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

NON-PARTY BRIEF OF *AMICI CURIAE* WISCONSIN FAMILY ACTION, ILLINOIS FAMILY INSTITUTE, MINNESOTA FAMILY COUNCIL, DELAWARE FAMILY POLICY COUNCIL, NEBRASKA FAMILY ALLIANCE, HAWAII FAMILY FORUM, THE FAMILY FOUNDATION, MINNESOTA-WISCONSIN BAPTIST CONVENTION, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, CONCERNED WOMEN FOR AMERICA, ETHICS & PUBLIC POLICY CENTER, NATIONAL LEGAL FOUNDATION, AND PACIFIC JUSTICE INSTITUTE IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The interests of the *Amici Curiae* are provided in the accompanying motion.

SUMMARY OF ARGUMENT

The transgender policy of the Madison Metropolitan Public Schools ("MMPS Policy" or "Policy"), by hiding from parents suspected of being not sufficiently supportive that their children are expressing a transgender identity at school, violates the rights of parents in two principal respects not addressed in detail by the Petitioner Parents. First, their fundamental right to direct the care and education of their children includes the right to decide where the child will attend school, but the Policy improperly denies them critical information to inform that decision. Second, by withholding such sensitive information when school officials, in their judgment, suspect parents might be insufficiently supportive, the school effectively labels those parents as abusive of their children, without affording them any due process protections as provided by both statutory and constitutional law. Both of these constitutional violations provide irreparable injury that fully supports the requested injunctive relief.

ARGUMENT

I. The MMPS Policy Violates the Fundamental Right of Parents to Care for and Educate Their Children by Depriving Them of Relevant Information

The Wisconsin Constitution, like its federal counterpart, identifies and protects parental interests as fundamental. The Plaintiff Parents have explicated the panoply of these rights in fuller detail and the many ways in which the Policy violates them. In this section, we emphasize that denying parents important information they need to determine whether their child should continue to attend a public school is itself a violation of those rights.

MMPS's defense of its Policy is premised on the fact that whether a minor will become transgender is a matter of significant importance to that child. *A fortiori*, it is an issue of significant importance to the parents of that child. Indeed, the Policy itself, by instructing school personnel to conceal information from parents about it, implicitly recognizes that parents have a substantial interest in their children's transgender behavior.

The Policy has a direct effect on familial relationships. Just by asking questions such as, "Do you want to tell your parents?" and "Are your parents supportive of you?," as the Policy requires, school personnel suggest to children that they should distrust their parents. It is just as obvious that a child living one life at school and another at home creates an emotional

distance from the parents and threatens alienation from them after the double life is discovered. The Policy does not deal with just internal "school matters."

It has long been established that a key component of the parents' constitutionally protected responsibilities is to decide whether or not to send their children to public schools. *See Wis. v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925). That right is not extinguished as soon as parents put their child in public kindergarten. At any point, and based on ever-changing circumstances unique to their own situation and their child's needs and interests, they may revisit their decision to send their child to a public school. *See Yoder*, 406 U.S. at 213-15. For parents to be able to make the determination of what they believe to be in their child's best interest, they cannot be denied information that all concede may be important to that decision. School personnel cannot, on their own motion, freely withhold relevant information to the very parents who may wish to withdraw their child due to the school's "philosophy" and its application to their own child. Petitioner Parents have fundamental interests threatened here that cannot be shut out by the schoolhouse door. It is parents, not schools, who have a fundamental liberty interest "to direct the education and upbringing of [their] children." *Glucksberg v. Wash.*, 521 U.S. 702, 720 (1997).

While gender dysphoria, like other medical conditions, may need to be addressed while the child is in school, it is not part of the primary educational mission for which parents have entrusted their children to the public schools. It is a core parental issue involved in the care, health, and welfare of their children. A school certainly could not refuse to disclose student grades to their parents because the students were afraid of the parents' reaction, even though grades are central to the educational function of the school. Much less can a school withhold information from parents about their child's transgender behavior, which is not. The words of the United States Court of Appeals for the Third Circuit in an analogous case are apt here:

> School-sponsored counseling and psychological testing that pry into private family activities can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children, as they are guaranteed by the [U.S.] Constitution. Public schools must not forget that "*in loco parentis*" does not mean "displace parents."
>
> 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. State deference to parental control over children is underscored by the [U.S. Supreme] Court's admonitions that the child is not the mere creature of the State, and that it is the parents' responsibility to inculcate moral standards, religious beliefs, and elements of good citizenship.

Gruenke v. Seip, 225 F.3d 290, 307 (3d Cir. 2000) (internal citations and quotations omitted).

To the extent compelling interests are involved, they also support providing this information to the parents. Parents share the Policy's goal to

provide the support and comfort that the child needs to resist and recover from any harassment or bullying from fellow students they may experience. But parents cannot do that if they are kept in the dark. And one solution to such harassment may be to remove the child from the situation. Providing a safe school environment does not allow schools to dictate how parents treat or instruct their children, even if school personnel might happen to disagree. Much less does it allow schools to alter information provided by parents to the school and hide that fact from them when the parents might desire to provide additional assistance, tailored to their children, to minimize the difficulties and noted dangers of a child making a gender transition.

Another stated purpose of the Policy is to protect the child's privacy. Your *Amici* agree that minor children have privacy rights vis-à-vis governmental school officials. But minor children have no right to keep secrets from their own parents, which is what is involved here. And children cannot manufacture any such "right" by disclosing matters first to school personnel. As the United States Court of Appeals for the Fifth Circuit noted in a related context, it "has never held that a person has a constitutionally-protected privacy interest in her sexual orientation, and it certainly has never suggested that such a privacy interest precludes school authorities from discussing with parents matters that relate to the interests of their

children." *Wyatt v. Fletcher*, 718 F.3d 496, 505 (5th Cir. 2013). The same applies to gender identity.

II. The MMPS Policy Also Violates the Procedural Due Process Rights of Parents by Assuming That Those MMPS Labels as "Unsupportive" Are Negligent or Abusive

Some of the implied assumptions on which the MMPS Policy relies are these:

1. Minor children know what is best for themselves on all occasions, at least when sexual matters are concerned.
2. Minor children always know when their parents will be "supportive" and when they will not be.
3. School personnel will never unduly influence minor children when helping a child to determine whether parents will be "supportive."
4. School personnel and minor children will always employ a standard meaning of "supportive."
5. Parents who may counsel their child against transgenderism are, by definition, not "supportive."

None of these assumptions are reasonable, and, both individually and in combination, they are obviously inadequate to overcome the fact that the care and nurture of the minor child lies first and foremost with the parents. *See*

Evelyn C.R. v. Tykila S., 2001 WI 110, 246 Wis. 2d 1, 629 N.W.2d 768; *T.M.F. v. Children's Serv. Soc'y,* 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983).

All these implied assumptions build to a final one that parents who are presumed not to be adequately supportive might expose their children to harm and abuse. Even if there were evidence of abuse occurring in some situations, it does not permit a broad, prophylactic abridgement of constitutional rights. An individual's fundamental rights may not be foreclosed, without notice, based on a generalized suspicion of some of the members of the class to which the individual belongs.

Both this Court and the U.S. Supreme Court have repeatedly applied this principle in parental rights settings. For example, in *Santosky v. Kramer*, 455 U.S. 745, 747-48 (1982), the Court held that the State must find that a parent is guilty of neglect by clear and convincing evidence; and in *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972), the Court held that due process requires a natural parent to be given a hearing prior to a determination of neglect. The U.S. Supreme Court has summarized, "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (emphasis in original); *see also In re Winship*, 397 U.S. 358, 365-66 (1970) (remarking that

"labels and good intentions do not themselves obviate" due process safeguards).

Consonant with these federal constitutional requirements mirrored in the Wisconsin Constitution, this State has specific, codified procedures for dealing with abusive and neglectful parents. If there is a particularized concern that parents may abuse their own child, those laws set out the process to be followed, a process that includes full notice to parents of any suspected abuse or neglect and the right to respond before a neutral judicial officer. *See, e.g.*, Wis. Stat. § 48.21 (requiring judicial hearing for taking child away from allegedly abusive or neglectful parents), § 48.23(2) (requiring counsel for parents in such hearings), § 48.305 (granting non-consenting parent the right to a prompt hearing when child is removed from home); § 48.31 (requiring proof of abuse or neglect by clear and convincing evidence); § 48.415 (specifying grounds for involuntary termination of parental rights).

Notification, hearing, judicial fact-finding, and a heightened standard of proof are all procedural due process protections required before parents may be deprived of their fundamental liberty interest in the care of their children. *See In re S.M.H.*, 2019 WI 14, 385 Wis.2d 418, 922 N.W.2d 807 (reversing termination ruling when parents were not provided full evidentiary hearing). As this Court has held:

> It is apparent that the Wisconsin legislature has recognized the importance of parental rights by setting up a panoply of substantive rights and procedures to assure that the parental rights will not be terminated precipitously, arbitrarily, or capriciously, but only after a deliberative, well considered, fact-finding process utilizing all the protections afforded by the statutes unless there is a specific, knowledgeable, and voluntary waiver.

In re M.A.M., 116 Wis.2d 432, 437, 342 N.W.2d 410 (1984).

Put simply, parental rights may not be eliminated in secret by a school policy.

The Legislature's treatment of abortions by minors provides an analogous situation, although, unlike with procuring an abortion, the U.S. Supreme Court has not found a constitutional right of a minor to exhibit as transgender. The Legislature has provided for parental consent with judicial override but, along with it, adopted the following findings:

> (a) The legislature finds that:
>
> 1. Immature minors often lack the ability to make fully informed choices that take account of both immediate and long-range consequences.
>
> 2. The medical, emotional and psychological consequences of abortion and of childbirth are serious and can be lasting, particularly when the patient is immature.
>
> 3. The capacity to become pregnant and the capacity for mature judgment concerning the wisdom of bearing a child or of having an abortion are not necessarily related.
>
> 4. Parents ordinarily possess information essential to a physician's exercise of the physician's best medical judgment concerning a minor.
>
> 5. Parents who are aware that their minor is pregnant or has had an abortion may better ensure that she receives adequate medical attention during her pregnancy or after her abortion.
>
> 6. Parental knowledge of a minor's pregnancy and parental consent to an abortion are usually desirable and in the best interest of the minor.

> (b) It is the intent of the legislature in enacting this section to further the purposes set forth in s. 48.01, and in particular to further the important and compelling state interests in:
>
> 1. Protecting minors against their own immaturity.
>
> 2. Fostering the family structure and preserving it as a viable social unit.
>
> 3. Protecting the rights of parents to rear minors who are members of their households.

Wis. Stat. § 48.375(1). All these findings and compelling interests as specified by the Legislature are fully applicable in the transgender situation, if not more so considering that the MMPS Policy is applied to students of any age, including those in elementary school.

Indeed, these findings and interests put in sharp focus that the MMPS Policy usurps the parental role concerning transgenderism. Without a discussion with his or her parents on this sensitive subject, a child very likely will not know whether or not the parents are "supportive." MMPS personnel, out of imagined fear for the child's safety, may lead the child not to bring this matter to the parents' attention, as long as there is any perceived ambivalence about the parents' support. And the term "supportive" in this context is undefined and too vague to pass due process muster. *See Milwaukee v. K.F.*, 145 Wis.2d 24, 426 N.W.2d 329 (1988); *State v. Culver*, 2018 WI App 55, ¶29, 384 Wis.2d 222, 918 N.W.2d 103 (noting that a provision is unconstitutionally vague "if it permits a decision maker to

enforce it arbitrarily"); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) (holding that a "more stringent vagueness test should apply" when the measure "threatens to inhibit the exercise of constitutionally protected rights").

What is also very clear is that the MMPS employee involved with surveying the child and filling out the intake form likely is not professionally qualified to counsel on gender transformation. Nor is MMPS going to pay for professional assistance for the child, despite the fact that adolescents acting out gender transformation roles are much more prone to suicide and that the vast majority of children who experience gender dysphoria ultimately find comfort with their biological sex as they mature. (See Pet. Br. at 24-25.) Does the school's supposed "right" to decide what's best for minors go so far as to allow school personnel to hide from parents that their child is considering suicide? This Policy raises the not insubstantial specter of parents suing for wrongful death of their minor children because their parental rights were violated and their children were deprived of counseling, both parental and professional, that parents would have provided but for the MMPS Policy of secrecy and dissembling. *See*, *e.g., Littlejohn v. Sch. Bd. of Leon Cnty. Fla.,* No. 4:2021cv004-15 (N.D. Fla., complaint filed Oct. 18, 2021) (action by parents of minor child for secretly aiding their child to exhibit as transgender in middle school); *Konen v. Caldiera,*

http://libertycenter.org/cases/konen/ (admin. claim filed against California public school and its officials by parent and her minor child for secretly counseling and assisting minor to exhibit as trans at middle school); *cf. Arnold v. Bd. of Educ. of Escambia Cnty., Ala.*, 880 F.2d 305, 311-12 (11th Cir. 1989) (finding school violated parental rights by keeping daughter's pregnancy secret from them).

School personnel (who have undoubtedly in almost all cases spent much less time with the child than the parents have) have no right to withhold from parents—in their sole discretion and on remarkably insufficient information and based on their supposition about what the parental response might be—that their child is exhibiting as transgender in school. It is parents that the law presumes know their own children best and are best positioned and motivated to protect and counsel them. *See Parham*, 442 U.S. at 602. It is parents who are given the primary right to care for their child, not school counselors, teachers, or principals. *See Stanley*, 405 U.S. at 651; *Gruenke*, 225 F.3d at 307. Of course, there are instances in which parents, in exercising their rights, fall woefully short of their responsibilities to act in their child's best interest. But fundamental parental rights, like other fundamental rights, may only be curtailed or withheld after notice and due process. They may not be withheld utilizing amorphous standards interpreted solely in a government official's discretion. School

officials by the expedient of publishing their own "policy" cannot give themselves authority to bypass the due process protections set up to regulate neglect and abuse by parents—implementing their own standards, in their own ways, on an unreviewable, case-by-case basis.

CONCLUSION

This Court should find for Petitioners in all respects.

Respectfully submitted,

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March 23, 2022

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), (c) for a brief. The length of this brief is 2,882 words.

Dated: March 23, 2022.

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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: March 23, 2022.

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