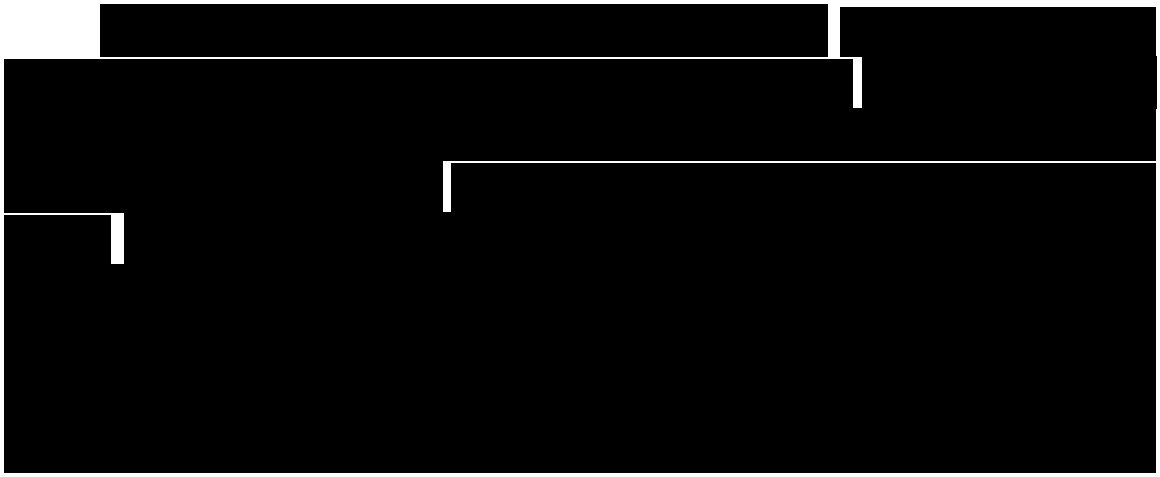
[19] Carnahan, Ashley, *Detransitioned teen wants to hold 'gender-affirming' surgeons accountable: 'What happened to me is horrible'*, Fox News (Nov. 11, 2022), https://www.foxnews.com/media/detransitioned-teen-hold-gender-affirming-surgeons-accountable.

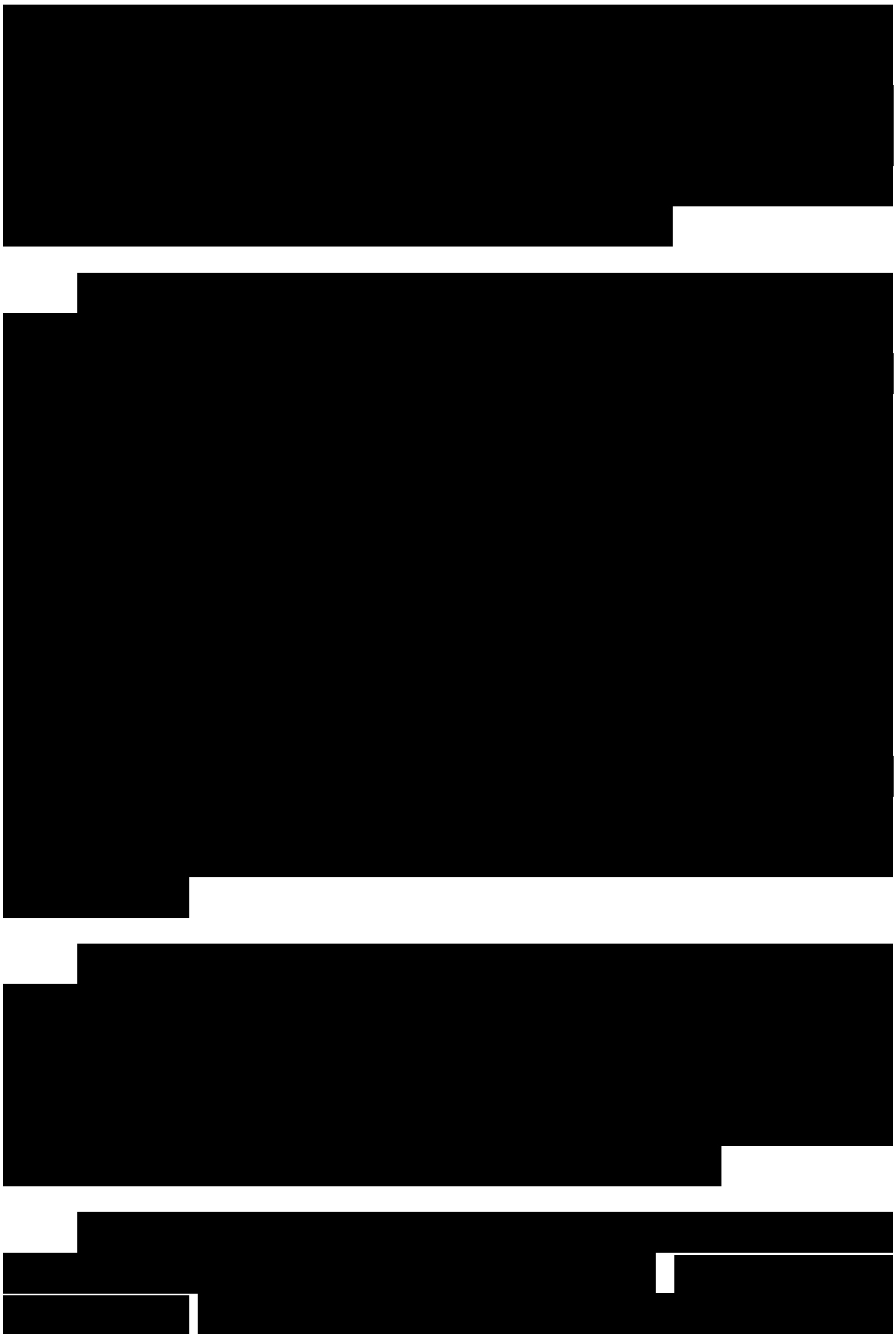
3. *Defendants' Expert* [redacted][20]

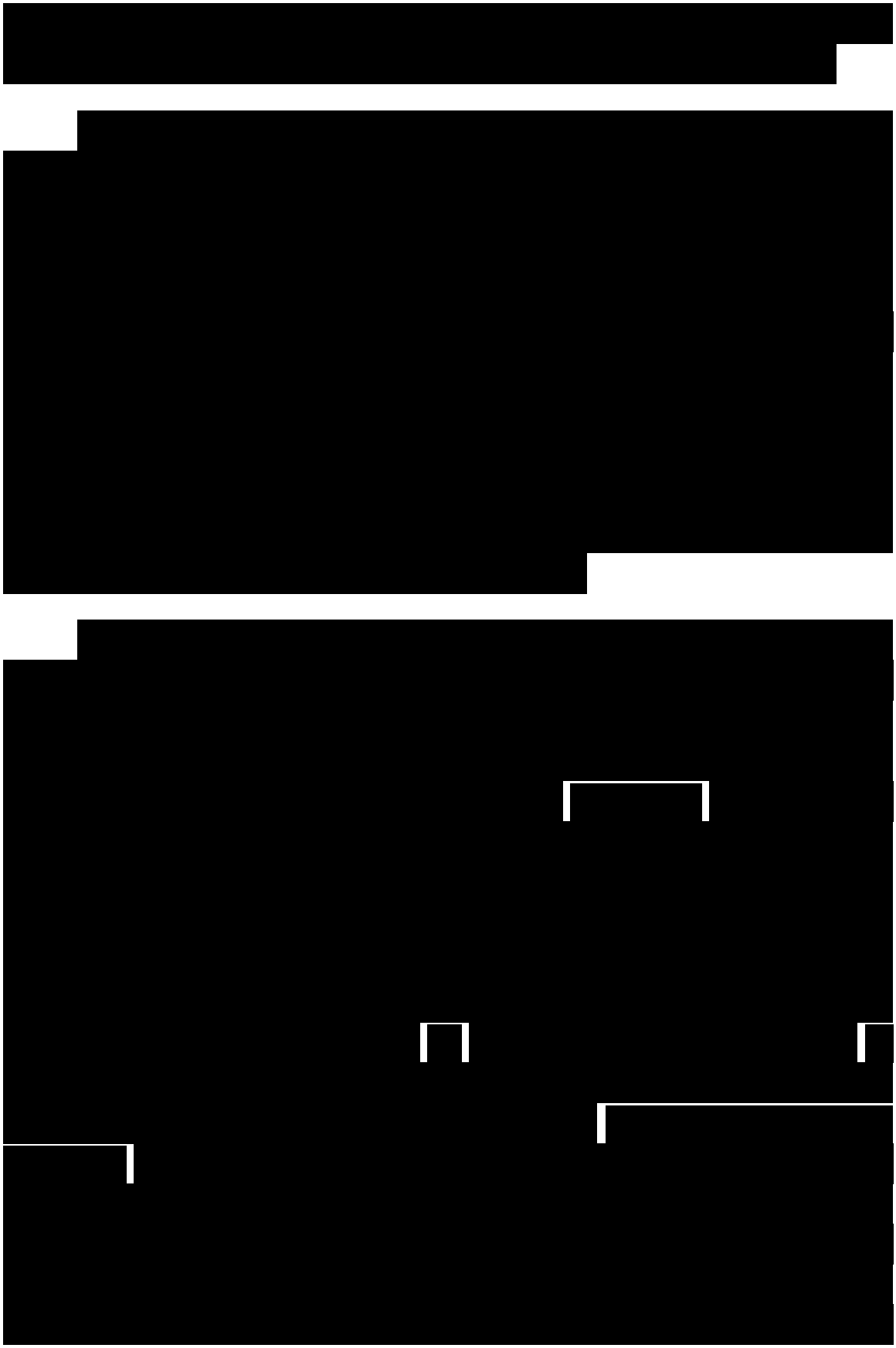
[redacted]

[20] 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 error, and obviously so, for reasons Plaintiff addresses in more detail in her opening brief. Opening Br. Argument Part IV. Briefly, however, Dr. Leibowitz has publicly submitted an affidavit in this case that the ACLU has publicized on their website. *See* https://www.aclu.org/legal-document/doe-v-mmsd-expert-affidavit-dr-scott-f-leibowitz. It is deeply unfair to then seal his entire deposition. The Circuit Court rejected the argument that sealing the deposition transcript was necessary to protect Dr. Leibowitz, given that he has already identified himself in connection with this case. R.359:30–31. Instead, the Court relied on the fact that the parties have not yet litigated evidentiary objections, R.359:31–35—which is irrelevant to whether it should be sealed, and in any event was due to the Court short-circuiting the usual summary judgment process. This Court can and should unseal Dr. Leibowitz's deposition transcript on appeal.

[21] 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 II.A.1, 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.

ARGUMENT

I. This Court Should Take This Appeal on Bypass

There are many reasons to take this case on bypass, but the most important reason is to protect parents' constitutional rights and their children from lifelong harm, since there is now evidence that the District is *currently* applying its Policy to hide information from parents, *see supra* Background Part B.1; Wis. Stat. § 809.62(1r)(a) (a "real and significant question of … state constitutional law").

Whether parents have standing to challenge an official school policy, like the Madison School District's, to hide things about their own children from them (issue 1), and whether such a policy should be temporarily enjoined (issue 2), both have statewide importance, because multiple school districts around the state have similar policies, including Milwaukee,[22] Oshkosh,[23] Kettle Moraine, and Eau Claire, the latter two of which have active cases against them on the same subject. *T.F. v. Kettle Moraine Sch. Dist.*, No. 21-CV-1650 (Waukesha Cnty. Cir. Ct., filed Nov. 17, 2021); *Parents Protecting Our Children v. Eau Claire Area Sch. Dist.*, No. 3:22-cv-508 (W.D. Wis., filed Sep. 7, 2022).

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[22] Milwaukee Public Schools, *Gender Inclusion Guidance*, at 3, 5 (Oct. 2016), https://milwaukeepublic.ic-board.com/attachments/f36536ea-e075-4a98-b135-54abb5ee05c1.pdf

[23] Monique Lopez, *Oshkosh schools no longer getting parental OK for student identity*, Fox 11 (Oct. 22, 2021), https://fox11online.com/news/education/oshkosh-schools-no-longer-getting-parental-ok-for-student-identity

Even setting that point aside, all three issues presented by this appeal warrant bypass.

A. The Court's Decision Conflicts with This Court's Precedent on Standing and Creates a Split in Wisconsin

As explained more thoroughly below, *infra* Part II.A.1, this Court has long recognized 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, because a declaratory judgment action "is *primarily* anticipatory or preventative in nature." *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976) (emphasis added). Indeed, this Court has held that forcing parties to wait until they have been harmed by an unlawful policy "would defeat the purpose of the declaratory judgment statute." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶¶ 45–46, 244 Wis. 2d 333, 627 N.W.2d 866.

Thus, this Court has long recognized that a "*threatened* [ ] injury" is sufficient for standing, *e.g.*, *Marx v. Morris*, 2019 WI 34, ¶ 35, 386 Wis. 2d 122, 925 N.W.2d 112, especially for declaratory judgment actions, where standing and ripeness are "[b]y definition, … different from the ripeness required in other actions." *Milwaukee Dist. Council 48*, 2001 WI 65, ¶ 41, 244 Wis. 2d 333, 627 N.W.2d 866; *see also Fabick v. Evers*, 2021 WI 28, ¶ 11 n.5, 396 Wis. 2d 231, 956 N.W.2d 856 ("a century's worth of precedent makes clear that *threatened*, as well as actual, pecuniary loss can be sufficient to confer standing."). Defendants even conceded the point below. R.292:3 (acknowledging that "potential future injuries" are sufficient for standing).

As explained in more detail below, *infra* Part II.A.2, the District's Policy unquestionably threatens Jane Doe 4's (like all parents) constitutional rights and substantial harm to her child and their

relationship, and a preemptive lawsuit and injunction is the only possible way to prevent these harms, given that the District's policy is to conceal the violation and harm from parents when it is occurring. Nevertheless, in direct "conflict with" this Court's controlling precedents, Wis. Stat. § 809.62(1r)(d), the Circuit Court held that Jane Doe 4 lacks standing because she does not have "evidence of past individual harm," R.312, (even though, as noted above, there *is* evidence that the District is currently violating parents' rights, and may even be presently concealing a violation from Jane Doe 4).[24]

The Circuit Court's decision on standing also creates a split among circuit courts in this state on standing, requiring this Court to "harmonize the law." Wis. Stat. § 809.62(1r)(c). In the Kettle Moraine case mentioned above, the Waukesha County Circuit Court denied a motion to dismiss, both as to parents who had been harmed by that District's policy *and as to parents who had not yet been harmed but sued preemptively*, precisely because, under this Court's well-established precedents, parents "need not wait for potential harm from [a school district's] policy to occur for their children before they are entitled to seek declaratory relief on whether the policy violates their parental rights." App. 21.

B. The Court's Failure to Enjoin the Policy Allows the Ongoing Violation of Parents' Rights and Harm to Children

As outlined above, the Circuit Court "denied [Plaintiff's] motion for an injunction," App. 7, by instead dismissing the case when the only motion pending was Plaintiff's injunction motion. *Supra* Background Part A.

[24] The Court also held that Jane Doe 4 "present[ed] no evidence that she predicts [or] anticipates [that she] will actually suffer any individual harm," R.312:1, but that is simply not true, as explained below, *infra* Part II.A.1.

As already argued, this Court's review of the injunction question—whether the District's policy should be temporarily enjoined while this case proceeds—presents a "real and significant question of … state constitutional law," Wis. Stat. § 809.62(1r)(a), which will have "statewide impact," *id.* § 809.62(1r)(c)2. There is also "a clear need to hasten the ultimate appellate decision," Internal Operating Procedures at 8, given that there is now evidence that the District is currently violating parents' constitutional rights and potentially causing lifelong psychological harm to children. *Supra* Background Parts B.1, B.2.

Bypass is also warranted given the simultaneous motion for an injunction pending appeal, *infra* Part II, because the Wisconsin Court of Appeals has *already denied an identical motion* for an injunction pending appeal, last time this case was on appeal, on the grounds that the harms are too "speculative" to warrant an injunction. R. 159. Forcing Plaintiff to wait for the Court of Appeals to rule on the same motion again would waste judicial resources and allow ongoing harm to parents' constitutional rights and children to continue. This Court is the only Court that has not yet ruled on the injunction question (while the Circuit Court has denied Plaintiff's repeated requests for a temporary injunction now three times), so it is ripe for this Court's review.

Defendants may argue that the injunction question is not properly presented in this appeal because the Court dismissed the case on standing. Any such argument would be wrong, for multiple reasons, including that Plaintiff's motion was the only motion pending and that ordering an injunction is the "usual" outcome when a trial court dismisses a case with an injunction motion pending, *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 102, 146 N.W.2d 447 (1966) ("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.").

But if, for some reason, the Circuit Court's abnormal process below prevents the injunction question from being squarely presented in this appeal, that would simply provide yet another reason for bypass, so that this Court can exercise its superintending authority—which is the "exclusive" province of this Court, *In re Commitment of Thiel*, 2001 WI App 52, ¶10 n.6, 241 Wis. 2d 439, 625 N.W.2d 321—to order an injunction. 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.'"). 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 B.1. And many well-respected experts view this as a psychosocial 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.

If the injunction question is not properly presented, then it follows, *a fortiori*, that "an appeal from [the] final judgment is inadequate and [ ], grave hardship will follow." *Universal Processing*, 2017 WI 26, ¶48. Plaintiff filed her injunction motion nearly three years ago, and this Court directed the Circuit Court to rule on it. *Doe I*, 2022 WI 85, ¶¶35, 41. The Circuit Court's decision to instead dismiss the case on standing, without any motion pending and even though the Court had denied a motion to dismiss on that basis two years earlier, was clear error, legally, factually, and procedurally. *Infra* Part II.A.1. Thus, this Court should grant bypass to ensure that the injunction question is decided and to protect parents' constitutional rights and children from harm.

C. The Circuit Court's Discovery Order Conflicts with the Text of Wisconsin's Statutes, This Court's Seminal Holding in *Dudek*, and Creates a Conflict with Uniform Federal Practice

In *State ex rel. Dudek v. Cir. Ct. for Milwaukee Cnty.*, 34 Wis. 2d 559, 150 N.W.2d 387 (1967), this 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 concluded 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 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.

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. § 801.04(2)(d) provides that parties may discover only the "*facts known and opinions held* by experts," and may do so 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*.

Wis. Stat. § 801.04(2)(d) also provides that parties may only discover "facts known and opinions held by experts"—both testifying and nontestifying experts—that are "*otherwise discoverable under par. (a).*" The limiting subparagraph of § 804.01(2)(a) authorizes discovery only of "*nonprivileged* matter that is relevant to any party's claim or defense," and one of the privileges is the work-product doctrine, both as reflected in *Dudek* and in 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." Wis. Stat. § 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 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."[25]

[25] These amendments were made in response to disagreement among federal courts about whether a change to the federal rules in 1993 meant that attorney-expert communications and draft reports were automatically discoverable. *See generally, Nexxus Prod. Co. v. CVS New York, Inc.*, 188 F.R.D. 7 (D. Mass. 1999). The language that some federal courts relied on, during that 17-year period, to hold that these are

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 the "mental impressions, conclusions, opinions, or legal theories" of Plaintiff's attorneys 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. Defendants did not narrow their request, but instead filed a motion to compel. R.276.

The Court held a hearing on November 7, and issued an oral decision, followed by a written order on November 23, R.313 (issued after dismissing the case, as outlined above), ordering Plaintiff's counsel to produce all communications and draft reports between counsel and Dr. Levine, without regard to whether any of those materials contain attorney work-product, on the theory that they become automatically discoverable once the expert submits testimony in a case. Neither the Court, nor the Defendants, in either their written materials or argument during the hearing, identified any case in Wisconsin holding that

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automatically discoverable has never been present in Wisconsin's statutes. In any event, even between 1993 and 2010, multiple federal courts held that the work-product doctrine would still apply to such materials. *E.g.*, *id.* (listing cases); *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 662 (S.D. Iowa 2000) ("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.") (citations omitted). In any event, the amendments in 2010 resolved the dispute in favor of the view that attorney-expert communications and draft reports *are* covered by the work-product doctrine, a position that, Plaintiff submits, *Dudek* recognized and has always been the rule in Wisconsin.

attorney-expert communications and drafts are categorically excluded from the work-product privilege solely because the expert submits testimony in a case. Nor did Defendants or the Court adequately distinguish the text of Wisconsin's statutes or *Dudek*, which clearly indicates that the work-product doctrine *does* apply, even when the expert's testimony becomes "admissible evidence." 34 Wis. 2d at 597. Instead, the Court relied entirely on its intuition and past experience, R.310:34–40, later acknowledging, on the record, that it "[didn't] know of a case directly on point either," and that relying on past experience was "a pretty poor basis of a circuit court's decision," R.359:78–79.[26]

The Circuit Court's decision holding that attorney-expert communications and draft reports are *categorically* excluded from the work-product doctrine is in direct "conflict with" this Court's seminal decision in *Dudek* and the text of Wisconsin's statutes. Wis. Stat. § 809.62(1r)(d). The decision also creates a "conflict" with uniform federal practice, as described above. *Id.*

Additionally, to the extent that *Dudek* and the statute do not control, this question would then be a "novel" "question of law," with "statewide impact," that requires this Court's law-developing role. Wis. Stat. § 809.62(1r)(c); *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997). Whether and to what extent the work-product doctrine applies to attorney-expert communications is an important legal issue to legal practice in Wisconsin. Wis. Stat. § 809.62(1r)(b). Again, Plaintiff submits that *Dudek* and Wis. Stat. § 804.01 clearly protect an attorney's mental impressions, conclusions, opinions, or legal theories reflected in

[26] To make matters worse, the Circuit Court also required Plaintiff to pay attorneys' fees for Defendants' motion to compel, R.313, concluding that Plaintiff's position was not "substantially justified," Wis. Stat. § 804.12(1)(c)2; R.359:78–79, even though Plaintiff had cited *Dudek*, the text of § 804.01, and federal practice, whereas Defendants could not identify any case to the contrary. R.359:78. Plaintiff's appeal will raise the fees ruling as well, *see supra* Issue 3, but Plaintiff does not address it further here for purposes of this bypass petition and injunction motion.

attorney-expert communications, regardless of whether the expert's testimony becomes "admissible evidence," 34 Wis. 2d at 597, but if not, this is an unresolved legal issue that warrants resolution by this Court.

D. This Court Should Grant Bypass Now

While this Court has a past practice of denying petitions for bypass as premature if filed before the principal briefs on appeal, this Court has, somewhat regularly, recognized exceptions to this default practice. *E.g.*, *Teigen v. WEC*, No. 2022AP91 (order dated Jan. 28, 2022); *State ex rel. Kaul v. Prehn*, No. 2021AP1673 (order dated Nov. 16, 2021); *Waity v. LeMahieu*, No. 2021AP802 (order dated July 15, 2021). As Justice Hagedorn recently explained in one order denying bypass (which was then later granted), the exceptions typically include cases where "relief is urgently needed or not practically available from a lower court." *Becker v. Dane County*, No. 2021AP1343 (order dated Nov. 16, 2021) (Hagedorn, J., concurring).

Both are true here. As described in more detail above and below, relief from this Court is urgently needed because the District is currently violating parents' constitutional rights, and, if the experts discussed above are correct, is causing long-term harm to the minor students in their care—while hiding the harm and constitutional violation from their parents. Unlike in *Becker*, the underlying policy is still "in effect" and not "stayed" (and is currently being applied). And the injunction Plaintiff requests is modest and would only apply in situations where the District *is currently* or *otherwise would* violate parents' rights; it simply requires District staff to notify and defer to parents before treating their child as the opposite sex, while at school.

And relief is "not practically available" from the lower courts. The Circuit Court denied Plaintiff's preliminary injunction motion by instead dismissing the case, and then denied a motion for injunction pending appeal, and the Court of Appeals has already denied a motion for

injunction pending appeal (substantially similar to this one) last time this case was appealed. Only this Court has not yet ruled on whether the District's policy should be temporarily enjoined while this case proceeds.

Finally, the underlying rationale for the default practice does not apply here, given the procedural history of this case. As Justice Hagedorn explained in *Becker*, the point of waiting until the briefs have been filed is to ensure that this Court "know[s] the full scope of what we are being asked to decide." *Becker*, No. 21AP1343 (order dated Nov. 16, 2021) (Hagedorn, J., concurring). This case was already before this Court last term, and the parties already briefed and argued the injunction question to this Court—the majority just concluded that question was not yet properly before it, given the unique procedural posture—so this Court is already fully aware of the main issues in this case and appeal.

II. This Court Should Grant an Injunction Pending Appeal

The grounds for relief pending appeal mirror those for a preliminary injunction, and require courts to consider four factors: the moving party's likelihood of success on appeal, the risk of irreparable injury, whether an injunction will harm other interested parties, and whether an injunction is in the public interest. *Waity v. LeMahieu*, 2022 WI 6, ¶¶ 48–49, 400 Wis. 2d 356, 969 N.W.2d 263. These "are not prerequisites but rather are interrelated considerations that must be balanced together." *Id.* (quoting *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995)). All four factors cut heavily in favor of an injunction.

A. Plaintiff is Highly Likely to Succeed in Her Appeal

1. Plaintiff Has Standing to Challenge a Policy to *Hide* a Constitutional Violation from Her[27]

This 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

[27] 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.

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, during his deposition, [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, this 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.A.2.

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

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. 53–54. 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. 54; 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. 54–55; 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, this 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, R.312:4–5, 26, 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." R.312:1. 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.11, 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.

2. The District's Policy Violates Parents' Rights

i. 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).[28]

[28] 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, 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.

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. 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

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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.

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.

ii. 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] 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]

[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 Defendants 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," R.10:39—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.

iii. The District's Policy Fails Strict Scrutiny.

The Policy's primary stated justification is protecting children's privacy, R.10:14, 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*, R.10:21, 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. R.10:39. 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.*, this 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*.[29] 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 parents ("abuse or neglect"), *id.* § 48.981(2), and provides robust

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

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,[30] medication (even aspirin) at school[31]) or even much less significant ones (e.g. athletics,[32] field trips[33]); 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. Defendants' expert [redacted]

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

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

[32] 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

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

[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 Significant 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* p. 10–11. 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. 15. 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 Erred in Denying an Injunction

This Court reviews a decision on a motion for relief pending appeal under an abuse of discretion standard. *Waity*, 2022 WI 6, ¶ 50. A court abuses its discretion when it: (1) "fail[s] … to consider and make a record of factors relevant to a discretionary determination"; (2) "consider[s] clearly irrelevant or improper factors"; or (3) "clearly giv[es] too much weight to one factor." *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 430, 293 N.W.2d 540 (1980) (citation omitted). It is an abuse of discretion to "fail[ ] … to consider a matter relevant to the determination of the probability of the petitioners' success." *Id.* at 428.

Finally, as this Court explained in *Waity*, it is an abuse of discretion not to consider "the possibility that appellate courts may reasonably disagree with its legal analysis." 2022 WI 6, ¶ 53. The Circuit Court committed at least four different errors, each of which independently was an abuse of discretion that warrants reversal and an injunction from this Court.

First, the Circuit Court entirely failed to analyze any of the factors for an injunction pending appeal, an obvious abuse of discretion, instead accusing Plaintiff of waiving any argument as to those factors. App. 8–10. But Plaintiff had already thoroughly briefed each of the factors in her briefing to the Circuit Court on her preliminary injunction motion (and supplemental briefs on standing) and expressly incorporated those arguments rather than repeating them verbatim. R.317:2 (Citing various sections from R.30, 253, 290, 307). The Circuit Court had previously held (because the parties agreed) that the standard for an injunction pending appeal mirrors that for a preliminary injunction, R.153:32, and had repeatedly directed the parties not to engage in repetitive arguments, *e.g.*, R.288:8, 11. Plaintiff was trying to reach a decision on her request for an injunction as efficiently as possible, given that she filed it nearly three years ago, that it was clear the Circuit Court would deny it, *e.g.*, R.288:58 (declining to hear oral argument on the factors for an injunction, during the hearing on Plaintiff's motion), and given that the District's Policy is causing ongoing, irreparable harm. *Supra* Part II.B. The Circuit Court has now denied Plaintiff's repeated requests for a temporary injunction three times—partially (mostly) denying her motion for injunction pending appeal last time this case was on appeal, R.157; denying her preliminary injunction motion by instead dismissing the case, R.312; and denying an injunction pending appeal during this appeal, App. 4–16.

Second, the Court committed a clear *Waity* error by failing to consider appellate review of its decisions. App. 8–9 (explicitly declining to "reflect on its own decisions and somehow reach a different conclusion

about how another judge could decide this case."). Instead, the Court accused Plaintiff of failing to make any argument about how the issues would be viewed on appeal. But Plaintiff's arguments to the Circuit Court, both on standing and the merits, were based on this Court's well-established precedents and were thoroughly briefed and filled with citations. *E.g.*, R.290. And Plaintiff emphasized to the Court, twice, that *Waity* required it to consider appellate review. R.356:48–49 ("The only difference on appeal, just to put it out there for everybody, is *Waity* said that the court has to consider separately the likelihood of success on appeal"); 369:1. A party can do nothing further than cite this Court's precedents on a legal issue and flag *Waity*.

Third, the Court reasoned that it *could not* grant the injunction Plaintiff requested because it had dismissed the case on standing, believing that its dismissal somehow limits "the scope of [Plaintiff's] appeal" to the issue of standing and prevented it from granting an injunction. App. 9–10. But the Court cited nothing for that proposition, and the text of the statute provides, without qualification, that courts can "grant an injunction" "[d]uring the pendency of an appeal." Wis. Stat. § 808.07(2). In any event, the Circuit Court was wrong about the scope of Plaintiff's appeal. As noted above, this Court has held that an order "direct[ing] the entry of an injunction" is the "usual" outcome on appeal when a trial court dismisses a case with an injunction motion pending. *Fromm*, 33 Wis. 2d at 102. Furthermore, the Circuit Court itself, in its decision, recognized that it "denied [Plaintiff's] motion for [a preliminary] injunction," App. 7, so the injunction question is squarely presented by this appeal. Thus, the Circuit Court necessarily "appl[ied] an incorrect legal standard," *Waity*, 2022 WI 6, ¶ 50, by relying on its erroneous view that it *could not* grant Plaintiff's request.

Moreover, as explained above, even if the Circuit Court were correct that the unusual process it followed below somehow limits the scope of Plaintiff's appeal, that only provides a reason for this Court to exercise its superintending authority to grant an injunction. *Supra* p. 26.

Plaintiff's injunction motion has now been outstanding for nearly three years. When this Court remanded the case last summer, it directed the Circuit Court to rule on that long-outstanding motion. *Doe I*, 2022 WI 65, ¶¶ 35, 41. The Circuit Court's decision to instead dismiss the case was clearly improper, as explained above—it had already denied a motion to dismiss based on the exact same standing argument, summary judgment was premature, and the only motion pending was Plaintiff's preliminary injunction motion. *Supra* Background Part A. And its standing analysis is clearly wrong, under well-established precedents. *Supra* Part II.A.1. This Court should not allow the Circuit Court's errors to prevent resolution of the injunction question, especially when the District is currently applying its Policy to violate parents' constitutional rights and to conduct what many experts view as a psychosocial experiment on children with the potential for serious, long-term harm—and then to conceal the violation and harm from parents when it is occurring.

Fourth, and finally, the Circuit Court erroneously disregarded Plaintiff's expert's affidavits, App. 9, based on an order it entered after the Court had dismissed the case and Plaintiff had appealed, purporting to retroactively strike those affidavits as a sanction for not yet complying with an order that was "moot" before it was entered and before Plaintiff had any opportunity to appeal or seek a stay of that order (even though Plaintiff indicated to Defendants and the Court that she was planning to appeal it). That strike order was itself erroneous, for multiple reasons.

First, the underlying order to compel conflicts with *Dudek*, the text of Wis. Stat. § 804.01, and Federal Practice, as explained briefly above, *supra* Part I.C., and more fully in Part III.B of Plaintiff's opening brief.

Even putting that point aside, the strike order was also procedurally improper for multiple reasons. 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, R.312:6. 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.

The strike order was also an unwarranted sanction given that, when Defendants filed their motion to strike (a week after Plaintiff appealed), the underlying order to compel was "moot" and no longer operative and therefore Plaintiff was not in violation of anything. R.313:2. 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. R.310:34–40.[34] 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, 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

[34] On November 16, Defendants filed a motion to "enforce" the order that was not yet in place and that they had delayed submitting to the Court, *infra* n.35. R.302, even though Plaintiff had indicated, on both November 9, R.297, and November 15, R.355:5, that she was waiting for the written order to appeal. Defendants' motion to "enforce" the not-yet-entered order was the first time they asked for a deadline, but Plaintiff never had an opportunity to respond to that motion before the Court dismissed the case. R.354:10. Nevertheless, on November 23, five minutes before the Circuit Court dismissed the case, it signed and filed Defendants' proposed order that appears to direct Plaintiff to produce the documents "by November 23." R.311 (again, the Court filed this *on* November 23). Just five minutes later, before Plaintiff had a chance to do anything, the Court signed its order dismissing the case. R.312. Then, a minute after that, it finally entered its order on the original motion to compel, but in it held that both that order and the "order previously entered" were "moot" as a result of the dismissal order. R.313. Plaintiff promptly appealed all three orders on November 28, R.318–19, but did not seek a stay of the discovery orders because the Court had "moot[ed]" them before they were even entered.

case and "moot[ed]" the order. Thus, Plaintiff was never in violation of any written order.

As to the Circuit Court's oral ruling on November 7, 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 did not make 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.[35]

Had the Circuit Court not "moot[ed]" the discovery orders before they were entered, a stay pending appeal clearly would have been warranted.[36] This Court has explained that, "[w]hen considering potential harm [for purposes of a stay pending appeal], circuit courts must consider whether the harm can be undone if, on appeal, the circuit court's decision is reversed. If the harm cannot be 'mitigated or remedied upon conclusion of the appeal,' that fact must weigh in favor of the

[35] The hearing where the Court ordered Defendants to draft an order was on November 7. R.310:39. Plaintiff indicated on November 9 that she was waiting for the written order but "Defendants have yet to send Plaintiff or the Court a proposed order." R.297. Defendants still waited until November 11 to submit a proposed order and did not send it to Plaintiff first. R.300.

[36] Plaintiff's position is that no stay of those orders is necessary, given that the Circuit Court already held that they are "moot" as a result of the dismissal order. R.313. As to the strike order, that was erroneous for the reasons explained. However, to the extent that this Court believes a stay of the "moot" discovery orders (or the strike order) is necessary for this Court to consider Dr. Levine's affidavits for purposes of this motion, Plaintiff respectfully requests it, primarily for the reasons explained in *Waity*, *Dane County v. PSC*, and *Scott*. And she is highly likely to succeed in her appeal of the discovery orders, for the reasons explained in Part I.C.

movant." *Waity*, 2022 WI 6, ¶ 57. This Court recently applied that principle to an appeal of a compelled discovery order and held that the circuit court erred by failing to stay that order because, if the party were required to comply with the discovery order before the appeal were resolved, that "could [not] be undone on appeal." *Dane County v. PSC*, 2022 WI 61, ¶ 82, 403 Wis. 2d 306, 976 N.W.2d 790; *see also State v. Scott*, 2018 WI 74, ¶¶ 42, 44, 382 Wis. 2d 476, 914 N.W.2d 141 (holding that medication orders "should be stayed automatically pending appeal" because the appeal would otherwise be "rendered a nullity").

As recognized in *Dudek* and reflected in the relevant Wisconsin statute, the work-product doctrine is meant to prevent lawyers from using the discovery process to obtain opposing counsel's "mental impressions, conclusions, opinions, or legal theories." Wis. Stat. § 804.01(2)(c)1; *Dudek*, 34 Wis. 2d at 580. Plaintiff appealed the discovery orders precisely to protect her attorneys' "mental impressions, conclusions, opinions, or legal theories" from opposing counsel's view. Once she produces documents containing such information, that "can[not] be undone," and the appeal would be "rendered a nullity." *Waity*, 2022 WI 6, ¶ 57; *Dane County v. PSC*, 2022 WI 61, ¶ 82; *Scott*, 2018 WI 74, ¶ 44. Thus, had the discovery orders not been "moot[ed]" before they were entered, a stay pending appeal would have been warranted, and the strike order was erroneous for that reason as well.

Even if the strike order were warranted, notwithstanding all of the above, Defendants' own expert [redacted]. The ultimate issue in this case is not particularly complicated—parents have a long-recognized constitutional right to be the primary decision-makers with respect to their own minor children, and yet the District has taken a major, controversial, and impactful decision out of parents' hands, and will instead unilaterally decide to begin treating minors as if they are the opposite sex while they are at school, and will

hide from parents that it is doing so. That is a clear constitutional violation that cries out for injunctive relief.

Each of the four errors discussed above is an independently sufficient abuse of discretion, such that this Court should reverse and grant an injunction pending appeal.

CONCLUSION

This Court should accept this case on bypass and grant an injunction pending appeal.

Dated: January 26, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this memorandum conforms to the rules contained in Wis. Stat. § 809.81 for a document produced with a proportional serif font. The length of this memorandum is 20,112 words.

Dated: January 26, 2023.

LUKE N. BERG