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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

REPLY BRIEF OF PETITIONERS

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ARGUMENT

I. Respondents Cannot Justify Concealing a Serious Mental-Health Issue From Parents

As Petitioners explained, the District's policy to treat school like Las Vegas—what happens at school stays at school—violates parents' constitutional rights and threatens long-term harm to children, and should be enjoined while this case proceeds. Br. 17–28. Respondents do not dispute that the lower courts entirely failed to consider Petitioners' likelihood of success against this extraordinary policy.

Perhaps realizing their case against an injunction is weak, Respondents lead with various meritless attempts to convince this Court not to reach the injunction question, Resp. 28–40; *infra* Part II, and once they get to the merits, they respond to strawmen. They argue that parents have no "right to control the curriculum and school environment," but this case has nothing to do with that. Resp. 41–45. Petitioners do not dispute that "[curriculum] [d]ecisions … are uniquely committed to the discretion of local school authorities" (and of course there is no right to a "homework-free summer," the issue in *Larson v. Burmaster*). 2006 WI App 142, ¶¶41–42. But parents do have a constitutional right to be the primary decision-makers with respect to their minor children, Br. 17–18, and when a major decision-point arises—like whether staff will treat a child of theirs as the opposite sex—schools must defer to parents, even if the issue surfaces at school.

The few non-curriculum-related cases Respondents cite are equally irrelevant. The bathroom-policy cases, *e.g.*, *Barr*, Resp. 42, involved how schools treat *other* children; here the District disregards parental decisions about *their own* children. *Thomas* and *C.N.*, Resp. 42, did not involve anything remotely comparable to secretly facilitating a gender-identity transition at school. And *C.N.* endorsed *Gruenke*, *see* Br. 18–19, explaining that a survey is not "of comparable gravity" to

"depriv[ing] [parents] of their right to make decisions concerning their child"—exactly what is at stake here. 430 F.3d at 184–85.[1]

Respondents then argue that parents who wish to preserve their decision-making role should "home school" or "enroll [their children] in a private school," Resp. 43, a stunning acknowledgement of their "statist" view that school staff "supersede parental authority" while children are in school. *See Parham*, 442 U.S. at 603. That position is not only unconstitutional; the implications are terrifying.

Next, Respondents downplay the significance of adults treating children as the opposite sex, comparing it to a nickname and not a form of psychotherapeutic treatment. Resp. 45–49. Psychiatrists with decades of experience treating gender dysphoria disagree. Br. 11–12, 23–24. Even WPATH, on which *their expert* relies, Supp. App. 146, lists "[c]hanges in gender expression and role" *first* among "[t]reatment options" for gender dysphoria, R.7:16. Respondents argue it can't be medical treatment because District staff are "not medical providers," Resp. 47, but that makes it worse, not better. District staff "have no way to know whether a student has gender dysphoria" (their words, R.42:11) and they further concede this can be a serious mental-health issue, Resp. 47–48; R.77, ¶17. Seeking to present as the opposite sex is a well-recognized "yellow flag" that a child *may* be dealing with gender dysphoria and should, "at the very least," be professionally evaluated, which only parents can provide. R.28:27–30; Dkt.142 ¶11. Even Respondents' expert recommends a professional evaluation. Supp. App. 147–48.

[1] Some amici mischaracterize Petitioners' position as asking this Court to impose an affirmative duty on teachers to inform parents of any "gender nonconforming" behavior they observe at school. *E.g.* Madison Teachers Br. at 7 n.2, 13. Petitioners do not ask for this. They seek an injunction that does two things: (1) requires parental consent before staff begin referring to a child using opposite sex names and pronouns; (2) prevents the District from *prohibiting* teachers from openly communicating with parents about their kids. R.89.

Respondents argue that various factual disputes prevent this Court from resolving the injunction question. Resp. 50–53. Many of these are not actually in dispute or are beside the point. *See* Dkt.142 ¶11 (acknowledging Respondents "[are] correct" that a child who requests a different name may or may not be dealing with gender dysphoria, and explaining why parents nevertheless must be involved). And the rest do not affect the underlying issue, which is simply whether schools may exclude parents from a major and controversial decision affecting their children. This case cannot and will not (now or ever) resolve the ongoing debate about whether adult "affirmation" of a child's self-declared gender is helpful or harmful. Petitioners submitted Dr. Levine's affidavit to summarize the debate and show that respected mental-health professionals believe there are serious risks and potential lifelong harms from transitioning at a young age, reinforcing why parents must be involved. The *existence* of that debate is beyond dispute; even WPATH acknowledges it. Br. 12.

Even if this Court believes resolving some of these disputes may ultimately be relevant to the constitutional issues,[2] the question at this stage is whether a policy that threatens serious harm and upends a foundational cornerstone of our legal system should be enjoined until this case reaches a final judgment. The temporary injunction standard, when properly applied, accounts for factual disputes that have yet to be resolved; after all, courts assess the *likelihood* of success.[3]

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[2] Respondents' assertion that the Article I, § 18 and state-law claims are not raised here is wrong. Resp. 44 n.17. The question is whether the lower courts erroneously denied an injunction, which incorporates all legal claims through the likelihood-of-success factor—and Petitioners have raised these arguments at every level. R.90:22, 27–30; Inj. Mem., Appellate Dkt. 10-13-2020, at 40–45 and nn.12–13.

[3] That said, this Court *could* resolve the constitutional question now, as courts frequently do in appeals of injunctions in constitutional cases. *E.g.*, *Vitolo v. Guzman*, 999 F.3d 353, 365 (6th Cir. 2021) ("[P]laintiffs will win on the merits … that is

Respondents argue the harms are too "speculative" to warrant an injunction, Resp. 36–38, but the magnitude is enormous, R.28 ¶69 ("changing the life path of the child"), and *the District's secrecy policy* requires a preemptive injunction to prevent these harms. Plaintiffs cannot know if or when their children will deal with this, and the first sign may come at school, Br. 11–12, 25, which Respondents do not dispute. Respondents counter that, under the partial injunction, Petitioners can "simply ask," Resp. 38, but they have no answer to the reasons Petitioners gave for why this is insufficient, including that, even *if* they can get the truth after the fact (the current injunction doesn't even guarantee that), harm has already been done. Br. 27.

II. Respondents' Attempts to Evade This Court's Review Are All Meritless

Respondents argue this Court has no jurisdiction because Petitioners did not separately appeal the Circuit Court's decision not to timely hear their temporary injunction motion. Resp. 28–31. That argument is both wrong technically, *see Univest Corp. v. Gen. Split Corp.*, 148 Wis. 2d 29, 37 (1989), and mischaracterizes the record. First, there was nothing to appeal—the Circuit Court simply decided it would not timely consider Petitioners' motion (itself an error[4]). During the *same* hearing, Petitioners explained they would "ask the appellate courts to enter an injunction directly" if the Circuit Court would not hear their motion. R.95:31. The Court then agreed to hear, and ultimately did hear, a second, nearly identical motion, which, if granted, would have accomplished the same thing, so there was no reason to appeal the

dispositive here."); *SEIU v. Vos*, 2020 WI 67; Br. 26–27 (listing more cases). Petitioners submit that the underlying question is not difficult. Notably, two years into this case, Respondents still cannot come up with a single comparable example of school districts hiding an issue of similar magnitude from parents.

[4] Wis. Stat. §§ 808.07(2) and 808.075(1) provide that "a trial court … may … grant an injunction" "whether or not an appeal is pending." Thus, litigants are surely entitled *to be heard* in a timely manner if they have requested one.

scheduling decision, even if that were possible. And Respondents fully responded with a lengthy brief and expert affidavit. R.95:45–48; R.89–90; Dkts.140–41.

Furthermore, Petitioners *did* raise the Circuit Court's failure to hear their original motion with the Court of Appeals and, based on that error, moved for both a temporary injunction and an injunction pending appeal (to the extent there was any difference), and the Court of Appeals held that the criteria (and thus outcome) would be the same. App. 32 n.4. Thus, if this Court were to remand without any analysis, as Respondents ask, the Circuit Court would conclude it was bound by the Court of Appeals' decision, forcing Petitioners through the whole appellate process again, wasting judicial resources.

Relatedly, Respondents argue an injunction will be moot once this Court resolves this appeal. Resp. 31–33. Hardly. Petitioners seek an injunction to protect their children and their parental role while this case proceeds, as it will regardless of the outcome. At bottom, Respondents are twisting the lower courts' errors into reasons to avoid this Court's review. This Court should not buy it. The lower courts' failure to evaluate Petitioners' injunction request (filed two years ago) is not a reason to send it back for another go at it (and two more years of delay), but to reverse and direct the entry of an injunction. The issue has been fully briefed and argued at every level, and is ripe for this Court's review.

Respondents suggest it would be unfair for this Court to order an injunction because they have not yet "engage[d] in discovery." Resp. 36. But a temporary injunction motion is usually the first thing heard in a case, before there is time for discovery, and Respondents *still* cannot explain what they hope to discover that would be relevant. *Infra* pp. 10–11. In any event, Respondents *could have* conducted discovery, but chose not to. They had access to Petitioners' injunction motion and affidavits for *seven months* before the hearing, and during that time they did not pursue any discovery, either of Dr. Levine and Jay Keck, R.28–29, or of

the Petitioners, even though Petitioners repeatedly offered to provide any information they wanted, R.5:16 and n.6; 45:26–27; 92:28–29; 93:13, and the Court made clear there was "no stay of discovery," R.95:42.

Finally, Respondents' status quo arguments, Resp. 35–36, are meritless. Br. 28. The purpose of the requested injunction is to prevent the District from facilitating a major *change* to a child's identity at school, in secret, without parental consent. The injunction won't require anything unless this issue comes up while this case proceeds—in other words, it will preserve the status quo.

III. Respondents Cannot Explain How Petitioners' Identities Are Relevant

Petitioners provided substantial legal, Br. 28–35, and factual, Br. 35–42, support for their anonymity request, including numerous federal cases that have allowed anonymity in very similar circumstances, Br. 30–31; 33–35. There are three main questions for this Court: first, can plaintiffs in Wisconsin courts *ever* remain anonymous to all but the court; if so, how should courts analyze such requests; and third, is anonymity warranted here?

Respondents put most of their effort into reviving the Circuit Court's erroneous view that plaintiffs in Wisconsin courts may *never* sue anonymously. Resp. 13 (arguing Wisconsin courts "do not have [this] authority"). That is an extraordinary position—even the Court of Appeals did not go that far. App. 18 n.8. This Court has long recognized Wisconsin courts' "inherent power" to restrict "access to judicial records when the administration of justice requires it." *Bilder*, 112 Wis. 2d at 556. And Wisconsin courts *have* allowed plaintiffs to remain anonymous to all but the Court, recently in an open-records case *against the District*. *See* Order, Dkt. 27, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (allowing anonymity but requiring an affidavit "*for the Court's*

eyes only.").[5] Holding that this is never permitted would drive plaintiffs away from Wisconsin courts in many different contexts. Br. 33–35.

Respondents suggest, inaccurately, that *Bilder* already held plaintiffs may *never* remain anonymous to all but the Court. Resp. 12; 18–21. *Bilder* did not even consider, much less resolve, this question. Thus, Respondents' stare-decisis section is completely irrelevant. Resp. 18–21. Petitioners do not ask this Court to overrule or modify *Bilder*; they cited it for a general proposition about Wisconsin courts' "inherent power," 112 Wis. 2d at 556, and simply ask to apply that principle to another context. Nor do Petitioners call for "a new policy favoring anonymous litigation." Resp. 12. Petitioners agree that, as in federal court, there should be a presumption against anonymity, but it can be overcome in the right circumstances and it has been overcome here.

Respondents concede that federal courts have allowed this. Resp. 26. They try to distinguish some of these cases on the ground that anonymity would cause "no harm" or "adverse effect" on the defense. Resp. 24, 26. But that is also true here, and one of Petitioners' main arguments for reversal is the lower courts' failure to consider this. Br. 38–40. By distinguishing cases on this basis, Respondents implicitly concede this *is* a relevant factor, contrary to the Court of Appeals' holding. Respondents also mischaracterize *Bolton*, *Elmbrook,* and *Campbell*. In *Bolton* the Court indicated even it did not know the plaintiff's identity, 410 U.S. at 187 ("[W]e may accept as true … Mary Doe's existence"); in *Elmbrook* the Court found anonymity would have no "adverse effect" on the District's defense, 658 F.3d at 724 (and the record reflects the District's counsel never learned plaintiffs' identities, *see* Dkts. 19-2:21, 34, 89, No. 2:09-cv-409 (E.D. Wis.)), and in *Campbell*,

[5] This order is judicially noticeable, but Respondents have disputed its contents, so Petitioners attach it to this reply for ease of reference.

the court concluded the defendants did not and "cannot" "make a showing of necessity" to learn plaintiff's identity, 515 F. Supp. at 1245.

If this Court agrees with Petitioners (and the Court of Appeals) that plaintiffs in Wisconsin courts can *sometimes* remain anonymous, then the question is *when*. Petitioners propose incorporating the factors federal courts have found relevant into the balancing test Wisconsin courts already apply to similar questions, Br. 29–30. Respondents do not offer any alternative. Nor do they even attempt to defend the Court of Appeals' limitations on which factors may be considered. Br. 31–33.

As for application, Respondents make no serious attempt to rebut the Circuit Court's factual finding that Petitioners "would likely be subject to threats and intimidation" if their identities were known. App. 39. They briefly assert that Petitioners "have not shown" that the negative and harassing comments and tweets (Br. 35–36) "[are] related to this case specifically." Resp. 14. That is demonstrably false. Every single one was a reaction to a news article or press release about this very case. R.6, ¶¶9–12; R.46, ¶¶2–25. Petitioners also submitted unrebutted affidavit testimony from an attorney about death and rape threats, and numerous other examples of retaliation over related speech, Br. 36–38, so the claim that Petitioners did not support their motion "with particularity," Resp. 14, is impossible to square with the record.

Respondents also cannot explain how Petitioners' identities are *in any way* relevant to a *facial* challenge to the District's policy. They assert generically they need discovery to "uncover the truth of Petitioners' claims" about "the context in which their children supposedly are impacted …, the nature of communication between MMSD and their children, or whether any issues related to their children's gender identity ever arose at school." Resp. 25 n. 11. The problem is that Petitioners *make no claims* about these things; their basis for standing and harm is the District's policy to hide from parents a serious mental-health issue that their children (like all children) might begin to deal with at any

time. Respondents cannot convert *Petitioners'* claims into something they are not and use hypothetical, non-pled allegations as a hook for something to "explore" in discovery. Regardless, even though there is nothing relevant to discover, Respondents can still conduct discovery without knowing Plaintiffs' identities. Br. 39–40.[6]

Respondents' other reasons are equally meritless. They claim they need to check for conflicts, Resp. 17, but Petitioners provided a simple solution to this early on, R.45:25–26; R.44, and Respondents have not raised this since, until now. Respondents argue Petitioners' claims might become moot, Resp. 18, but the plaintiffs (originally 14) have withdrawn from the case if their children leave the District. R.82; Dkts. 149; 174. Finally, Respondents say they need to "verify that these parents exist [and] that their children are students at MMSD." Resp. 15. But Petitioners' affidavits establish that they are real people with real children, R.10–23; *see Moe v. Dinkins*, 533 F. Supp. 623, 627 (S.D.N.Y. 1981), and the court can "verify" that basic (and normally undisputed) fact, as in both *Doe v. Madison School District Number 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998) and *Doe v. Madison Metropolitan School District*, No. 2019CV3166 (Dane County Cir. Ct.), *supra*.

Finally, Petitioners argued, in the alternative, that the Circuit Court erred by requiring disclosure of their identities to the Intervenors and to anyone other than *attorneys of record* for the District. Br. 42–43. Respondents do not respond. Thus, if Petitioners cannot remain anonymous to all but the Court, this Court should, at the very least, limit their exposure to attorneys appearing for the District.

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[6] Petitioners have *not* "suggested they intend to seek discovery from MMSD." Resp. 25. The sole issue is whether the District's written policy, which says what it says, violates parents' constitutional rights. Respondents' citation is to a hearing on a motion after Petitioners received a tip from a teacher that the District was continuing to train its teachers in direct conflict with the partial injunction. *See* Dkt. 163.

CONCLUSION

The decisions of the Court of Appeals should be reversed.

Dated: March 30, 2022.

Respectfully submitted,

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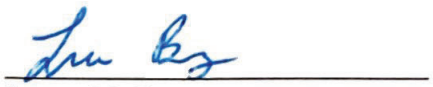
CERTIFICATION

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 3,000 words.

Dated: March 30, 2022.



LUKE N. BERG

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I hereby certify that:

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

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Dated: March 30, 2022.

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