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SUPREME COURT

No. 2020AP1032

In the Wisconsin Supreme Court

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

JOHN DOE 5 and JANE DOE 5,
PLAINTIFFS-APPELLANTS,

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

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* Pro hac vice motion granted. R. 31.

TABLE OF CONTENTS

ISSUES PRESENTED

1. May plaintiffs in Wisconsin courts sue using pseudonyms in appropriate cases, and if so, when and how? Did the lower courts erroneously deny Petitioners' anonymity request?

The Circuit Court denied Petitioners' motion to proceed anonymously, concluding that it lacked authority to grant Petitioners' request. As a result, the Circuit Court failed to apply the proper balancing test and disregarded certain highly relevant factors.

Petitioners appealed, and while the Court of Appeals disagreed with the Circuit Court about its authority, it nevertheless affirmed, without articulating a clear test or explaining why Petitioners' substantial legal and factual support was insufficient. Moreover, the Court excluded or limited certain highly relevant factors, creating multiple conflicts with the approach followed in federal courts. Finally, the Court of Appeals imposed a procedural requirement that is inconsistent with the text of Wis. Stat. § 801.21 (governing motions to seal).

2. Whether the lower courts erred by declining to enjoin a significant violation of constitutional rights without considering Petitioners' likelihood of success or properly weighing the serious harms Petitioners identified?

Petitioners filed a temporary injunction motion the day after they filed this case, but the Circuit Court declined to hear the motion, based on multiple errors. Petitioners then filed a motion for injunction pending appeal, pursuant to Wis. Stat. § 808.07, which the Circuit Court partially granted and partially denied. For the part denied, however, the Circuit Court failed to consider

Petitioners' likelihood of success or address the harms Petitioners' raised.

Petitioners then filed a motion for an injunction with the Court of Appeals, pursuant to Wis. Stat. § 809.12, but Court of Appeals denied that motion, also failing to consider Petitioners' likelihood of success and without engaging Petitioners' actual arguments as to harm.[2]

SUMMARY OF GROUNDS FOR REVIEW

Both issues meet multiple of this Court's criteria for review. Whether, when, and how plaintiffs may sue anonymously in Wisconsin courts has never been addressed by this Court (or any published decision in Wisconsin, until this case) even though multiple cases have allowed pseudonymous plaintiffs. Thus, there is a need for this Court to "establish[ ] [or] implement[ ] … a policy within its authority." Wis. Stat. § 809.62(1r)(b). Likewise, a decision will "develop … the law" on a question that is "novel," legal rather than factual, and that "calls for application of a new

[2] Petitioners previously filed a petition for review from the Court of Appeals' denial of their motion, but this Court denied that petition without comment, presumably based on the rule established in *In Interest of A. R.*, 85 Wis. 2d 444, 445, 270 N.W.2d 581 (1978) (holding that parties generally can only petition from a decision "finally disposing of the case in the court of appeals."). Since the Court of Appeals has now issued a final decision on the appeal (as to the anonymity issue), its decision on the injunction motion is now properly before this Court as well. *See Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 32, 36–39, 435 N.W.2d 234 (1989) ("Once the case is before us, it is within our discretion to review any substantial and compelling issue which the case presents," including "issues addressed in earlier decisions of the court of appeals in the same case.").

doctrine." *Id.* § 809.62(1r)(c). Given the variety of circumstances that might call for anonymity, establishing the test and relevant factors for such requests will have "statewide impact" and resolve questions "likely to recur." *Id*. Finally, the Court of Appeals' decision "conflict[s] with" the test federal courts apply, in multiple ways. *See id*. § 809.62(1r)(d). If the Court of Appeals' decision remains the binding precedent on anonymity requests in Wisconsin courts, it will force plaintiffs in sensitive constitutional cases out of state court and into federal court.

The second question presented 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); and the underlying issue is "a novel one" that "will have statewide impact," *id*. § 809.62(1r)(c)(2).

BACKGROUND

The Madison Metropolitan School District ("the District") has a policy allowing children of *any age* to secretly change gender identity at school, requiring all staff to treat them as though they were the opposite sex, without parental notice or consent, and even directing staff to conceal this from parents in various ways, including in violation of state law.[3] Many psychiatric professionals

[3] The District's policy says that students (with no age limit in the policy) may change gender identity at school by selecting a new "affirmed name and pronouns" to be used at school "regardless of parent/guardian permission to change their name and gender in [the District's] systems." App. 69. All teachers and district staff must "refer to students by their affirmed names and pronouns" (as opposed to their actual legal names); failure to do so is "a

believe that gender-identity transitions during childhood can have lifelong implications and even do substantial harm, and that parental involvement is critical for properly diagnosing gender dysphoria, for identifying and addressing likely comorbidities, and for providing ongoing support in the event of a transition. R. 28 ¶¶ 60–84; *infra* pp. 19–20. Thus, experts recommend that parents be involved and ultimately decide what is best for their child. *Id.*

Petitioners, all parents of children in the District, challenged the District's policy to exclude parents from this major decision—and hide it from them—as a violation of parents' constitutional rights. R. 1 ¶¶ 70–97. They filed their complaint using pseudonyms, given the sensitive issues, submitting a motion to proceed anonymously on the same day. R. 4–5. They also filed a motion for a modest temporary injunction that would require the District to notify and defer to the parents if a child seeks to transition at school while this case proceeds; an injunction that is necessary because, given the official policy of deception, parents will not learn what is occurring at school in time to prevent harm.

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violation of the [District's] non-discrimination policy." App. 69. Staff are prohibited from "disclos[ing] any information that may reveal a student's gender identity"—including the new "affirmed name and pronouns" being used at school—"to others, including parents or guardians … unless legally required to do so or unless the student has authorized such disclosure." App. 66. The Policy then directs staff to actively deceive parents, by "us[ing] the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family," App. 68, so as not to "out students while communicating with family," App. 67. The District directs its staff to record a student's new "affirmed" name and pronouns in a form that the District instructs should be "ke[pt] … in your confidential file, not in student records," App. 70–71, to evade (and in violation of) state law, which gives parents access to their children's records. Wis. Stat. § 118.125.

A. Anonymity Motion

In support of their anonymity motion, Petitioners submitted substantial—and unrefuted—evidence of a risk of retaliation against them or their minor children, including dozens of harassing and threatening comments, emails, and calls *already received in response to this case*, R. 5:12–13; 45:20–24, news articles accusing Petitioners of being "transphobic" and "bigots," R. 45:21, affidavit testimony from an attorney describing how she and her colleagues have been fired from jobs and threatened with violence for their advocacy on related issues, R. 5:9; 9, and numerous other publicly documented examples of retaliation for speech on this topic, including against a Madison resident. R. 5:9–12; R. 45:20. Because no Wisconsin cases discuss whether and when plaintiffs may sue anonymously, Petitioners pointed to substantial federal case law, including multiple federal appellate cases allowing anonymity in very similar circumstances (parent challenges to controversial school policies). R. 5:4–7.

The Circuit Court found that Petitioners "ha[d] made [a] demonstrable factual showing that, as a factual matter, would their names be disclosed, they would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly functioning of the court case," App. 39, but concluded it lacked authority to grant Petitioners' request and denied their motion. App. 39 ("In the end, I'm bound by Wisconsin law."). Because the Circuit Court viewed itself as "bound" by Wisconsin law, it never applied the balancing test discussed and

developed by federal courts.[4] Moreover, the Circuit Court explicitly declined to evaluate a key factor Petitioners emphasized (the irrelevance of their identities to the case). *See infra* pp. 12–13; App. 41–42 (noting that Petitioners "may be" "right" that "their identit[ies] [are] completely immaterial," but concluding "it's not for me to say" "at this point").

The Circuit Court agreed to grant a protective order, but the contemplated order would expose Petitioners' identities to an extraordinarily large group of people: any employee (associates, paralegals, secretaries, interns, etc.) of three separate large law firms—two of which represent *intervening parties*, including the entire staff of the nation's largest issue advocacy legal organization (the ACLU) with strong ideological commitments in this heated area, R. 62; App. 44, 45–52—regardless of whether those employees work on this case, as well as any consultants, investigators, deposition and trial witnesses, etc. that those law firms use. App. 5–8; R. 94:15–32, 41; Pet'rs Br.[5] 15–16 (more detailed procedural history). Quite simply, given a regrettable "cancel culture" in which even IRS confidentiality is no longer

[4] The Court of Appeals recast the circuit court's reasoning as though it did, App. 21, but the transcript reveals otherwise. App. 39–40 ("In the end, I'm bound by Wisconsin law … the question [ ] is what does the law allow the court to do?"). In any event, the circuit court never "ma[de] a record of factors relevant to" Plaintiffs' request, a well-recognized abuse of discretion, *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 430, 293 N.W.2d 540 (1980).

[5] Citations to "Pet'rs Br." are to Petitioners' appellate brief at the Court of Appeals, and is referenced only for a more detailed procedural history or a complete list of cases.

inviolable,[6] plaintiffs must and do reasonably fear that their identities will be leaked at some point—and they and their children severely harassed—if those identities are disclosed under the terms of the Circuit Court's order.

Petitioners appealed, but the Court of Appeals affirmed. App. 1–26. The Court of Appeals apparently disagreed with the Circuit Court that it lacked authority to grant anonymity (a seeming contradiction to *affirming*), hinting that anonymity might be allowed in some circumstances, App. 18 ¶ 31 & n.8, but failed to explain *when*. *Infra* pp. 10–11. Moreover, the Court of Appeals rejected the federal test and limited or excluded multiple critical factors federal courts consider, all without providing clarity as to the test or factors Wisconsin courts *should* consider. It also misinterpreted Wisconsin law to require plaintiffs seeking anonymity to disclose their identities *before* seeking permission to proceed anonymously. *Infra* p. 13.

B. Injunction Motion

Petitioners filed a temporary injunction motion the day after they filed their complaint, but the Circuit Court erroneously concluded that Wis. Stat. § 802.06(1)(b) prevented it from hearing that motion until after resolving Respondents' subsequent motion to dismiss, R. 92:5–22, even though the same court had recently heard an injunction motion and motion to dismiss simultaneously in a different case. *SEIU v. Vos*, No. 2019CV302 (Dane Cty. Cir. Ct.) (Docket Entry 3/25/19). Then, after the Court *denied* the

[6] *See* Richard Rubin, *IRS Is Investigating Release of Tax Information of Wealthy Americans*, Wall Street Journal (June 8, 2021), https://www.wsj.com/articles/irs-is-investigating-release-of-tax-information-of-wealthy-americans-11623179470.

motion to dismiss, it still refused to consider Petitioners' outstanding injunction motion until after resolution of this appeal, R. 95:25–31, even though Wis. Stat. §§ 808.07 and 808.075, provide that "a trial court … may … grant an injunction" "whether or not an appeal is pending."

Given that Petitioners would not be timely heard on their initial motion, they filed a second motion for an injunction pending appeal pursuant to Wis. Stat. § 808.07. R. 89–90. The Circuit Court did consider that motion and granted limited relief, but denied most of Petitioners' request. The court's narrow injunction prevents District staff from "conceal[ing] information" or "answer[ing] untruthfully" in response to direct questions parents ask about their children. App. 54. But Petitioners asked for an injunction requiring parental notice and consent *before* the District facilitates a transition at school, R. 89, since an "affirmed" transition can do substantial harm, R. 28:26–30, 90:34–37, and, without notice, parents will not become aware of the harm until after the fact. Yet the Circuit Court simply declined to consider the remainder of Petitioner's request. App. 56–57, 58–62 ("I'm not talking about those today.").

Petitioners asked the court to give its reasons for the partial denial to facilitate appellate review, Dkt. 155,[7] and the court's written decision, App. 53–55, reveals that it failed to properly apply the injunction standard. The court never assessed Petitioners' likelihood of success on their claim that, as a matter of parents' constitutional rights, schools must defer to parents on decisions as significant as whether *their child* will transition to a different gender identity at school. R. 90:14–32. Instead, the court

[7] Citations to "Dkt." are to docket entries in the trial court.

only assessed Petitioners' likelihood of success on the unrelated anonymity issue. App. 54. Similarly, with respect to harm, the Circuit Court simply held that Petitioners could not show harm as an "inescapable effect of being anonymous," App. 54, without assessing any of Petitioners' actual arguments as to harm, none of which depend in any way on their identities, *see* R. 90:32–40, including that constitutional violations are inherently "harm" for purposes of an injunction, R. 90:37.

Petitioners then filed a motion for an injunction with the Court of Appeals, under Wis. Stat. § 809.12. 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. 27–35. Even as to harm, the Court of Appeals did not address most of Petitioners' arguments for why an injunction is warranted: that the District's policy of secrecy *requires* a preemptive injunction; that gender-identity transitions can do lifelong harm; that parents cannot know in advance when or if their children will begin to deal with this; and that the injunction they sought 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.

ARGUMENT

I. This Court Should Address Whether, When, and How Plaintiffs May Sue Anonymously in Wisconsin Courts

This case presents an ideal vehicle for this Court to "establish … a policy" and "develop … the law" on whether and when plaintiffs in Wisconsin courts may sue anonymously. Wis. Stat. § 809.62(1r)(b), (c); *Cook v. Cook*, 208 Wis. 2d 166, 189, 560

N.W.2d 246 (1997) ("[T]he supreme court's primary function is that of law defining and law development.")

Courts around the country have recognized that anonymous litigation can be appropriate, and even necessary, in certain cases, *E.g.*, *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (surveying caselaw); R. 5:4–7 (listing cases), including cases like this involving parent challenges to sensitive and controversial school policies. *E.g.*, *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721–24 (7th Cir. 2011), *opinion vacated but anonymity portion adopted en banc*, 687 F.3d 840, 842–43; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 & n.1 (2000); Pet'rs Br. 23–25. Until this case, no published opinion from a Wisconsin court has ever addressed anonymous litigation, although Wisconsin courts have allowed plaintiffs to sue using pseudonyms, including recently. *E.g.*, Order Granting Petitioner's Motion to Proceed Anonymously, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Feb. 20, 2020, Judge Anderson Presiding); R. 5:3 (listing cases).

Given the dearth of Wisconsin case law on this issue, Petitioners asked the lower courts to adopt and apply the balancing test and factors that federal courts consider, R. 5:5–6, noting that the high-level inquiry is equivalent to the test Wisconsin courts have applied to related questions. *Compare Sealed Plaintiff*, 537 F.3d at 189 (balancing the "plaintiff's interest in anonymity … against both the public interest in disclosure and any prejudice to the defendant"); *with Krier v. EOG Envtl., Inc.*, 2005 WI App 256, ¶ 23, 288 Wis. 2d 623, 707 N.W.2d 915 ("balanc[ing] the factors favoring secrecy against the … presumption of access."). For authority, Petitioners invoked both Wis. Stat. § 801.21, which allows courts to seal or redact sensitive

information and to rely on "common law" "grounds" for doing so, *id*. § 801.21(4), and on courts' "inherent" authority, as recognized by this Court in *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983).

Yet the Circuit Court declined to "transport[ ] into Wisconsin jurisprudence … the practice of the federal courts in similar circumstances," concluding that it was "bound by Wisconsin law," namely the lack of "precedent for what the plaintiff is asking for in the current published case law." App. 39–40. Likewise, the Court of Appeals "decline[d] to adopt the purported federal balancing test." App. 19. While the Court of Appeals hinted that anonymity may sometimes be allowed, App. 18 n.8, it failed to articulate a clear test, or outline factors relevant to such requests, nor did it explain why, if anonymity is ever warranted, it is not justified here. The Court's failure to articulate a clear test alone warrants this Court's review, to "clarify" and "establish" the rule in Wisconsin for this. Wis. Stat. § 809.62(1r)(b), (c).[8]

Even putting aside the lack of any clear test, three other aspects of the Court of Appeals' decision warrant correction by this Court, two of which create needless "conflicts" with the federal courts. *See* Wis. Stat. § 809.62(1r)(d).

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[8] The Court of Appeals did say, at a high level, that the tests to be applied are the "administration of justice" and/or "overriding public interest" tests, App. 13–15, but aside from these catchphrases, it did not explain how to *apply* these "tests" to an anonymity request. The Court then stated that Petitioners failed to "develop[ ] [an] argument" under these tests. App. 24. With all due respect, that characterization is deeply unfair. Petitioners did not cite or discuss Wisconsin cases on this issue only *because there are none*. They did cite numerous on-point federal cases, carefully walked through the factors those courts have considered, and submitted substantial—and unrefuted—evidentiary support for their request. R. 5, 45:17–29; Pet'rs. Br. 1–47.

First, and most strikingly, the Court of Appeals held that in Wisconsin, unlike in federal courts, a "plaintiff's need for anonymity" is not "weighed in the balance"; instead, only "the *public's* interest in protecting the party's identity is relevant." App. 15, 19 (citing *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811). The Court of Appeals significantly over-reads *Linzmeyer* (its limited point was that the grounds for protecting information do not *perfectly overlap* with private *reputational* interests), but more importantly, the Court's distinction is confusing and will be incredibly difficult to apply going forward. For example, does Petitioners' evidence that they and their minor children face a serious risk of retaliation, *supra* p. 4, involve the "plaintiffs' [private] need for anonymity"—which is not to be considered, according to the Court—or the "public's interest in protecting the party's identity"? The Court of Appeals did not explain, but, notably, *did not even mention or discuss this evidence*, an indication of that court's view about which side of the line it falls on.

Even if the Court of Appeals were correct to draw a public-versus-private-interest distinction, federal courts have found that allowing plaintiffs to anonymously challenge controversial policies without "fear of [ ] reprisals" *does* "serve the *public's* interest … by enabling [lawsuits raising important issues] to go forward," cases that otherwise might never be brought. *E.g.*, *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1072–73 & n.15 (9th Cir. 2000). And multiple Wisconsin statutes protect the identities of "juveniles and parents of juveniles," demonstrating the *public's* interest in protecting minors. *E.g.* Wis. Stat. § 809.19(2)(a); 48.93(1d); 118.125(2).

Second, the Court of Appeals also excluded from consideration two other key factors federal courts consider: whether plaintiffs' identities are in any way relevant to the case and whether anonymity will prejudice the defendants. *E.g.*, *Elmbrook Sch. Dist.*, 658 F.3d at 724 (emphasizing "no indication that litigating anonymously will have an adverse effect on the District or on its ability to defend itself"); *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1245 (D.D.C. 1981) (rejecting an opposition to anonymity because defendants failed to "ma[ke] a showing of necessity" to learn plaintiff's identity). Petitioners heavily emphasized that they brought only a facial challenge to the constitutionality of the District's policy, making their identities irrelevant, and *still* offered various means to provide Respondents with any information they wanted, short of their identities (though Respondents have yet to point to anything they need that they do not have). R. 5:14–17 & n.6; 45:23–27; 93:12–14, 21. Yet the Circuit Court declined to evaluate the relevance of Petitioners' identities, believing it lacked authority to grant Petitioners' request, App. 41–42; *supra* p. 5, and the Court of Appeals held that this was not error because, according to it, the relevance (or not) of plaintiffs' identities and the "lack of prejudice" to defendants "are [not] weighed in the balance in Wisconsin," App. 23–24.

Third, the Court of Appeals suggested that, to even request anonymity, Wis. Stat. § 801.21 requires parties, at the time they file their request, to simultaneously provide their identity under a temporary seal. App. 17–18 ¶¶ 30–31 & n.8. But § 801.21 does not require that—it says explicitly that parties "*may*" file the sensitive information under a temporary seal. The only thing § 801.21 requires is a motion, served on all the parties, "specify[ing] the authority" for the request, which can include the "common law." *Id.* § 801.21(1), (4). Petitioners filed such a motion. R. 4–5. They

did not submit their identities under seal *right away* because it was unclear whether Respondents would have access to that information, or what would become of it if their request was denied; Petitioners made clear, however, that they were ready and willing to disclose their identities to the court. R. 45:24; R. 92:27; R. 93:11. The Court of Appeals' holding effectively means that plaintiffs cannot request anonymity without first giving it up.

These issues are "likely to recur" and their resolution will "have statewide impact," Wis. Stat. § 809.62(1r)(c)2–3, because anonymous litigation has proven to be a necessary tool in a variety of contexts where plaintiffs risk retaliation for participating in controversial public-interest litigation, such as cases involving abortion, *Roe v. Wade*, 410 U.S. 113 (1973), birth control, *Poe v. Ullman*, 367 U.S. 497 (1961), undocumented immigrants, *Plyler v. Doe*, 457 U.S. 202 (1982), workers' rights, *Does I thru XXIII*, 214 F.3d 1058, the establishment clause, *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, or—to give a recent Wisconsin example—open-records enforcement, Order Granting Petitioner's Motion to Proceed Anonymously, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Feb. 20, 2020, Judge Anderson Presiding). If the Court of Appeals' decision stands—which fails to articulate a clear test, excludes or limits important considerations, and requires plaintiffs to reveal their identities just to ask for permission to proceed anonymously—it will force plaintiffs in sensitive constitutional cases like these out of state court and into federal court.

Anticipating Respondents' likely response, the fact that the Circuit Court agreed to grant a limited protective order is no reason to deny this petition, for multiple reasons. First, the primary question raised is whether plaintiffs in Wisconsin may

ever remain anonymous to *all but the court*, and if so when. Petitioners cited many examples where this was allowed in federal court, including cases very similar to this one, *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998); *Elmbrook Sch. Dist.*, 658 F.3d 710 at 24; Pet'rs Br. 25–28 (listing many more cases), and at least one[9] in Wisconsin. *See Doe v. Madison Metropolitan School District*, No. 19-cv-3166, *supra*. The Circuit Court believed this is never allowed in Wisconsin courts, App. 39, and, while the Court of Appeals disagreed on this foundational point, App. 18 n.8, it nevertheless affirmed the result, but without clarifying when it *would* be allowed. Second, the Circuit Court's protective order exposes Petitioners' identities to an unreasonably large group. *Supra* pp. 5–6. Such exposure is completely unnecessary, given the irrelevance of Petitioners' identities to the case, which the lower courts did not consider, *see supra* pp. 12–13, and unreasonable, given the significant risks if their identities are leaked, *see supra* pp. 4–5.

Third, and finally, Petitioners also opposed and appealed having to disclose their identities to *intervenors*—parties they did not sue—but the Court of Appeals did not even address this issue. R. 62; App. 44, 45–52; Pet'rs Br. 15, 44–45. One of the primary criteria for intervention is that it will not "prejudice" the original parties, Wis. Stat. § 803.09(2), yet the Circuit Court's decision to both grant intervention and require Petitioners to disclose their identities to the intervenors significantly prejudices them, given the serious risks of retaliation against them. R. 62:1–5. If the Circuit Court is correct that, in Wisconsin, any intervening parties must also learn the identities of plaintiffs seeking anonymity, *see*

[9] Many more Wisconsin cases have allowed plaintiffs to sue using pseudonyms, but without a discussion of the extent of their anonymity. R. 5:3.

App. 52, this will even further deter parties from filing in state court, since they cannot know in advance who might seek to intervene in the case.

II. This Court's Review Is Necessary to Preserve Parents' Constitutional Rights, to Protect Children from Harm, and to Correct Significant Misapplications of the Injunction Standard

There are multiple reasons to resolve the second issue presented, but the primary reason is to protect parents' constitutional rights and their children from lifelong harm. *See* Wis. Stat. § 809.62(1r)(a) (a "real and significant question of … state constitutional law").

A. The District's Policy Severely Infringes Parents' Constitutionally Protected Role

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). Indeed, courts have recognized that 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. And 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.

Parents' rights are especially protected on "matters of the greatest importance," *see C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005), 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; *see In re Sheila W.*, 2013 WI 63, ¶¶ 16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). Thus, courts have recognized that a school violates parents' constitutional rights if it usurps their role in significant decisions. *Gruenke v. Seip*, 225 F.3d 290, 295–97, 306–07 (3d Cir. 2000) (emphasizing, after a school failed to notify and defer to parents about how to handle a teen pregnancy, "[i]t 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.")

The District's Policy violates parents' constitutional rights by taking a major, controversial, psychologically impactful, and potentially life-altering decision, R. 28 ¶¶ 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. 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. The Policy further violates parents' rights by prohibiting staff from notifying or communicating with parents about a serious issue their children are facing, R. 1 ¶¶ 41–44, effectively substituting District staff for parents as the primary

source of input for children navigating difficult waters. *See H. L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "presumptively include[ ] counseling [their children] on important decisions"); *Gruenke*, 225 F.3d at 306–07. By hiding such a major issue from parents, the Policy also interferes with parents' ability to provide professional assistance their children may urgently need. R. 28 ¶¶ 57, 78–79, 114. And all this without any finding of parental unfitness—a process for which Wisconsin has well-established procedures, with statutory clarity, transparency, and procedural safeguards, the very opposite of a secret, unilateral action by unaccountable District employees.

The District's Policy fails strict scrutiny. The Policy's primary stated justification is protecting children's privacy, App. 68, but this is not a compelling interest 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); Wis. Stat. § 118.125(2)(a), (b) (recognizing parents' right to access their children's education records). The Policy also suggests that it is necessary to keep students safe *from their parents*, App. 68, but government "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); *A. A. L.*, 2019 WI 57, ¶ 24. That Respondents may disagree with the approach some parents choose—such as "watchful waiting," rather than immediately "affirming" a transition, R. 28 ¶¶ 29–44 (outlining competing approaches)—is not sufficient to displace parents. 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, notice, hearing, etc.). And the District's policy applies to students of *any age*, five on up. *Supra* pp 3–4 n.3.

B. The District's Policy Causes Significant Harm

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 (6th Cir. 2021) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. … [P]laintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here.").

But even putting that point aside, the District's policy threatens significant harm to children. Respected psychiatric professionals believe that "affirming" or facilitating a gender-identity transition during childhood is itself a powerful psychotherapeutic intervention and can become self-reinforcing, causing gender dysphoria to persist, with long-term consequences. R. 28 ¶¶ 60–69, 98–120 ("In sum, 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."); 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)[10] ("[P]arents 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.")

Respondents have cited the World Professional Association for Transgender Health (WPATH) as the go-to source in this area, Dkt. 141 ¶ 14, and *even it* acknowledges that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views," and that there is insufficient evidence "to predict the long-term outcomes of completing a gender role transition during early childhood," and therefore recommends *deferring 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." R. 7:24.

Thus, this Court's review of the denial of a temporary injunction is warranted to prevent irreparable injury, both of a deprivation of parents' constitutional rights and lasting psychological harm to minor children.

C. This Court's Review Is Necessary to Correct the Lower Courts' Clear Misapplication of the Temporary Injunction Standard

Even putting aside the constitutional rights and psychological harms at stake, this Court's review is warranted because 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

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

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). And this Court has long held that a court erroneously exercises 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." *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 428, 430, 293 N.W.2d 540 (1980). Here, the lower courts misapplied this standard in multiple ways.

First, 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 merits with respect to the portion of the Policy it enjoined, App. 61–62, but then simply disregarded them as to the remainder, App. 56–57, 58 ("I'm not talking about those today."), instead assessing only Petitioners' likelihood of success on its appeal of the separate procedural question of whether and how Petitioners may proceed anonymously, App. 54. But the likelihood of success factor must involve whether the moving party "will *ultimately* prevail," *see Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013), especially when, as here, the issue on appeal is an ancillary issue, such that the case will proceed regardless of the outcome of the appeal.[11]

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

[11] Even if there were a difference in the likelihood of success factor between a preliminary injunction and an injunction pending appeal, *but see Grote*, 708 F.3d at 853 n.2, Petitioners moved for both at every level. *Supra* pp. 7–8; App. 32 n. 4.

injunction. App. 33. The Court of Appeals' harm analysis was itself incorrect, as explained below, *infra* pp. 22–23, 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 other words, the likelihood of success and irreparable injury are "inversely proportional," such that "more of one factor excuses less of the other." *Gudenschwager*, 191 Wis. 2d at 441. 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, evaluating the likelihood of success is *especially* important in constitutional cases, given that "most courts" hold that "irreparable injury is presumed" "[w]hen constitutional rights are threatened or impaired." *Vitolo*, 999 F.3d at 360; Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1. Petitioners argued this point at every level, R. 90:35, Memorandum in Support of Motion for Injunction at 63, No. 2020AP1032 (filed Oct. 13, 2020), yet neither the Circuit Court nor the Court of Appeals addressed it. App. 27–35; App. 53–55. This Court should "clarify," *see* Wis. Stat. § 809.62(1r)(c) that "[i]n constitutional cases, the [likelihood of success] factor is typically dispositive." *Vitolo*, 999 F.3d at 360.

Third, the Court of Appeals wrongly held that the potential harms to children, *supra* pp. 18–20, were too "speculative" to warrant an injunction. But it is well-established that "an injunction is designed to *prevent* injury" and "may issue merely upon proof of a sufficient *threat* of *future* irreparable injury." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 802, 280 N.W.2d 691 (1979) (emphases added). Given the District's policy of secrecy—prohibiting staff from even *notifying* parents before

teachers begin treating their child as the opposite sex at school—the *only* way to prevent harm is a preemptive injunction, since Petitioners have no way to know in advance if or when their children will begin to deal with this issue, R. 28 ¶ 78 (noting that a struggle with gender identity can arise seemingly "out of the blue"). The consequences of a secret, "affirmed" transition at school can be enormous and lifelong. R. 28 ¶¶ 60–69, 98–120. And the injunction Petitioners sought is perfectly tailored: it imposes no burden or restriction on the District *whatsoever* unless this issue actually arises while the case is pending.

To draw a simple analogy, if a school district entered into an agreement with a drug company to secretly administer an experimental drug to children who reacted to a bee sting, without parental notice or consent, there is no question that practice 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 the particular plaintiffs' children might never get stung by a bee, or because the drug's side effects are not fully known.

The Circuit Court's limited injunction is not sufficient to protect against these serious harms, because it only prevents District staff from lying in response to a direct question *after a secret transition at school has already occurred and harms have been realized*. App. 54; App. 58–62. Parents need to be involved and consulted *before* their child transitions at school, for many reasons. R. 28 ¶¶ 70–84. 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. R. 28 ¶ 78.

D. A Decision from this Court Will Have Statewide Implications

Finally, this Court's review is warranted because a decision by this Court will "help develop … the law" and "will have statewide impact." Wis. Stat. § 809.62(1r)(c)(2). Madison is not the only school with a policy like this, nor are Petitioners the only parents affected by such a policy. The Milwaukee public schools, the largest district in the state, have a similar policy. Milwaukee Public Schools, *Gender Inclusion Guidance* at 3, 5–6 (Oct. 2016).[12] Parents in the Kettle Moraine school district recently encountered a similar policy and were forced to withdraw their 12-year-old daughter from public school. *See* Notice of Claim Letter (May 18, 2021)[13] (full disclosure: undersigned counsel represent the parents in that case). The Kenosha School District 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).[14] Other parents in nearby states

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

[13] https://will-law.org/wp-content/uploads/2021/05/NOC-and-Demand-Letter-Redacted.pdf

[14] 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

are discovering similar policies, evidence that this is becoming widespread. *E.g.*, R. 29 ¶¶ 1–19 (one parent's experience).

Respondents are likely to argue that this is not a good vehicle due to its posture as an appeal from the denial of a temporary injunction, but courts, including this Court, regularly hear appeals from orders granting or denying temporary injunctions. *E.g.*, *Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, 393 Wis. 2d 38, 946 N.W.2d 35; *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261; *Woznicki v. Erickson*, 202 Wis. 2d 178, 182, 549 N.W.2d 699 (1996); *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."). The underlying issue in this case is the purely legal question of whether a school district may constitutionally exclude parents from important, health-related decisions involving *their* children. Wis. Stat. § 809.62(1r)(c)(3). In many constitutional cases, the legal issue can be largely, if not entirely, resolved at the temporary injunction stage. *See*, *e.g.*, *Vitolo*, 999 F.3d at 365 ("[P]laintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here."); *Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) ("In First Amendment cases, however, the likelihood of success on the merits is usually the decisive factor."); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013) ("Here, the analysis begins and ends with the likelihood of success on the merits of the RFRA claim. On the strength of that claim alone, preliminary injunctive relief is warranted."). Regardless of ultimate outcome, a proper analysis (indeed, *any* analysis) of Petitioners' *likelihood* of success will provide

important guidance to the lower courts on remand and to school districts around the state.

CONCLUSION

This Court should grant this Petition for Review.

Dated: August 13, 2021.

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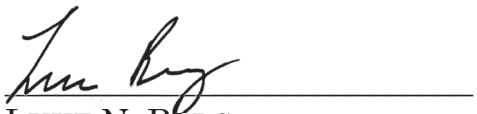
CERTIFICATION

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 7,173 words.

Dated: August 13, 2021.



LUKE N. BERG

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

I hereby certify that:

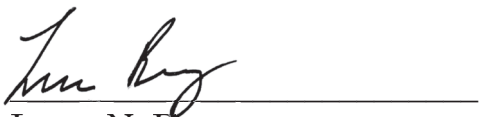
I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

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: August 13, 2021.



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