No. 2020AP1032

In the Wisconsin Supreme Court

JOHN DOE 1, JANE DOE 1, JANE DOE 3,
JANE DOE 4, JOHN DOE 5, and JANE DOE 5,
PLAINTIFFS-APPELLANTS-PETITIONERS,

JOHN DOE 6, JANE DOE 6,
JOHN DOE 8, and JANE DOE 8,
PLAINTIFFS,

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.

PETITION FOR REVIEW AND APPENDIX*

RICK ESENBERG
LUKE N. BERG
ANTHONY F. LOCOCO
Wisconsin Institute for
Law & Liberty
330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202

ROGER G. BROOKS†
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260

Attorneys for Plaintiffs-Appellants-Petitioners

* Due to its size, the appendix is bound separately from this Petition.

† Pro hac vice motion granted. R. 31.

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INTRODUCTION

The Madison Metropolitan School District ("the District") has a policy allowing children of *any age* to secretly change gender identity at school, by adopting a new name and pronouns, and requiring all staff to treat them as though they were the opposite sex, without parental notice or consent. The policy then prohibits staff from communicating with parents about this major change unless the child allows it, and even directs staff to actively deceive parents by reverting to the child's original name and pronouns around parents and by violating state records laws.

Transitioning to a different gender identity during childhood is a major and controversial decision, the long-term effects of which are still unknown and debated. Many psychiatric professionals experienced in these issues believe that transitioning at a young age may do long-lasting harm. Yet the District has decided that it will facilitate transitions by students no matter the situation—and in secret from the involved student's family.

Petitioners, all parents of children in the Madison public schools, filed a lawsuit challenging the District's Policy as a violation of parents' constitutional rights to direct the upbringing of their children and sought a temporary injunction requiring communication with and deference to parents on this serious issue while this case is pending. Although they filed their injunction motion nearly ten months ago, and despite repeated efforts, Petitioners still have yet to have a court consider their request for an injunction under the proper standard.

Petitioners have not been heard at all on their original motion to enjoin the District's unlawful policy, due to multiple errors by the Circuit Court. The court first erroneously interpreted a new procedural rule to automatically postpone an injunction motion until after a subsequently-filed motion to dismiss is resolved. Then, after the Court denied the motion to dismiss, it further postponed Petitioners' outstanding motion until after their appeal of the Court's partial denial of their motion to proceed

anonymously, even though the statutes authorize consideration of an injunction motion while an appeal is pending.

Petitioners then filed a second motion for an injunction pending their appeal, and while the Circuit Court did consider that motion and granted very limited relief, it essentially denied Petitioners' request for a temporary injunction without evaluating their likelihood of success on the merits or addressing the harms they raised in their motion.

Petitioners then went to the Court of Appeals, but, like the Circuit Court, it also did not consider Petitioners' likelihood of success at all, instead simply dismissing the serious and irreparable harms they asserted as too "speculative" to warrant an injunction, but without engaging their actual arguments as to harm. The Court of Appeals' harm analysis was wrong by itself, but it was also clear error to disregard the other factors.

This Court's review is warranted first and foremost to protect parents' constitutional rights and their children from serious consequences while this case is pending. The potential

harm to children who deal with this issue is sufficiently grave that, even if it cannot be quantified, it warrants injunctive relief. Review is also warranted for multiple other reasons: because the lower courts misapplied the injunction standard by failing to consider Petitioners' likelihood of success on the merits; because the underlying question—whether schools may constitutionally exclude parents from a major, controversial decision, with lifelong implications, involving *their* children—is a significant and novel question of statewide importance; and to resolve a split among the lower courts about whether, in light of a recent amendment to the procedural rules, the filing of a motion to dismiss prevents a circuit court from considering a temporary injunction motion.

STATEMENT OF ISSUES

1. Whether the Circuit Court and/or Court of Appeals erred by denying Petitioners' injunction motions without properly applying the injunction standard?

After the Circuit Court erroneously postponed consideration their original motion, Petitioners filed a second injunction motion pursuant to Wis. Stat. §808.07, and, when the Circuit Court partially denied it, Petitioners sought the Court of Appeals' review by filing a motion there, following the procedure in Wis. Stat. §809.12. The Court of Appeals denied Petitioners' motion, but misapplied the injunction standard in multiple ways.

2. Whether the Circuit Court erred when it concluded that Wis. Stat. §802.06(1)(b) requires courts to postpone consideration of an earlier-filed temporary injunction motion until resolution of a subsequent motion to dismiss?

Petitioners raised this issue in its motion filed with the Court of Appeals, but that court did not address it.

SUMMARY OF GROUNDS FOR REVIEW

This case meets multiple of this Court's criteria for review: it involves "[a] real and significant question of … state constitutional law," Wis. Stat. §809.62(1r)(a); the lower courts' decisions are directly "in conflict with" this Court's "controlling" precedents as to proper application of the temporary injunction standards, *id*. §809.62(1r)(d); the underlying issue in this case is "a novel one" that "will have statewide impact," *id*. §809.62(1r)(c)(2); and this Court's review is necessary to "harmonize" a split among lower courts over the proper interpretation of Wis. Stat. §802.06(1)(b), Wis. Stat. §809.62(1r)(c)(3).

STATEMENT OF THE CASE

A. The Controversy Surrounding Childhood Gender Identity Transitions

"Transgender" individuals believe they have a "gender identity" that does not match their biological sex. App. 162 ¶13. "Gender dysphoria" refers to the psychological distress often associated with a mismatch between a person's biological sex and

self-perceived or desired gender identity. *Id.*; R. 77 ¶17. The origins and causes of transgenderism and gender dysphoria are still largely unknown; some professionals believe they are driven primarily by social and environmental factors, while others believe that "gender identity" has a biological basis. App. 161 ¶10; App. 166–69; R. 77 ¶¶18–20. Regardless of who is correct, multiple studies have found that most children (80–90%) who question their gender identity ultimately "desist," reverting to an identity consistent with their biological sex; that is, *unless* they transition. App. 178–82 (listing studies); *see* App. 151.

Given this evidence and the uncertainty surrounding the underlying causes, there is significant disagreement among professionals over how to treat gender identity issues in children. App. 166–69 (surveying approaches); *see generally* Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016).[3] One particularly

[3] https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html

controversial issue is whether children should socially transition to a different gender identity (i.e. adopt a new name and pronouns). App. 181–82. Many professionals believe transitioning may become "self-reinforcing," causing children to solidify and retain a transgender identity when their gender-identity issues might otherwise have resolved, in turn leading to many long-term consequences. App. 179–82; Singal, *supra*.

Petitioners' expert, for example, Dr. Stephen Levine (who was the *court-appointed* expert in a major case in this area, *see Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014)) explains that "therapy for young children that encourages transition … 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." App. 182. Another prominent expert, Dr. Kenneth Zucker, has publicly written that "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds

of long-term persistence." Kenneth J. Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, 19:2 Int'l J. of Transgenderism 231 (2018).[4]

The debate has also been covered extensively in the media, *see* Singal, *supra*, and multiple recent books make similar arguments. *See* Heather Brunskell-Evans and Michele Moore, *Inventing Transgender Children and Young People* (2019) (essays from clinicians, psychologists, sociologists, educators, parents, and de-transitioners); Abigail Shrier, *Irreversible Damage: The Transgender Craze Seducing Our Daughters* (2020).

Respondents have never disputed that there is significant controversy about this. *Their expert* cites the World Professional Association for Transgender Health (WPATH) as the go-to source in this area, App. 251, and even WPATH acknowledges that "[s]ocial transitions in early childhood" are "controversial," that

[4] https://www.researchgate.net/publication/325443416

"health professionals" have "divergent views," and that there is insufficient evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." App. 152. WPATH therefore encourages health professionals to *defer to parents* "as they work through the options and implications," *even* "[i]f parents do not allow their young child to make a gender-role transition." App. 152.

B. The District's Policy to Exclude Parents

In April 2018, the Madison School District adopted a document entitled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students." App. 113–47. Consistent with federal law, the Policy requires parental consent before students may change their name or gender in *official* records. App. 132; 34 CFR §§99.3; 99.4; 99.20(a). Nevertheless, the Policy enables children, of *any age*, to change gender identity at school by selecting a new "affirmed name and pronouns" to be used at school "regardless of parent/guardian permission to change their name and gender in [the District's] systems." App. 132.

While the Policy requires this change of name and pronouns to be carefully kept out of the District's systems (see below), it is a formal, official change—the Policy requires all teachers and district staff to "refer to students by their affirmed names and pronouns" (as opposed to their actual legal names), and failure to do so is considered "a violation of the [District's] non-discrimination policy." App. 132. The Policy then prohibits staff from "reveal[ing] a student's gender identity"—including the new "affirmed name and pronouns" being used at school—"to … parents or guardians … unless legally required to do so or unless the student has authorized such disclosure." App. 123, 125. The Policy even directs staff to actively deceive parents, by "us[ing] the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family." App. 130.

The District provides teachers with a form, entitled "Gender Support Plan," to use if a student expresses a desire to change gender identity at school. App. 148–49. In a section entitled "family support," the form asks, "Will the family be included in developing

a gender support plan?" with a blank space for teachers to fill in after making this critical decision. App. 148. Then, in blatant violation of state law giving parents access to their children's education records, Wis. Stat. §118.125, the form directs teachers to keep this paperwork "in your confidential files, not in student records." App. 148.

C. Procedural Background

Petitioners filed their complaint, along with a motion for a temporary injunction and a motion to proceed anonymously (to protect themselves and their children from likely harassment and other injury), on February 18–19, 2020. R. 1–2, 4–5, 26–27.

On March 11, the District filed a short motion to dismiss and asked the Circuit Court to postpone Petitioners' temporary injunction motion until after resolution of its yet-to-be-briefed motion to dismiss. R. 36. Petitioners objected, App. 73–83; R. 38, but the Circuit Court concluded, erroneously, that Wis. Stat. §802.06(1)(b) prevented it from hearing Petitioners' temporary injunction motion until the motion to dismiss was resolved, even though both it and other judges in Dane County had recently

considered and decided injunction motions simultaneously with a motion to dismiss. App. 70–87. The Circuit Court indicated that, if it denied the motion to dismiss, it would hear and resolve Petitioners' injunction motion in an "expedited fashion," before the fall school year. App. 88.

In early May, three high school student groups intervened in support of the District's policy and joined the District's motion to dismiss (hereafter referred to collectively as "Respondents"). R. 50–52, 66. Importantly, Intervenors submitted affidavits validating Petitioners' concern that transitions are being facilitated in District schools, in secret from parents. R. 53 ¶¶13–14; R. 54 ¶¶11–12; R. 55 ¶¶8, 11.

The Circuit Court denied Petitioners' motion to proceed anonymously on May 26 and ordered Petitioners to disclose their identities to the lawyers representing the District and the Intervenors (including all lawyers at those law firms and all of their staff) subject to a protective order. R. 74. Petitioners appealed the disclosure order and moved for a stay of that order, which the

Circuit Court granted. R. 83, 84, 91. That appeal is currently pending before the Court of Appeals.

The Circuit Court also denied Respondents' motion to dismiss. R. 71. Petitioners then asked the Circuit Court to proceed with their outstanding temporary injunction motion, citing Wis. Stat. §§808.07 and 808.075, which provide that "a trial court … may … grant an injunction" "whether or not an appeal is pending." R. 87:2–4; App. 92. Nevertheless, the Circuit Court decided not to hear Petitioners' outstanding temporary injunction motion until after the appeal of the disclosure order is resolved. App. 98–103.

Petitioners then filed a second motion for an injunction pursuant to Wis. Stat. §808.07, R. 89–90, as they explained they would do to facilitate an appeal, App. 103, 107–12, which the Court ultimately did consider. The Circuit Court partially granted an injunction to the extent that the Policy "allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school,

including information about the name and pronouns being used to address their child at school." App. 11, 13–69.

But the injunction did not go far enough. Petitioners' motion had asked for an injunction requiring parental consent *before* the District may facilitate this major life change at school, and allowing staff to openly discuss with parents what is happening at school *with their children*. R. 89:1–2. The Circuit Court's limited injunction only prevents teachers from lying to parents if they ask a *direct* question about their children at school—it does not prevent the District from facilitating gender-identity transitions in secret at school, without prior parental notice or consent, and it allows the District to continue preventing staff from *volunteering* information to parents and requiring deception, at least until parents ask directly about this issue.

Petitioners further explained that the limited injunction, while a step in the right direction, is not sufficient to prevent the serious harms they raised in their motion. Those harms include the "self-reinforcing" effect of having "people in positions of

authority treating the child as if they are the opposite sex," which experts believe can do lasting harm. App. 40; *infra* Part I.B. And while concerned parents can now ask about this issue and expect not to be lied to, their child "might start dealing with this tomorrow or next week or [in] the following months, and parents should not have to interrogate their teachers on a periodic basis just to ensure that something secret is not happening in school." App. 39–40.

The Circuit Court acknowledged that Petitioners had sought an injunction requiring parental notice and consent prior to a transition at school while this case proceeds, App. 24–25, but simply declined to reach those issues, App. 43 ("I'm not talking about those today."); App. 47 ("I'm not making a decision on" those issues); App. 67.

After the hearing, Petitioners filed a short motion for clarification, Dkt. 155, asking the court to give its reasons for the partial denial to facilitate appellate review, *see* App. 107–12, and the Circuit Court provided a short explanation in its written injunction order, App. 11–12. Yet the Circuit Court did not address

Petitioners' arguments or properly apply the injunction factors. As to the likelihood of success, the Circuit Court did not consider Petitioners' argument that, as a matter of parents' constitutional rights, schools must defer to parents on decisions as significant and controversial as whether their child will transition to a different gender identity. Instead, the Circuit Court simply concluded that Petitioners are unlikely to succeed on their appeal *of the anonymity issue*—even though, with respect to the part the Circuit Court did enjoin, the Circuit Court properly considered Petitioners' likelihood of success on the underlying merits, as it should have. By failing to reach the merits of Petitioners' motion for a temporary injunction because they were, in the court's view, unlikely to succeed on a separate procedural issue (which would not have ended the action), the Circuit Court again declined to resolve Petitioners' injunction motion.

Similarly, with respect to irreparable harm, the Circuit Court held that Petitioners could not show harm as an "inescapable effect of being anonymous." App. 11–12. Yet the

Circuit Court did not discuss or assess any of Petitioners' actual arguments, none of which depend in any way on facts that are unique to them. *See* R. 90:30–38; *infra* Part I.

Petitioners then filed a motion for an injunction with the Court of Appeals, as required by Wis. Stat. §809.12, emphasizing, among other things, that the Circuit Court had entirely failed to consider Petitioners' likelihood of success on the merits. On November 9, the Court of Appeal issued a short decision and order denying Petitioners' motion. App. 1–9. Yet, like the Circuit Court, the Court of Appeals also ignored Petitioners' likelihood of success, instead relying entirely on its view that the harms Petitioners' raised were too "speculative." App. 7. Even as to harm, the Court of Appeals did not address most of Petitioners' arguments for why an injunction is warranted: that gender-identity transitions are experimental and controversial and many experts believe they can do lifelong harm; that parents have no way to know in advance when or if their children will begin to deal with this issue; that the District's policy of secrecy from parents requires a preemptive

injunction to prevent those harms and ensure that their rights are respected; and that the injunction they seek only applies if the situation arises while this case is pending, and then only requires the District to defer to parents, as is the norm.

Thus, despite having filed this case and a temporary injunction motion almost ten months ago, Petitioners still have yet to have a court fully consider their arguments that the District's Policy of secretly facilitating transitions at school, without parental notice and consent, is both harmful and unconstitutional, and should be enjoined while this case proceeds.

ARGUMENT

I. This Court's Review Is Necessary to Preserve Parents' Constitutional Rights and to Protect Children From Lifelong Harm

There are many reasons to grant this Petition for Review, *infra* Part II, but the primary reason is to protect parents' constitutional rights and their children from lifelong harm. Wis. Stat. §809.62(1r)(a) ("A real and significant question of … state constitutional law is presented.")

A. The District's Policy Violates Parents' Rights

One of the most fundamental and longest recognized "inherent rights" protected by Article 1, §1 (as well as the Fourteenth Amendment[5]) 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). This Court recently reaffirmed this right, holding that any government action that "directly and substantially implicates" parents' rights is "subject to strict scrutiny review." *A.A.L.*, 2019 WI 57, ¶22.

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). This right is similar to, but distinct from, parents' right under Article 1, §1, in that it protects parental decision-making authority over significant decisions that implicate religious beliefs. *E.g.*, *id.*

[5] Petitioners only bring claims under the Wisconsin Constitution.

(whether children attend school past eighth grade). As with an infringement of parents' rights under Article 1, §1, any "interference with" religious freedom rights protected by Article 1, §18 is subject to strict scrutiny. *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶61, 320 Wis. 2d 275, 768 N.W.2d 868.

Parents-rights cases establish three important principles relevant here. First, parents are the primary decision-makers with respect to their minor children—not their school, or even the children themselves. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Jackson*, 218 Wis. 2d at 879; *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). 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); *Yoder*, 406 U.S. at 233–34, which includes medical care: "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; App. 204–05; *see In re Sheila W.*, 2013 WI 63, ¶¶16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). *Third*, the fact that "the decision of a parent is not agreeable to a child or … involves risks" "does not diminish the parents' authority to decide what is best for the child," nor does it "automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603–04.

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, and eventually pressured 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 that 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.

The District's Policy infringes parents' constitutional rights in at least three ways.

First, the Policy violates parents' right to make important decisions for their minor children. App. 132. As described briefly above, there is an ongoing debate among mental health professionals about whether children should socially transition and the long-term implications if they do. App. 166–74, 178–82; *supra* pp. 6–10. Even WPATH, which Respondents' expert endorses, App. 251, acknowledges that gender-identity transitions are "controversial," that the long-term implications are unknown, and recommends deferring to parents. App. 152. The District's

Policy disregards these professionals and instead takes this life-altering decision out of parents' hands and places it with educators, who Respondents have conceded have no expertise whatsoever in these matters, R. 42:11, 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. By enabling children to transition without parental involvement, the District is effectively making a treatment decision without the legal authority to do so and without informed consent from the parents. *See Sheila W.*, 2013 WI 63, ¶¶16–24 (Prosser, J., concurring); App. 182–87, 199–205. Given the significance of changing gender identity, especially at a young age, parents "can and must" make this decision. *Parham*, 442 U.S. at 603; App. 182–87, 204–05. The Policy therefore "directly and substantially" interferes with parents' right to make this critical decision. *A.A.L.*, 2019 WI 57, ¶ 22.[6]

[6] For many parents, including Petitioners John and Jane Doe 1, Jane Doe 4, and John and Jane Doe 5, gender identity issues also implicate their religious beliefs. E.g., R. 10 ¶¶14–21. By facilitating a transition without their

Second, the Policy violates parental rights by prohibiting staff from communicating with parents about a subject directly involving their children, App. 123, 25, and even requiring teachers to actively deceive parents by using different names at school and around parents, App. 130. These policies violate parents' rights by circumventing parental involvement altogether on this sensitive issue. *See H. L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "presumptively include[ ] counseling [their children] on important decisions"). Parents cannot guide their children through difficult decisions without knowing what they are facing. The District's Policy effectively substitutes District staff for parents as the primary source of input for children navigating these difficult waters. *See Gruenke*, 225 F.3d at 306–07.

Third, the Policy interferes with parents' ability to provide professional assistance their children may urgently need. Gender dysphoria can be a serious psychological issue that requires

consent, the Policy directly interferes with religious parents' right to choose a treatment approach that, consistent with their beliefs, does not involve an immediate social transition. *E.g.*, R. 10 ¶19.

support from mental health professionals, App. 177–78, 182–86, as even Respondents have conceded, R. 77 ¶17. And children experiencing gender dysphoria often face other issues, including depression, anxiety, suicidal ideation and attempts, and self-harm, App. 177–78 ¶57; 184–85 ¶¶78–79; 197 ¶114, and so should be evaluated, App. 185 ¶79. Respondents have admitted that District staff do not have the training and experience necessary to advise on the treatment options, and that they lack legal authority to provide children with treatment. R. 42:11. Gender dysphoria may first manifest at school and may surprise parents, App. 184–85 ¶78; App. 333 ¶13, as a parent who has experienced this describes, App. 241–45. And it should go without saying that parents cannot help their children through an issue that is concealed from them. Thus, teachers must be free to openly discuss with parents what they observe at school so that parents can assess whether their child needs professional help.

The Policy is also a striking aberration from the District's normal practices. District schools require parental consent for

athletics,[7] field trips,[8] medication at school,[9] school dances,[10] and internship programs,[11] among many other things. Yet the Policy does not even require parental *notice* for gender identity transitions.

The District's Policy clearly fails strict scrutiny. The Policy's primary stated justification is protecting children's privacy, *see* App. 123, but this is not a compelling interest, at least with respect to parents, because children do not have privacy rights *vis-à-vis their parents*. *See Bellotti v. Baird*, 443 U.S. 622, 634, 638–40 (1979); *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013). The Policy also suggests, and Respondents have argued, that the Policy is necessary to keep students safe *from their parents*, *see* App. 130, but the state "has no interest in protecting children from their

[7] https://west.madison.k12.wi.us/athleticparticipation

[8] https://lafollette.madison.k12.wi.us/files/lafollette/uploads/parentalpermissionform_11.04.19.pdf; https://sennett.madison.k12.wi.us/files/sennett/FieldTripBackUpPermissionForm2012English.pdf

[9] https://studentservices.madison.k12.wi.us/Medication

[10] https://west.madison.k12.wi.us/prom-2020

[11] https://science.madison.k12.wi.us/internship

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).

Nor is the Policy narrowly tailored in any sense. It does not contain any of the substantive or procedural protections that are typically required to displace a parent. *See*, *e.g.*, *A.A.L.*, 2019 WI 57, ¶¶35, 37 ("clear and convincing" evidence standard); Wis. Stat. §§48.981(3)(c); 48.24 et seq. (CPS process, which includes notice and a hearing). And, most troubling, the District's policy applies to students of *any age*, five on up.

B. The Policy May Do Lasting Harm While This Lawsuit Is Pending

As described briefly above, many professionals in the field believe that "affirming" a gender-identity transition during childhood can be self-reinforcing, causing gender dysphoria to persist when it otherwise might have resolved itself. *Supra*, pp. 7–9. And there are many lifelong consequences if a child's transgender identity persists as a result of changing gender

identity at school. First and most obvious is the inherent difficulty of feeling trapped in the wrong body, which is often associated with psychological distress. App. 163–98 ¶¶16, 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. App. 162 ¶12; App. 193–95. Additional risks include isolation from peers, fewer potential romantic partners, and other social risks. App. 195–96. There is also a growing number of "detransitioners" who come to deeply regret transitioning. App. 198–99. Even WPATH, which Respondents' expert endorses, App. 251, notes that there is little evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." App. 152.

Second, the District's Policy directly interferes with parents' right to choose a course of treatment that does not involve an immediate transition. An "affirmed" social transition is just one of multiple alternative treatment paths; other approaches include "watchful waiting" or therapy to help a child identify and address

the underlying causes of the dysphoria and hopefully find comfort with his or her biological sex. App. 169–74.

Third, children questioning their gender identity often need mental health support, regardless of whether they transition, and the District's policy of secrecy prevents parents from providing their children with assistance they may urgently need. App. 177–78, 184–86, 197 ¶114. Enabling children to lead a "double life" is also "psychologically unhealthy in itself" and harmful to the integrity of the family. App. 186 ¶82.

The Court of Appeals held that these harms were too "speculative" to warrant an injunction. That was wrong for multiple reasons. First, if certain experts are correct, the consequences of a secret "affirmed" transition at school could be enormous and lifelong. The fact that the science is unsettled does not diminish the potential harms, but instead *magnifies* them. Experimental treatments typically require *more* rigorous informed consent procedures, App. 203–05, precisely because of the unknown risks. Second, Petitioners have no way to know in

advance if or when their children will begin to deal with this issue, App. 184–85 ¶78; App. 333 ¶13; *see* App. 241–45, and they have to seek an injunction now because the District's secrecy policy prevents them from learning when the harms are imminent, or worse, realized. The District's Policy is designed to withhold from parents what is happening at school—indeed, Petitioners are challenging this very aspect of it. Third, the injunction Petitioners seek is perfectly tailored to the harm they seek to avoid—it only requires the District to defer to parents *if* this issue arises while the case is pending. Otherwise, it imposes no burdens and requires nothing of the District whatsoever.

The Circuit Court's limited injunction is not sufficient to protect against these serious harms, because it only requires District staff to answer truthfully in response to a direct question *after a secret transition at school has already occurred and harms have been realized*. Moreover, even if parents can get a truthful

answer about what is happening *today*, their children could begin to struggle with this issue tomorrow, next week, or next month.[12]

To draw a simple analogy, if a school district adopted a policy of secretly offering an experimental and controversial drug to children reacting to a bee sting, without parental notice or consent, there is no question such a policy would be swiftly enjoined, both to protect parents' right to make important treatment decisions for their minor children and to prevent the potential harms the drug might do. A court would not deny an injunction on the grounds that the harms are too "speculative" because children may never get stung by a bee or because the drug's side effects are not fully known. The point of an injunction is to *avoid* harm; that is all Petitioners seek.

[12] That school is currently virtual does not eliminate the need for an injunction. App. 8. The harms Petitioners and experts fear come from an "affirmed" name-and-pronoun change: having adults treat a child as if he or she were the opposite sex, reinforcing and solidifying that belief, which can happen over Zoom as in person. Regardless, Petitioners seek an injunction while this case is pending, which will likely last beyond the present period of virtual learning.

II. Review Is Warranted for Multiple Additional Reasons

In addition to presenting a "real and significant question of … state constitutional law," Wis. Stat. §809.62(1r)(a), *supra* Part I, there are multiple additional reasons to grant this Petition for Review.

First, the Circuit Court's and Court of Appeals' decisions are directly "in conflict with" this Court's "controlling" precedents as to temporary injunctions. Wis. Stat. §809.62(1r)(d). The basic requirements for an injunction are well-established: likelihood of success, irreparable harm, and lack of an adequate remedy at law. *E.g.*, *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977).[13] And this Court has long held that a court abuses its discretion when it "fail[s] … to consider a matter relevant to the determination of the probability of the petitioners' success" or "clearly giv[es] too much weight to one factor."

[13] The parties have disputed whether there is a fourth requirement relating to the status quo. Petitioners will address that issue in briefing if this Court accepts this Petition.

Wisconsin Ass'n of Food Dealers v. City of Madison, 97 Wis. 2d 426, 428, 430, 293 N.W.2d 540 (1980).

Neither the Court of Appeals nor the Circuit Court considered Petitioners' likelihood of success on the merits *at all*. The Circuit Court did consider Petitioners' likelihood of success on the underlying merits with respect to the portion of the Policy it enjoined, App. 46–47, but then simply disregarded them as to the remainder, instead considering only Petitioners' likelihood of success on its appeal of the separate, procedural question of whether and how Petitioners may proceed anonymously, App. 11. But the standard for an injunction pending appeal is the same as for a preliminary injunction, *see Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013), as everyone has thus far agreed, App. 6 and n.4; App. 44–47, and thus courts must weigh whether the moving party "will *ultimately* prevail," *Grote*, 780 F.3d at 853 n.2. And when, as here, the issue on appeal is an ancillary procedural issue, such that the case will proceed regardless of the outcome of the appeal, the Petitioners' likelihood of success *on the ultimate*

merits (rather than on the ancillary issue on appeal) should be the primary, if not only, consideration.[14]

The Court of Appeals also entirely disregarded Petitioners' likelihood of success, concluding that it "need not decide … the other requirements for temporary injunctive relief" after it concluded Petitioners' harms were too "speculative" to warrant an injunction. App. 7. The Court of Appeals' harm analysis was itself incorrect, as explained above, *supra* pp. 30–32, but even if it were correct, the factors for temporary relief are "not prerequisites but rather are interrelated considerations that must be balanced together." *See State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995); *In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). In other words, the likelihood of success and irreparable injury are "inversely proportional," *Gudenschwager*, 191 Wis. 2d at 441, such that "the greater the moving party's

[14] Even if there were some difference between an injunction pursuant to section 813.02 and section 808.07, Petitioners moved for both, App. 6 n.2, given that the Circuit Court erroneously declined to hear Petitioners' original temporary injunction motion in a timely manner, *infra* pp. 37–38.

likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *A & F Enters.*, 742 F.3d at 766. Thus, even if the Court of Appeals' harm analysis were correct (and it was not), Petitioners' likelihood of success is still a critical factor that must be evaluated.

Second, a decision by this Court will "help develop … the law" and "will have statewide impact." Wis. Stat. §809.62(1r)(c)(2). Other school districts in the state have policies similar to Madison's. *E.g.*, Milwaukee Public Schools, *Gender Inclusion Guidance* at 3, 5–6 (Oct. 2016).[15] The Kenosha School District, in particular, recently voted against a policy similar to the one challenged here, but is "await[ing]" a decision in this case and may change course depending on the outcome. *See* Terry Flores, *Unified OKs transgender student policy, awaits Madison lawsuit ruling before making other changes*, Kenosha News (Nov. 23, 2020).[16]

[15] https://esb.milwaukee.k12.wi.us/attachments/f36536ea-e075-4a98-b135-54abb5ee05c1.pdf

[16] https://www.kenoshanews.com/news/local/education/unified-oks-transgender-student-policy-awaits-madison-lawsuit-ruling-before-making-other-changes/article_a56bdb18-cc86-58bb-8753-b1e90ae6e4d4.html

Third, this Court's review is warranted to resolve a split among circuit court judges, even within Dane County, over the effect of a motion to dismiss on a previously filed injunction motion. Wis. Stat. §809.62(1r)(b), (c).

A recently added subsection, Wis. Stat. §802.06(1)(b), provides that "[u]pon the filing of a motion to dismiss … all discovery and other proceedings shall be stayed … until the ruling of the court on the motion … unless the court finds good cause upon the motion of any party that particularized discovery is necessary." The Circuit Court concluded that this section prevented it from hearing Petitioners' temporary injunction motion until after a subsequently filed motion to dismiss was resolved. App. 70–87. Yet in multiple other cases, courts have allowed a motion to dismiss and injunction motion to be heard simultaneously, notwithstanding Wis. Stat. §802.06(1)(b). *E.g.*, Order Denying Motion to Dismiss and Granting Temporary Injunction, *League of Women Voters v. Knudson*, Case No. 2019-CV-84 (Mar 21, 2019, Dane County Cir. Ct.); Decision and Order, *Service Employees*

International Union v. Vos, Case No. 2019-CV-302 (Mar. 26, 2019, Dane County Cir. Ct.).

The Circuit Court's interpretation of §802.06(1)(b) cannot possibly be correct, because it would allow defendants to procedurally evade temporary relief for months in every case, without any hearing, totally undermining that remedy. *See State v. Villamil*, 2017 WI 74, ¶19, 377 Wis. 2d 1, 898 N.W.2d 482 (statutes must be interpreted "to avoid absurd results."). A better interpretation of the phrase "discovery and other proceedings" is that "other proceedings" refers only to *discovery-related* proceedings. That interpretation makes sense of the clause allowing an exception for "good cause," which only references discovery. Wis. Stat. §802.06(1)(b). The Act adopting section 802.06(1)(b) also states that it "relat[es] to: discovery of information in court proceedings," without any suggestion that it also upends the temporary injunction remedy. 2017 Wis. Act 235.

Finally, the issues are entirely legal. Wis. Stat. §809.62(1r)(c)(3). The overarching question is whether the lower

courts abused their discretion by denying an injunction, especially by failing to consider Petitioners' likelihood of success. *Wis. Ass'n of Food Dealers*, 97 Wis. 2d at 428. And properly assessing Petitioners' likelihood of success involves only the purely legal question of whether a school district may constitutionally exclude parents from important, health-related decisions involving *their* children. This Court does not need to (and cannot, in any event) resolve the debates about when and whether childhood gender-identity transitions are appropriate. The important and indisputable point is that this life-altering decision is the province of parents in consultation with the professionals they select to consult, not of educators.

III. A Petition for Review Is the Proper Procedural Vehicle

This petition admittedly reaches this Court via an "unusual procedural posture." *See Leavitt v. Beverly Enterprises, Inc.*, 2010 WI 71, ¶1, 326 Wis. 2d 421, 784 N.W.2d 683. Petitioners seek this Court's review of an order denying a motion for an injunction filed in the Court of Appeals, while the issue directly on appeal (an

entirely separate procedural issue) remains pending before that court. While the ordinary rule appears to be that parties may not file a petition for review from an order on a motion until the entire appeal is resolved, *see In Interest of A. R.*, 85 Wis. 2d 444, 445, 270 N.W.2d 581 (1978), a petition for review is nevertheless appropriate here for multiple reasons.

First, the default rule from *A.R.* is not a hard and fast rule. Just two months after *A.R.*, this Court explained that a party can file a petition for review from an order denying a motion for bail pending appeal, even while the underlying appeal proceeds separately. *State v. Whitty*, 86 Wis. 2d 380, 272 N.W.2d 842 (1978). The Court explained in part that "[an] order disposing of [a] motion for bail pending appeal must be considered as a new proceeding separate from the underlying appeal," and the Court of Appeals' order was "a final disposition" of that question (whether bail pending appeal was warranted), so the "order can therefore be reviewed by this court in the exercise of our discretion pursuant to

sec. 808.10 and Rule 809.62." *Id.* at 387. In *A.R.*, by contrast, the motion and underlying appeal were effectively on the same issue.

As in *Whitty*, Petitioners' injunction request is entirely "separate from the underlying appeal" (going to whether and how Petitioners may proceed anonymously), and the Court of Appeals' order is "a final disposition" of the injunction question. *Id.*; *see also* Wis. Stat. §809.62(1g) (an "adverse decision" is "a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court," and "includes the court of appeals' denial of or failure to grant the full relief sought.")

Second, this Court has more recently explained that rules like in *A.R.* are "not based on lack of jurisdiction," but rather "based on practice, rooted in concerns for judicial administration and respect for the court of appeals' exercise of discretion," and so are subject to exceptions where appropriate. *Leavitt v. Beverly Enterprises, Inc.*, 2010 WI 71, ¶¶4, 44–47, 326 Wis. 2d 421, 784 N.W.2d 683. Article VII, §3 of the Wisconsin Constitution gives

this Court "superintending and administrative authority over all courts," and authorizes it to "review judgments *and orders* of the court of appeals." Thus, *Leavitt* held that Article VII, §3 *directly* gives this Court "jurisdiction to review an order issued by the court of appeals." 2010 WI 71, ¶5.

Third, while the procedural posture here is unique, this Court's review of a decision denying a temporary injunction is not; this Court has regularly considered appeals from the denial of a temporary injunction. *See*, *e.g.*, *Woznicki v. Erickson*, 202 Wis. 2d 178, 182, 549 N.W.2d 699 (1996); *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 427–28, 293 N.W.2d 540 (1980); *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 518–19, 259 N.W.2d 310 (1977); *Aqua-Tech, Inc. v. Como Lake Prot. & Rehab. Dist.*, 71 Wis. 2d 541, 545, 239 N.W.2d 25 (1976); *Bloomquist v. Better Bus. Bureau of Milwaukee*, 17 Wis. 2d 101, 102, 115 N.W.2d 545, 546 (1962) ("On many occasions this court has considered appeals from orders refusing or dissolving temporary injunctions."); *Chicago & N. W. Ry. Co. v. R.R. Comm'n*

of Wisconsin, 175 Wis. 534, 185 N.W. 632, 632, 635 (1921); *Eau Claire Water Co. v. City of Eau Claire*, 127 Wis. 154, 106 N.W. 679, 679 (1906); *Chicago & N.W.R. Co. v. Milwaukee, R. & K. Elec. R. Co.*, 95 Wis. 561, 70 N.W. 678, 680 (1897). Petitioners seek the same thing as in all these cases—this Court's review of erroneous lower court decisions denying an injunction without properly assessing the relevant factors or Petitioners' arguments.

Fourth, and significantly, the procedural irregularity here was caused by the Circuit Court's errors below. Petitioners filed a motion for a temporary injunction back in February, but the Circuit Court concluded, erroneously (as explained above), that Wis. Stat. §802.06(1)(b) requires postponing consideration of an injunction motion until after resolution of a *subsequently* filed motion to dismiss. Yet after the motion to dismiss was denied, the Circuit Court erred again by declining to consider Petitioners' outstanding temporary injunction motion until after Petitioners' appeal of the anonymity issue, App. 94–103, even though the whole purpose of an injunction is prevent harm while a case is pending,

and even though the statutes allow a circuit court to "*grant* an injunction" "whether or not an appeal is pending," Wis. Stat. §§808.07(2)(a), 808.075(1), which necessarily means parties are entitled to be *heard* if they have requested one. Had the Circuit Court promptly ruled on Petitioners' temporary injunction motion, as it should have, Petitioners could (and would have, if denied), filed a separate appeal from that order, allowing a petition to this Court in the ordinary course, as in the many cases listed above.

But as a direct result of those errors below, Petitioners were instead forced to file a second motion for an injunction pending appeal pursuant to Wis. Stat. §808.07. And, to appeal the Circuit Court's partial denial of Petitioners' injunction request pursuant to that section, Wis. Stat. §809.12 required Petitioners to file a motion with the Court of Appeals, rather than a separate appeal, thereby creating this unique procedural posture. It would be deeply unjust for Petitioners to lose access to timely review by this

Court because the Circuit Court erroneously declined to even hear their original temporary injunction motion in a timely manner.[17]

For all these reasons, a petition for review is the proper vehicle to seek this Court's review of the lower courts' decisions partially denying Petitioners' injunction motions.

* * * * *

If this Court agrees to grant this Petition for Review, it should assign a separate appeal number to this Petition, allowing this Court to review the injunction denial while the Court of Appeals separately decides the anonymity issue.

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[17] Respondents may argue that Petitioners can seek review of the denial of their injunction motion after the Court of Appeals rules on their appeal of the anonymity issue. But that could take months, and Petitioners moved for an injunction to prevent serious harms to their children and their constitutional rights while this case is pending. *See supra* Part I.B. Petitioners filed their original injunction motion back in February, and still have yet to have a court assess their arguments for an injunction under the proper standard. *See supra* pp. 12–19.

Alternatively, Respondents may argue that Petitioners could have attempted to appeal the Circuit Court's decision to postpone their original temporary injunction motion (or sought a supervisory writ). But that would not have been appropriate because the Circuit Court agreed to consider Petitioners' second injunction motion under Wis. Stat. § 808.07, which would have achieved the same thing if fully granted.

If, however, this Court concludes that the injunction and anonymity questions should be considered together (Petitioners' position is that they are separate and distinct), this Court should still grant this Petition, and then exercise its superintending authority to take jurisdiction of both questions. Wis. Const. art. VII, §3 (allowing this Court to "remove cases from the court of appeals."); *see also Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 37, 435 N.W.2d 234 (1989) ("[Wis. Stat. §809.62(6)] is a broad grant of discretionary power to this court with respect to petitions for review that are granted."). Whether and how civil litigants may sue anonymously is itself a novel and important question that ultimately warrants this Court's review. But more importantly, Petitioners filed this case ten months ago, and still have yet to have a court consider their request for an injunction under the proper standard. They should not have to wait any longer for this Court's review.[18]

[18] Respondents will undoubtedly point out that the time to file a bypass petition has passed, and that is true. Petitioners intentionally did not file a petition to bypass to allow the Court of Appeals to rule first. But, having denied

CONCLUSION

This Court should grant this Petition for Review.

Dated: December 9, 2020.

Respectfully submitted,

RICK ESENBERG
State Bar #1005622
rick@will-law.org

LUKE N. BERG
State Bar #1095644
luke@will-law.org

ANTHONY F. LOCOCO
State Bar #1101773
alococo@will-law.org

WISCONSIN INSTITUTE FOR
LAW & LIBERTY
330 E. Kilbourn Ave.,
Suite 725
Milwaukee, WI 53202
Phone: (414) 727-7361

ROGER G. BROOKS
rbrooks@ADFlegal.org

Petitioners' injunction motion without issuing any decision on the anonymity appeal, Petitioners have no choice but to seek this Court's review of the injunction denial now, to protect themselves and their children from the harms described above.

Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, Arizona 85260
Phone: (480) 444-0020
Fax: (480) 444-0028

Attorneys for Plaintiffs-Appellants-Petitioners

CERTIFICATION

I hereby certify that this petition for review conforms to the rules contained in Wis. Stat. §§ 809.62(4)(a); 809.19(8)(b), (c) for a petition and appendix produced with a proportional serif font. The length of this petition is 7,999 words.

Dated: December 9, 2020.

LUKE N. BERG

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

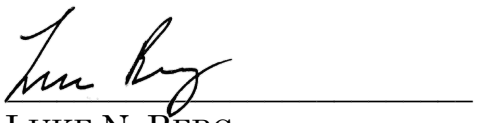
I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic petition is identical in content and format to the printed form of the petition filed as of this date.

A copy of this certificate has been served with the paper copies of this petition filed with the court and served on all opposing parties.

Dated: December 9, 2020.



LUKE N. BERG