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SUPREME COURT

No. 2020AP1032

In the Supreme Court of Wisconsin

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.

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

OPENING BRIEF OF PETITIONERS

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INTRODUCTION

The Madison Metropolitan School District ("the District") has a policy allowing children of *any age* to secretly adopt a new 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. Many psychiatric professionals believe that gender-identity transitions during childhood can have profound, lifelong effects and even do substantial harm, and that parental involvement is critical to properly diagnose gender dysphoria, to identify and address likely comorbidities, and to provide ongoing support, both by professionals and the family. Thus, experts recommend that parents must be involved and ultimately decide what is best for their child.

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. They filed their complaint anonymously using pseudonyms to avoid a serious risk of retaliation against them and their minor children given the sensitive issues, and because their identities are completely irrelevant to the constitutionality of the District's policy. They also sought a modest and perfectly tailored temporary injunction that would merely require the District to notify and defer to parents before treating a child as the opposite sex at school while this case proceeds; an injunction that is necessary because parents will not learn what is occurring at school in time to prevent harm, given the official policy of deception.

The lower courts partially denied the injunction without ever evaluating Petitioners' likelihood of success—a well-established abuse of discretion—and without properly weighing the long-term irreparable harm the Policy can inflict in the interim. The lower courts also erred with respect to Petitioners' anonymity motion by, in the Circuit Court's case, concluding it lacked authority to grant it, or, in the Court of

Appeals' case, distorting the legal test for assessing such requests. As a result, neither court properly evaluated Petitioners' request. This Court should reverse on both issues.

ISSUES PRESENTED

1. 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 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, 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 weigh 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. 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.

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. The Court excluded or limited certain highly relevant

factors, creating multiple conflicts with the approach followed in federal courts.

ORAL ARGUMENT AND PUBLICATION

By granting the petition for review, this Court has indicated the case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

A. The District's Policy

The District's Policy at issue provides that students (without any age limit) may change gender identity at school by selecting a new "affirmed name and pronouns" to be used at school "regardless of parent/guardian permission to change their name and gender in [the District's] systems." App. 69. All teachers and staff must "refer to students by their affirmed names and pronouns" (as opposed to their actual legal names); failure to do so is "a violation of the [District's] non-discrimination policy." App. 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, giving parents access to their children's records. Wis. Stat. §118.125.

B. Injunction Motion

Petitioners filed a temporary injunction motion the day after their complaint. R.26. In support of their motion, Petitioners submitted an expert affidavit from Dr. Stephen Levine, one of the top experts in the world on this subject.[1] Dr. Levine explained that there is an ongoing debate in the medical community about how best to respond when children struggle with gender dysphoria (a mismatch between their biological sex and self-perceived or desired gender). R.28 ¶¶22–44 (surveying competing treatment approaches). While some recommend immediately "affirming" a child's self-perception and facilitating a social transition (i.e., adopting a new name and pronouns), many other experts, Dr. Levine included, believe that "affirming" a transition can become self-reinforcing and do long-term harm. R.28 ¶¶60–69. Thus, he and many others believe treatment should begin instead with "watchful waiting" or therapy to help a child first identify and address the underlying causes of their dysphoria. R.28 ¶¶30–37. Multiple studies have shown that the vast majority of children "desist" (return to comfort with their biological sex) *if* they do not transition, while few desist after the *do* transition. R.28 ¶¶60–69.

Dr. Levine then outlines many significant, long-term consequences if a child's dysphoria persists as a result of transitioning. R.28 ¶¶98–120; *infra* pp. 23–24. He also explains that children struggling with their sex often present many other co-morbidities that require professional assistance only their parents can provide. R.28, ¶¶57, 78. Children also "differ widely and must be considered individually," R.28 ¶¶54–59, thus parents must be involved: (1) to accurately diagnose the causes of the

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[1] Dr. Levine was the *court-appointed* expert in a major case in this area. *See Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014). And he was the chairman of the committee that developed the 5th version of the World Professional Association for Transgender Health's standards-of-care document, R.28:4, a more recent version of which Respondents endorse and rely heavily on, Dkt. 141:7.

dysphoria, R.28 ¶¶71–79, (2) to provide "effective psychotherapeutic treatment and support for the child," R.28 ¶¶80–82; and (3) to provide informed consent for any treatment approach, R.28 ¶¶83–84, 121–39. Finally, Dr. Levine describes how this can arise seemingly "out of the blue," R.28 ¶78.

Illustrating how this can surface quickly without parents' awareness, Petitioners submitted affidavit testimony from a parent with a personal experience of a similar policy—he was surprised to discover one day that his daughter's school had secretly facilitated a transition without notifying him. R.29. After he learned about this, they met with "over 12 mental health professionals," and the "consensus" was that her perceptions "were driven by her underlying mental health conditions" and that "it would be against [her] long-term best interest to 'affirm' her sudden belief that she was transgender." R.29 ¶¶14–15. Nevertheless, the school disregarded his decision about what was best for his daughter, which he believes did "significant harm" to her. R.29 ¶¶16–19.

Petitioners also emphasized that even the World Professional Association for Transgender Health (WPATH) (which Respondents endorse, Dkt. 141[2] ¶14, and which Petitioners disagree with in many respects, R.28 ¶¶45–53), 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." R.7:24. It 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." *Id*.

Although they filed their motion immediately after their complaint, the Circuit Court erroneously concluded that Wis. Stat.

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[2] Citations to "Dkt." are to docket entries in the Circuit Court.

§802.06(1)(b) prevented it from hearing that motion until after resolving Respondents' subsequently filed motion to dismiss, R.92:5–22, even though it 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). Even after the Court *denied* the motion to dismiss, it still would not 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 courts 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, nearly identical 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 limited 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. *See infra* p. 27 (describing further problems with the limited injunction). Yet the Circuit Court simply declined to consider the remainder of Petitioners' 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, and the Court's written decision, App. 53–55, shows it failed to properly apply the factors. 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 staff will treat *their child* as the opposite sex while at school. Instead, the 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, including that constitutional violations inherently constitute "harm" for purposes of an injunction.

Petitioners then filed a motion for an injunction with the Court of Appeals, as required by Wis. Stat. §809.12. Yet, like the Circuit Court, that Court 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: 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 applies only if the situation arises while this case is pending, and then only requires the District to defer to parents, as is the norm.

C. Anonymity Motion

Petitioners also sought to remain anonymous to all but the Circuit Court, and in support, submitted substantial and unrefuted evidence of a significant risk of retaliation against them or their minor children, including dozens of harassing and threatening comments, emails, and calls *received in response to this case*, news articles accusing Petitioners of being "transphobic" and "bigots," 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, and numerous other publicly documented examples of retaliation for speech on this topic, including against a Madison resident. *Infra* Part II.B.1. Petitioners pointed to substantial federal case law, given the lack of any published Wisconsin cases about this, including multiple cases allowing

anonymity in very similar circumstances (parent challenges to controversial school policies). *Infra* Part II.A.

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.[3] Moreover, the Circuit Court declined to evaluate whether Petitioners' identities are relevant to the case, a key factor Petitioners emphasized. 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 ACLU, the nation's largest issue advocacy legal organization 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. those

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[3] 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" Petitioners' 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).

law firms use. App. 5–8; R.94:15–30, 38. Given a regrettable "cancel culture" in which even IRS confidentiality is no longer inviolable,[4] Petitioners reasonably feared that their identities would be leaked at some point—and they and their children severely harassed—and once their identities are leaked, no remedy would be available to undo these substantial harms.

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*. 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 to disclose their identities *before* seeking permission to proceed anonymously.

STANDARD OF REVIEW

This Court reviews the grant or denial of an injunction for an abuse of discretion. *Wis. Ass'n of Food Dealers*, 97 Wis. 2d at 428–30. A court abuses its discretion when it: (1) "fail[s] … to consider and make a record of factors relevant to a discretionary determination"; (2) "consider[s] clearly irrelevant or improper factors"; or (3) "clearly giv[es] too much weight to one factor." *Id.* (citation omitted). Especially relevant here, it is an abuse of discretion to "fail[ ] … to consider a matter relevant to the determination of the probability of the petitioners' success." *Id.*

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[4] *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.

Whether the Circuit Court had authority to grant Petitioners' anonymity request and what test to apply to such requests are legal questions subject to de novo review. *See State v. Henley*, 2010 WI 97, ¶29, 328 Wis. 2d 544, 787 N.W.2d 350. The proper application of that test should also be reviewed de novo, as with similar questions in the open-records context. *See Democratic Party v. DOJ*, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584; *Linzmeyer v. Forcey*, 2002 WI 84, ¶24, 254 Wis. 2d 306, 646 N.W.2d 811; *but see* App. 15 (applying an abuse-of-discretion standard); *Krier v. EOG Env't, Inc.*, 2005 WI App 256, ¶23, 288 Wis. 2d 623, 707 N.W.2d 915 (same).

ARGUMENT

I. An Injunction Is Critical to Preserve Parents' Constitutional Rights and Protect Children from Harm

As explained in more detail below, the lower courts committed multiple, well-recognized errors when evaluating Petitioners' temporary injunction motions, most significantly failing entirely to evaluate Petitioners' likelihood of success. This Court should reverse and "direct the entry of an injunction," the "usual" result when lower courts erroneously deny an injunction. *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966).

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) (listing cases); *Wis. Indus. Sch. for Girls v. Clark Cty.*, 103 Wis. 651, 79 N.W. 422, 428 (1899). Indeed, parents have the "*primary* role in decisions" with respect to their minor children—not their school, or even the

children themselves. *Jackson*, 218 Wis. 2d at 879; *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."). 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. 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); *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 42–43, 426 N.W.2d 329 (1988), any infringement of which is also 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 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).

In accordance with these principles, courts have recognized that a school violates parents' constitutional rights if it usurps their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), a high school swim coach suspected that a team member was pregnant, and, rather than notifying her parents, discussed the matter with others, eventually pressuring her into taking a pregnancy test. *Id.* at 295–97,

306. The mother sued the coach for a violation of parental rights, arguing that the coach's "failure to notify her" "obstruct[ed] the parental right to choose the proper method of resolution." *Id.* at 306. The court found the mother had "sufficiently alleged a constitutional violation" and condemned the "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Id.* at 306–07.

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 District is effectively making a treatment decision without legal authority and without informed consent from the parents. *See Sheila W.*, 2013 WI 63, ¶¶16–24 (Prosser, J., concurring); R.28 ¶¶65 (explaining that transitioning is "a form of psychosocial treatment"), 121–39 (discussing informed consent).

The Policy further violates parents' rights by prohibiting staff from notifying or communicating with parents about a serious issue their children are facing, effectively substituting District staff for parents as the primary source of input for children navigating difficult waters. Dkt. 183:2 ("The Guidance provides that teachers should not volunteer information.") (*see infra* p. 27 n. 12); *see H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "presumptively include[ ] counseling [their children] on important decisions"). In no other context do schools *prohibit* teachers from communicating openly with parents about serious issues with their children that arise at school.

By hiding such a major issue from parents, the Policy also directly interferes with parents' ability to provide professional assistance their children may urgently need. Gender dysphoria can be a very serious psychological issue that requires support from mental health professionals, R.28 ¶¶57, 78–79, as even Respondents have conceded, R.77 ¶17. And children experiencing gender dysphoria frequently face other co-morbidities, including depression, anxiety, suicidal ideation and attempts, and self-harm, and so should be evaluated. R.28 ¶¶57, 78–79, 114. District staff lack legal authority to provide children with professional support, as they admit. R.42:11. Even parents who would *allow* a transition presumably would want to be involved to provide support.

The District's policy also violates parents' rights by "undermining the family unit," as one parent recounts from personal experience. R.29, ¶19. Facilitating a "double life" at school, kept secret from parents, not only harms the family but is also "psychologically unhealthy in itself, and could readily lead to additional psychological problems." R.28 ¶82.

The District's Policy also violates state records laws. Parents generally have access to "all records relating to [their child] maintained by a school," Wis. Stat. §118.125(1)(d), (e), (2). There is a narrow exception for "[n]otes or records maintained for *personal use* by a teacher" *if* "not available to others." *Id*. §118.125(1)(d)1. The District's "gender support plan" form directs staff to "keep this interview in your confidential file, not in student records," App. 70—a blatant abuse of the exception to evade parent access; the form obviously is *not* solely for a teacher's "personal use," it is designed to record how *all teachers and staff* will be required to refer to the student going forward.

Finally, for many parents, including Petitioners John and Jane Doe 1 and Jane Doe 4, these issues also implicate their religious beliefs about how personhood and identity is defined—whether as a gift from God or by self-declaration. R.10:2–4, 16:2–4, 19:2–4. The Policy directly

interferes with parents' right both to choose a treatment approach and to guide, advise, and support their children in a manner consistent with their religious beliefs.

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

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*. *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013); *see also Bellotti v. Baird*, 443 U.S. 622, 634, 638–40 (1979); *e.g.*, Wis. Stat. §118.125 (parents' right to access their children's records). The Policy also suggests that it is necessary to keep students safe *from their parents*, App. 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" or therapy rather than immediately "affirming" a transition, R.28 ¶¶29–44—is not sufficient to displace parents.

The District has also attempted to justify the policy as deferring to students. But schools do not "defer to students" on related decisions (e.g.,

name changes in school records,[5] medication (even aspirin) at school[6]) or even much less significant ones (e.g. athletics,[7] prom,[8] field trips[9]); all typically require parental consent. The reason, of course, is that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." *Parham*, 442 U.S. at 603. That rationale has scientific support: "[A]dolescents chronically fail to appropriately balance short term desires against their longer term interests as they make decisions … [thus] the consent of parents or legal guardians is almost invariably required for even minor medical or psychiatric interventions." Dkt. 142 ¶28.

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.

Ultimately, the District's policy is premised on the idea that the District knows better than parents how to respond when a child struggles with their gender identity. That idea is, as the Supreme Court put it, "statist" and "repugnant to American tradition." *Parham*, 442 U.S. at 603; *see Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (finding a violation of parents' rights where state actors "not only failed to presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite.")

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

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

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

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

[9] https://lafollette.madison.k12.wi.us/files/lafollette/uploads/parentalpermissionform_11.04.19.pdf

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 the anonymity issue, 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 case will proceed regardless of the outcome of the appeal on an issue separate from the merits.[10]

The Court of Appeals also entirely disregarded Petitioners' likelihood of success, concluding it "need not decide … the other requirements for temporary injunctive relief" after it decided Petitioners' harms were too "speculative" to warrant an injunction. App. 33. Its harm analysis was itself incorrect, as explained below, *infra* pp. 25–26, but even if 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). Thus, Petitioners' likelihood of success is still a critical factor that must be evaluated. *Wis. Ass'n of Food Dealers*, 97 Wis. 2d at 428–30.

B. The Policy Causes Significant Irreparable Harm

The District's policy threatens significant harm to children. Respected psychiatric professionals believe that "affirming" or facilitating a gender-identity transition during childhood is a powerful psychotherapeutic intervention that can become self-reinforcing, causing gender dysphoria to persist, with long-term consequences. R.28 ¶¶60–69

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[10] 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. 12–13; App. 32 n. 4.

("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)[11] ("[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.").

There are many lifelong consequences if a child's gender dysphoria persists as a result of school staff secretly facilitating a transition at school. First and most obvious is the inherent difficulty of feeling trapped in the wrong body, which is often associated with psychological distress. R.28 ¶¶57, 78, 91, 95, 99, 112–14. There are also many long-term physical challenges, given that it is not physically possible to change biological sex. *Id.* ¶¶102–07. Additional risks include isolation from peers, fewer potential romantic partners, and other social risks. *Id.* ¶¶108–114. A growing number of "detransitioners" are speaking out who deeply regret transitioning while minors. *Id.* ¶¶115–20.

The Policy also directly harms parents' ability to choose a treatment approach that does not involve an immediate transition, such as "watchful waiting" or therapy to help children identify and address the underlying causes of the dysphoria and hopefully find comfort with their biological sex. R.28, ¶¶29–44. It also prevents parents from providing professional support their children may urgently need. *Supra*

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

p. 20. And a "double life" at school is "psychologically unhealthy in itself" and can lead to "additional psychological problems." R.28 ¶82.

One parent who experienced this firsthand explains that he believes his daughter's school "did significant harm to [his] daughter by … facilitating her social transition to a different gender identity despite our wishes and the recommendations of" "over 12 mental health professionals." R.29:3–4.

Respondents have cited the World Professional Association for Transgender Health (WPATH) as the go-to source in this area, Dkt. 141 ¶14 (Petitioners disagree, R.28:19–22), but *even it* acknowledges that "[s]ocial transitions in early childhood" are "controversial," that there is insufficient evidence "to predict the long-term outcomes of completing a gender role transition during early childhood," and that professionals should *defer to parents* even if they "do not allow their young child to make a gender-role transition." R.7:24.

The Court of Appeals wrongly held that these potential harms to children are 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"); R.29 (parent describing his surprise to learn his daughter's school secretly facilitated a transition without his knowledge). Moreover, the Intervenors have submitted evidence that the District is, *in fact*, presently treating minor students as the opposite sex while at school without their parents' knowledge. R.53:3; 54:3, 55:3.

The injunction Petitioners seek is perfectly tailored: it imposes no burden or restriction on the District whatsoever *unless* this issue actually arises while the case is pending; it simply requires the District to defer to parents before treating minor children as the opposite sex while they are at school, to avoid the potentially lifelong consequences of a secret, "affirmed" transition at school. R.28 ¶¶60–69, 98–120.

To draw a simple analogy, if a school district had a policy to secretly administer an experimental drug to children reacting 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.

Even putting aside the serious harms from a secret transition at school, a violation of constitutional rights is itself sufficient harm to warrant an injunction, because, "[w]hen an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. §2948.1 (3d. ed.); *e.g.*, *Vitolo v. Guzman*, 999 F.3d 353, 360, 365 (6th Cir. 2021) ("When constitutional rights are threatened or impaired, irreparable injury is presumed. … [P]laintiffs will win on the merits of their constitutional claim. And like in most constitutional cases, that is dispositive here."). Petitioners argued this point at every level, R.90:35, Injunction Memorandum at 69, 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 establish that "[i]n constitutional cases, the [likelihood of success] factor is typically dispositive." *Vitolo*, 999 F.3d at 360; *see also Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014) ("the decisive factor.");

Korte v. Sebelius, 735 F.3d 654, 666 (7th Cir. 2013) ("[T]he analysis begins and ends with the likelihood of success on the merits.").

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. It does not even require staff *to answer* if parents ask what name and pronouns staff are using to refer to their child. App. 54; Dkt. 183:2 ("If a parent asks … the teacher CAN choose not to answer the question.").[12] And it prohibits staff from openly communicating with parents if their children being to struggle with this. Dkt. 183:2 ("The Guidance provides that teachers should not volunteer information."). Parents need to be involved and consulted *before* authority figures begin treating their child as the opposite sex, 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.

C. The Other Factors Support a Temporary Injunction

There is no harm to the District from granting an injunction (especially a conditional, perfectly tailored injunction); it will merely require the District to defer to parents before treating children as the opposite sex while at school. Any harm the District may assert *from parents* is directly at odds with the "traditional presumption that a fit parent will act in the best interest of his or her child," *Troxel v. Granville*, 530 U.S. 57, 69 (2000) (plurality op.), and will be far more zealous in doing so than anyone else, including teachers and government

[12] The District has continued to train its staff that parents must be excluded from this major issue, forcing Petitioners to file a motion to enforce the (limited) injunction. Dkt. 163. These quotes are from the email the District sent to staff as a result of that motion.

bureaucrats, *Wis. Indus. Sch. for Girls*, 79 N.W. at 428 (parents "hav[e] the most effective motives and inclinations and [are] in the best position and under the strongest obligations to give to such children proper nurture, education and training").

Finally, an injunction will preserve the status quo. Petitioners seek to protect the names that they thoughtfully and lovingly gave to their children at birth and the sexual identities their children were born with. That "status quo" both predates the District's recent, anomalous Policy, and far exceeds it in importance. Petitioners simply want the District to defer to parents before facilitating a major change to minor children's identities. Nothing could be more directly related to "preserving the status quo." An injunction is also necessary to preserve parental decision-making authority over minor children, a "status quo" that preceded the District's policy by well over a century. *See Wisconsin v. Yoder,* 406 U.S. 205, 232 (1972) (an "enduring American tradition"); *Troxel*, 530 U.S. at 65 (plurality op.) ("the oldest of the fundamental liberty interests recognized by the [Supreme] Court").

II. Anonymity is Vital to Protect Petitioners and Their Children

Courts around the country recognize that anonymous litigation can be appropriate, and sometimes even necessary. *E.g.*, *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (surveying caselaw). Parent challenges to sensitive and controversial school policies are widely recognized as warranting anonymity. *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). Federal courts have allowed parties to remain anonymous even to the opposing parties in many of these cases. *Infra* pp. 33–35. Wisconsin courts have also allowed this. *See* Order Granting Motion to Proceed Anonymously,

Doe v. Madison Metropolitan School District, No. 2019CV3166 (Feb. 21, 2020, Judge Anderson Presiding).

As a preliminary matter, there are at least two sources of authority by which Wisconsin courts can allow plaintiffs to sue anonymously. First, §801.21 authorizes courts to seal or redact any "portion of a document" or "item[ ] of information" whenever there are "sufficient grounds" to do so, and those "grounds" can come from "common law." *Id.* §801.21(1), (4). Second, Wisconsin courts have "inherent power" to restrict "access to judicial records when the administration of justice requires it." *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983).

The Circuit Court concluded it lacked authority to allow Petitioners to remain anonymous. *Supra* p. 15. And the Court of Appeals imposed multiple, ill-advised limitations on such requests. This Court should reject these restrictions on the factors to consider, and instead incorporate the factors federal courts consider into the balancing test Wisconsin courts already apply. And this Court should establish that Wisconsin courts can, in appropriate circumstances, permit plaintiffs to remain anonymous to all but the Court. If this Court holds that that this is never allowed, or accepts the Court of Appeals' limitations on what can be considered, it will force plaintiffs in sensitive cases like this out of state court and into federal court, and potentially deny them effective protection of their distinct rights under the Wisconsin Constitution.

A. This Court Should Adopt the Factors Federal Courts Apply and Allow Plaintiffs To Sue Anonymously When Appropriate

1. When considering anonymity requests, federal courts uniformly apply "a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure," *Sealed Plaintiff*, 537 F.3d at 189 (surveying caselaw); *Elmbrook*, 658 F.3d at 722. This high-level inquiry is equivalent to the balancing test Wisconsin courts already apply to similar questions. *See Krier*, 2005 WI App 256, ¶23 (describing

the test as "balanc[ing] the factors favoring secrecy against the … presumption of access"); *Democratic Party of Wisconsin*, 2016 WI 100, ¶11 (for open-records requests, "consideration of all relevant factors to determine whether the public interest in nondisclosure outweighs the public interest in favor of disclosure.").

Federal courts have identified multiple factors to consider, the most relevant of which here are: (1) whether plaintiffs are minor children or parents of minor children, *Elmbrook*, 658 F.3d at 724; *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); (2) whether "the litigation involves matters that are highly sensitive and of a personal nature," such as controversial medical issues, *Sealed Plaintiff*, 537 F.3d at 190 (citation omitted); *e.g. Roe v. Wade*, 410 U.S. 113 (1973) (same); *Poe v. Ullman*, 367 U.S. 497 (1961) (birth control); (3) whether the case "implicate[s] deeply held beliefs [that] provoke intense emotional responses," such as "[l]awsuits involving religion," *Elmbrook*, 658 F.3d at 723; (4) whether there is a "danger of retaliation" due to the sensitive issues, *Elmbrook*, 658 F.3d at 723; *Sealed Plaintiff*, 537 F.3d at 190; (5) whether the lawsuit "challeng[es] the actions of the government," *id.*; (6) whether "because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities," *id.*, and (7) whether "the defendant is prejudiced by allowing the plaintiff to press his claims anonymously," *id.*; *Elmbrook*, 658 F.3d at 724. Every one of those factors cuts in favor of anonymity here. *See infra* Part II.B.

Applying these factors, federal courts around the country recognize that parent challenges to controversial school policies generally warrant anonymity. In *Doe v. Elmbrook School District*, for example, the Seventh Circuit held that a group of parents and students could anonymously challenge a school district's practice of holding high school graduations at a church. 658 F.3d at 717, 721–24. Because "[l]awsuits involving religion can implicate deeply held beliefs and provoke intense emotional responses," the Court found a significant risk of retaliation if the plaintiffs were identified. *Id.* at 723–24. And this risk was "particularly

compelling" given that the case involved children and was "intimately tied to District schools." *Id.* at 724. The parents were entitled to anonymity because identifying them "would expose … their children." *Id.* Finally, the case involved the pure legal issue of whether the policy was constitutional, so the Court found no "adverse effect on the District or on its ability to defend itself." *Id.*

Other similar cases include *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998) (parent challenge to prayers and religious songs in graduation speeches);[13] *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (parent challenge to policy of random searches of students' persons and belongings); *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294 and n.1 (parent challenge to prayer before football games); *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667, 670–71 (E.D. Ky. 2000) (parent challenge to Ten Commandments in classrooms); *Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093, 1094 (E.D. Mo. 2006) (parent challenge to Bible distribution at school).

The Court of Appeals imposed two improper restrictions on the factors to consider when evaluating anonymity requests. First, and most strikingly, it held that, 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. 19 (citing *Linzmeyer*, 2002 WI 84, ¶31). The Court 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, that distinction is confusing and will be incredibly difficult to apply. For example, does Petitioners' evidence that they and their minor children face a serious risk of retaliation, *supra* Part II.B.1,

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[13] This opinion was vacated by the *en banc* court on other grounds, 177 F.3d 789, but the anonymity portion subsequently endorsed by the Ninth Circuit. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1067 (9th Cir. 2000).

involve their "[private] need for anonymity"—which is not to be considered—or the "public's interest in protecting [them]"? The Court of Appeals did not explain.

Even if the Court were correct to draw a public-versus-private-interest distinction, federal courts have found that protecting plaintiffs from "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.*, *Advanced Textile Corp.*, 214 F.3d at 1072–73 & n.15. Likewise, 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)(am); 48.93(1d); 118.125(2). This Court should establish that a serious risk of retaliation, the presence of minors or their parents, and the sensitivity of the issues raised, are all relevant factors in the analysis, and that these can be sufficient "overriding" factors to allow anonymity, especially when *all* are present.

The Court of Appeals also excluded from consideration two key factors federal courts consider: whether plaintiffs' identities are in any way relevant and whether anonymity will prejudice the defendants. *E.g.*, *Elmbrook*, 658 F.3d at 724; *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1245 (D.D.C. 1981). It should not be hard to see why these factors matter; they are the other side of the balance. And, contrary to the Court of Appeals, App. 23, they directly implicate the "public interest." *See Advanced Textile Corp.*, 214 F.3d at 1072 n.15 ("[T]he question whether there is a constitutional right to abortion is of immense public interest, but the public did not suffer by not knowing the plaintiff's true name in *Roe v. Wade.*"). There is no good reason to exclude these factors.

Finally, the Court of Appeals suggested that, to even request anonymity, Wis. Stat. §801.21 requires parties to simultaneously disclose 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. Section 801.21 only requires 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, and made clear that they were prepared to disclose their identities to the Court, R.45:26; R.92:27; R.93:11. The Court of Appeals' holding effectively means plaintiffs cannot request anonymity without first giving it up.

2. This Court should also hold that plaintiffs can, in appropriate circumstances, remain anonymous to all but the Court. The Circuit Court concluded it lacked authority to grant such a request. App. 39. The Court of Appeals disagreed, App. 18 n.8, but did not explain when this *would* be allowed or why this case does not suffice.

Federal courts in many cases, including parent challenges to school policies, have allowed Petitioners to remain anonymous even to opposing parties and counsel. In *Elmbrook School District,* the Seventh Circuit emphasized that it found "no indication that litigating anonymously will have an adverse effect on the District or on its ability to defend itself in this or future actions." 658 F.3d at 724. In *Madison School District No. 321*, the court "met in chambers with [the plaintiff], without defense counsel present, to determine whether she ha[d] standing." 147 F.3d at 834 n.1. Similarly, in *Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093, the court allowed the plaintiff to submit her true name to the court ex parte. *See* Docket Entry March 15, 2006, Case No. 4:06-cv-392. The plaintiff in *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667, filed a complaint using a pseudonym and an anonymized affidavit, as Petitioners did here. *Id.* at 669. The defendants "moved to strike the affidavit of Sarah Doe based on the anonymity," but the Court found "[t]he anonymity of the plaintiffs [would] not adversely affect the defendants" because, as here, "the plaintiffs [sought] only an injunction, not individual damages." *Id.* at 670–71. In other cases, anonymous students have used an association as a stand-in to challenge a policy. *E.g.*, *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020) (challenge

to university's bias response process "on behalf of four anonymous students"); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019) (same); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020) (same).

The U.S. Supreme Court has allowed plaintiffs to remain anonymous *even to the court*. Most famously, the plaintiffs in both *Roe v. Wade* and *Doe v. Bolton* used pseudonyms, and the Court indicated that it did not know their true identities. *See Doe v. Bolton*, 410 U.S. 179, 186 (1973) ("[D]espite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970."); *Roe*, 410 U.S. at 120 n.4.

Other cases allowing plaintiffs to remain anonymous to opposing counsel and/or the court include: *Ullman*, 367 U.S. 497 (challenge to contraceptives ban) (anonymity discussed in *Buxton v. Ullman*, 156 A.2d 508, 514–15 (Conn. 1959)); *Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (parent challenge to school's random-search policy) (*see* Second Am. Compl., Dkt. 21, No. 4:99-cv-386 (E.D. Ark. Apr. 19, 2000) (no indication defendants or court given plaintiff's identity)); *Campbell*, 515 F. Supp. at 1245 (noting defendants had not "made a showing of necessity" to learn plaintiff's identity); *Moe v. Dinkins*, 533 F. Supp. 623, 627 (S.D.N.Y. 1981) (noting the complaint and sealed affidavits were sufficient for standing); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n. 7 (S.D.N.Y. 1973) (finding sufficient that "Plaintiffs' attorneys have represented to the court" plaintiffs were real individuals); *Doe v. Lavine*, 347 F. Supp. 357, 358 (S.D.N.Y. 1972); *Doe v. Shapiro*, 302 F. Supp. 761, 762 (D. Conn. 1969); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294 and n.1 (noting "many District officials" attempted to "ferret out the identities of the Plaintiffs").

A judge in Dane County recently allowed an open-records plaintiff to remain anonymous to opposing counsel. *Doe v. Madison Metropolitan School District*, No. 2019CV3166, *supra*. If anonymity were never permitted in Wisconsin Courts, records custodians could deny

anonymous records requests—which are explicitly permitted, Wis. Stat. §19.35(1)(i)—with impunity.

If this Court holds that anonymity from all but the court is never permitted, it will have profound implications in a variety of contexts, such as abortion, *Roe*, 410 U.S. 113, birth control, *Ullman*, 367 U.S. 497, undocumented immigrants, *Plyler v. Doe*, 457 U.S. 202 (1982), workers' rights, *Advanced Textile Corp.*, 214 F.3d 1058, the establishment clause, *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, and open-records enforcement.

B. If Any Case Warrants Anonymity, This One Does

1. Petitioners and Their Children Face a Serious Risk of Retaliation or Harassment

Petitioners provided substantial evidence of a serious risk of retaliation against them or their minor children if their identities become known, "a compelling ground for allowing a party to litigate anonymously," *e.g.*, *Elmbrook*, 658 F.3d at 723; *Sealed Plaintiff*, 537 F.3d at 190, and the Circuit Court found "as a factual matter," that Petitioners "would likely be subject to threats and intimidation," if their names become known. App. 39.

Petitioners and their counsel have received many harassing or threatening calls, emails, and comments. The editor of Tone Madison tweeted, "Where do WILL staff eat, stay, etc. when they're in town to work on their lawsuit in Dane County Court? I want to know who's doing business with a malicious, transphobic organization." R.46, Ex. 1. Scot Ross, who served on the Ethics Commission, tweeted, "Transphobes are going to transphobe. Dear god, the Republican Party is an overflowing hate-filled cesspool of white guys who can only sprout erections by bullying and shaming children." R.46, Ex. 2. Someone named "Belinda Davenport" commented, "[O]ppressed group[s] … will have no recourse but resort to violence … The time will come to drop the protest signs and

pick up the gun or even the WMD. Street gangs and assassins would be the only way to stop the bigots." R.46, Ex. 13 at 5–6.

Multiple articles by local papers accused Petitioners of being "transphobic" or "bigots." *See* Alice Herman, *The Wisconsin Institute for Law and Liberty litigates for hate*, Tone Madison (Mar. 3, 2020)[14]; Alan Talaga, *Trust the students*, Isthmus (Feb. 27, 2020).[15] Someone sent a message through WILL's online form stating, "Your [sic] going after children. … I hope your secrets come out before your [sic] ready." R.46, Ex. 12. Someone else left a voicemail stating, "You guys really have nothing better to do than harass kids? You guys suck." R.46 ¶2. Other harassing comments or tweets include: "These parents deserve every single bad name hurled at them," R.46, Ex. 15 at 2; "these Nazis … fear being called out for being Nazis," R.46, Ex. 4; "that bigoted lawsuit," R.46, Ex. 13 at 9; "these @wisgop sacks of fucking shit," *see* R.8, Ex. 8; "F*ck WI for Law & Liberty," R.8, Ex. 11; "Who funds these fuckers?" R.8, Ex. 11; "A group of 15 bigots," R.8, Ex. 9; "Those adults need to be committed to a mental institution," R.46, Ex. 13 at 9; *see* R.46 (listing many more examples).

Petitioners also submitted an affidavit from an attorney who was fired from a job and has been threatened with violence for her advocacy on related issues. R.9 ¶¶1–12. Her organization has received threats at events and protests requiring police intervention. R.9 ¶8; *see* Eileen Hamm, *Women's Liberation Front holds sold-out event at Seattle Public Library despite bomb threat, interruptions, arrests*, Feminist Current (Feb. 3, 2020) (video of protests).[16] Other members of her organization

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[14] https://www.tonemadison.com/articles/the-wisconsin-institute-for-law-and-liberty-litigates-for-hate

[15] https://isthmus.com/opinion/opinion/lawsuit-challenging-trans-policy-in-madison-schools/

[16] https://www.feministcurrent.com/2020/02/03/womens-liberation-front-holds-sold-out-event-at-seattle-public-library-despite-bomb-threat-interruptions-arrests/

have lost jobs, been kicked out of businesses, and received death and rape threats for arguing that "gender identity" does not trump biological sex. R.9 ¶¶9–12.

Petitioners provided many other well-documented examples of retaliation against people for taking similar positions. R.5:9–12; R.45:20. Dr. Kenneth Zucker, one of the world's leading experts on gender dysphoria, was "unceremoniously fired" from a clinic he led for multiple decades. Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016).[17] Abigail Shrier, author of a highly praised book on the subject, has faced a widely reported "campaign to censor" her and her book. Jonathan Zimmerman, *Commentary: Why efforts to censor Abigail Shrier's book will backfire and hurt transgender people*, Chicago Tribune (Nov. 23, 2020).[18] A group of 54 academics published an open letter describing how their speech on this topic has led to "campus protests, calls for dismissal in the press, harassment, foiled plots to bring about dismissal, no-platforming, and attempts to censor academic research and publications." *Academics are being harassed over their research into transgender issues*, The Guardian (Oct. 16, 2018).[19] A Madison folk singer has been "forced out of [her] job, and banned from playing music at various venues in [Madison]." Thistle Pettersen, *How I Became the Most Hated Folk Singer in Madison*,

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

[18] https://www.chicagotribune.com/opinion/commentary/ct-opinion-censorship-cancel-culture-abigail-shrier-transgender-20201123-sifw7khysrdpnbnj66qxp6yiam-story.html

[19] https://www.theguardian.com/society/2018/oct/16/academics-are-being-harassed-over-their-research-into-transgender-issues

Uncommon Ground (Nov. 10, 2019).[20] J.K. Rowling has been repeatedly harassed for her views on this subject, including "doxxing" her by posting her home address online. Matt Lavietes, *Trans activists will not be charged for sharing J.K. Rowling's address on Twitter*, NBC News (Jan. 18, 2022).[21]

This risk weighs even more heavily here given that this case implicates Petitioners' minor children. If Petitioners' identities become known, it will necessarily "expose … their children," *Elmbrook*, 658 F.3d at 724, and the harassment juveniles can inflict on one another can be especially cruel. Courts have repeatedly found that protecting minor children is a "particularly compelling," *Elmbrook*, 658 F.3d at 724, reason for anonymity, and Wisconsin Statutes also reflect the importance of protecting "juveniles and parents of juveniles" in sensitive cases, *e.g.* Wis. Stat. §§809.19(2)(am).

2. Petitioners' Identities Are Entirely Irrelevant

Petitioners' identities are not relevant in any way to this case, nor will their anonymity cause any prejudice to Respondents, two critical factors federal courts consider. As the "masters of the[ir] complaint," *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 387 (1987), Petitioners intentionally brought claims that do not depend on any disputable facts about them. They challenge the District's Policy on its face, advancing only the purely legal question of whether a school district may constitutionally exclude parents from the major decision whether school staff will treat a child of theirs as the opposite sex while at school. Petitioners "do not allege that their children are materially different from other children in the District or that [Petitioners] are materially different from other parents."

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[20] https://uncommongroundmedia.com/thistle-pettersen-how-i-became-the-most-hated-folk-singer-in-madison/

[21] https://www.nbcnews.com/nbc-out/out-news/trans-activists-will-not-charged-sharing-jk-rowlings-address-twitter-rcna12557

Dkt. 9:15. They do not claim that their children are currently struggling with this, but that, like all students, they may begin to at any time. They do not seek damages or any remedy that would apply only to them, but simply a declaration that the Policy violates parents' rights and an injunction requiring the District to defer to parents on this major issue. R.1:20–21; *see Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d at 670–71.

Petitioners must have standing, of course, but they submitted short, anonymized affidavits to establish that they have children in the District. R.10–23. That fact is not reasonably disputable, and Respondents have never indicated they intend to dispute it. Even if Respondents were to contest whether Petitioners are real people with real children in District schools, the Circuit Court can verify that they are, as other courts have done. R.45:26; *Madison School District No. 321*, 147 F.3d at 834 n.1. Petitioners' anonymity has not prevented Respondents from arguing that their status as parents of children in the District is insufficient for standing to challenge a policy that violates parents' rights—they filed a motion to dismiss on that basis and lost, for obvious reasons. R.36, 42, 71. Besides the fact that they are parents, Petitioners' lawsuit depends on the law, the Policy, and facts that do not relate to them (such as the background in their expert affidavit, R.28).

Respondents have repeatedly asserted that they need Petitioners' true names to conduct discovery, but Respondents can conduct discovery without learning who Petitioners are. Petitioners can respond to interrogatories and produce documents through counsel, and they can even participate in depositions (over the phone or Zoom, for example), while preserving their anonymity. Regardless, there is nothing to discover that is relevant to a facial, constitutional challenge to the District's Policy, the only claims Petitioners brought. Respondents have had multiple opportunities to identify something—anything—that might be discoverable and relevant about Petitioners, but they have been unable to come up with a single thing, instead making only vague assertions. R.42:21–22; 93:20 ("We would need to understand the factual

circumstances of those individuals"); 95:19–20; *Campbell*, 515 F. Supp. at 1245 (rejecting a challenge to anonymity because defendants failed to "ma[ke] a showing of necessity" to learn plaintiff's identity). Petitioners have also offered, repeatedly, provide any information about themselves Respondents believe they need, R.5:16 and n.6; 45:26–27; 92:30–31; 93:13, yet Respondents have never asked for anything.

The Circuit Court failed to grapple with whether Petitioners' identities are relevant to this case, or the lack of prejudice to Respondents, despite Petitioners' emphasis on these factors. App. 41–42 ("I'm not sure that [Petitioners'] identit[ies] [are] completely immaterial … at this point in this juncture it's not for me to say."). The Court of Appeals held that the Circuit Court's failure to evaluate these two critical factors was not an abuse of discretion because these factors "are [not] weighed in the balance in Wisconsin." App. 23. That is wrong and alone warrants reversal.

3. Disclosure Exposes Petitioners and Their Children to a Leak, an Unnecessary and Avoidable Risk

While a protective order provides some protection, every additional person who learns Petitioners' identities increases the risk that their names will be leaked, as the Circuit Court acknowledged, App. 41 ("I don't dismiss … your concern over the more people that know, the greater risk. That's true."). If that happens, there will almost certainly be no way for Petitioners to determine how their identities were leaked. And there would be no practical remedy; a leak cannot be undone, and Petitioners and their children would then face potentially serious harassment or retaliation. *Supra* Part II.B.1.

The protective order contemplated by the Circuit Court exposes Petitioners' identities to an unreasonably large group of people. The Circuit Court held that any associate, paralegal, secretary, or intern of the three law firms in the case (Boardman & Clark, Quarles & Brady, and the ACLU) could learn Petitioners' identities. R.94:24–30. This pool

of people with access to Petitioners' identities numbers well over a thousand, if not in the thousands: Boardman & Clark lists 58 attorneys on their website,[22] Quarles & Brady boasts 475,[23] and the ACLU has "500 staff attorneys, [and] thousands of volunteer attorneys,"[24] *plus* all the non-lawyer support staff for all three firms. Even more, the Circuit Court's proposed order would allow disclosure to court reporters, consultants, investigators, experts, and deposition and trial witnesses. R.94:32, 38.

One need not search long to find examples of sensitive information subject to protective orders leaking to the public. A few examples include: *Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49; *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010); *E.A. Renfroe & Co. v. Moran*, 508 F. Supp. 2d 986 (N.D. Ala. 2007); *State ex rel. Wyatt, Tarrant & Combs v. Williams*, 892 S.W.2d 584 (Ky. 1995); *U.S. v. Simon*, 664 F. Supp. 780 (S.D.N.Y. 1987); *see generally* William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 Rev. Litig. 565 (2008).

Perhaps closest to home, the *John Doe II* investigation received international attention when approximately 1,600 documents were leaked to the Guardian newspaper. Brad Schimel, *Final Report of the Attorney General Concerning Violations of the John Doe Secrecy Orders*, Wisconsin Department of Justice, 2 (Dec. 5, 2017).[25] The Attorney General found that the leak came from a member of the core prosecution team, *id*. at 30, 35, but despite a lengthy investigation, concluded that "identifying the leaker or leakers [was] simply not possible," *id*. at 86.

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[22] https://www.boardmanclark.com/our-people?type=attorneys

[23] https://www.quarles.com/about-quarles-brady/

[24] https://www.aclu.org/about/aclu-history

[25] http://www.thewheelerreport.com/wheeler_docs/files/1206johndoe_01.pdf

Even cases like this have led to attempted leaks of protected information. In *Santa Fe Indep. Sch. Dist.*, 530 U.S. 290, an anonymous challenge by parents to prayer before high school football games, the Court noted that "many District officials apparently neither agreed with nor particularly respected" the anonymity order and either "overtly or covertly [attempted] to ferret out the identities of the Plaintiffs." *Id.* at 294 n.1 (citations omitted).

These examples illustrate that a leak (which could even be inadvertent) is only one step away, that contentious, high-profile cases like this provide a strong temptation for a leak, and that once leaked, the "the bell cannot be unrung." Childs, *supra,* at 605.

Given that Petitioners' identities are completely irrelevant to the constitutionality of the District's Policy, the only issue raised in this case, *supra* Part II.B.2, there is no reason whatsoever to subject Petitioners and their children to the risk of a leak (or fear of a leak), and the corresponding risk of retaliation against them or their children.

C. At a Minimum, Petitioners Should Not Have to Disclose to Intervenors, and Only to Attorneys Appearing for the District

Petitioners also opposed (and appealed) having to disclose their identities to Intervenors—parties they did not sue—but the Court of Appeals did not address this issue. R.62; App. 6, 45–52. 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' lawyers (and associates, paralegals, secretaries, interns, etc.), over their objection, gravely prejudices them by significantly increasing their exposure and the risks to them. Moreover, one of the *two* law firms for Intervenors, the ACLU, takes a strong ideological position in this area. If the Circuit Court is correct that, in Wisconsin, any intervening parties must also learn the identities

of plaintiffs seeking anonymity, *see* App. 46, this will further deter parties from filing in state court, since they cannot know in advance who might seek to intervene in the case.

Finally, the Circuit Court also erred by making Petitioners' identities available to any staff of the law firms, and any investigators, experts, consultants, etc. they might choose to use in this case. *Supra* p. 15–16. If Petitioners are not permitted to proceed anonymously, their identities should be available only to the attorneys who appear in this case, both to limit their exposure and to ensure that, if their names are leaked, the Court knows who to hold accountable and has the ability to impose appropriate sanctions.

CONCLUSION

The decisions of the Court of Appeals should be reversed.

Dated: February 14, 2022.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 11,000 words.

Dated: February 14, 2022.

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 brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

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

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

Dated: February 14, 2022.

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