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COURT OF APPEALS

WISCONSIN COURT OF APPEALS
DISTRICT IV

Appeal No. 2023AP000306

JANE DOE, 4,

Plaintiff-Appellant,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant-Respondent,

GENDER EQUITY ASSOC OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL AND GENDER SEXUALITY ALLIANCE OF ROBERT M. LAFOLLETTE HS,

Intervenors-Defendants-Respondents.

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

AMICI CURIAE BRIEF OF INDEPENDENT RESEARCHERS CONCERNED WITH THE PROPER APPLICATION OF FRACTURED DECISIONS

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INTRODUCTION AND STATEMENT OF INTEREST

Fourteen anonymous plaintiffs filed this suit in February 2020, seeking a declaration regarding and an injunction against Madison Metropolitan School District's issuance of a guidance document. After more than thirty months of litigation, during which the plaintiffs dwindled to one, last November the circuit court dismissed Jane Doe's complaint for lack of standing.

The circuit court's decision was correct but relied on non-precedential language from *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. *Teigen* was a "fractured" decision, comprising three opinions, none garnering majority support, each taking a mutually exclusive approach to standing. Under longstanding practice, the standing analysis lacked precedential value. Yet the circuit court treated *Teigen*'s concurrence as binding law on the issue of standing, based on an inapposite doctrine federal courts use to analyze fractured opinions.

Amici are two legal practitioners and researchers who recently completed a thorough legal-historical analysis of Wisconsin's approach to fractured opinions. *See* Jeffrey A. Mandell & Daniel J. Schneider, *Counting to Four: The History and Future of Wisconsin's Fractured Supreme Court* (2023) (A-App. 3). As Wisconsin-licensed attorneys, *Amici* have a substantial interest in ensuring that the pronouncement of our state's highest court are applied correctly. We also bring substantial expertise to bear on the issue of fractured opinions.

Amici file this brief neither to split hairs nor highlight their own research. Wisconsin's high court faces a significant fracturing problem—both in the incidence of fractured opinions and the difficulty litigants and courts alike face in applying these decisions. Alan Ball, *The 2021-22 Term: Some More Impressions*, SCOWStats (July 18, 2022), https://scowstats.com/2022/07/18/the-2021-22-term-some-more-impressions/. This case is not the first, and will not be the last, to contend with a fractured opinion from our state's highest court. *Amici* have genuine concern that such opinions may continue to be misinterpreted, misapplied, and leave our state's legal professionals mistaken about the state of the law.

Given standing's vitality to litigation and litigants of all types, this case presents an excellent opportunity to reaffirm Wisconsin's longstanding approach to fractured opinions, explaining why Justice Hagedorn's *Teigen* concurrence is not binding precedent on standing.

ARGUMENT

I. A Brief History of State and Federal Fractured Opinions.

For the first century and a half of Wisconsin jurisprudence, fractured decision-making was a relative non-issue. Since fracturing was rare in these early years, there was little effort to define what such splits meant, or what rules applied when Justices' overlapping opinions failed to produce a majority decision with a clear supporting rationale, or *ratio decidendi*.

In 1908, the Wisconsin Supreme Court was asked to adjudicate a disputed will. An elderly woman left most of her estate to a Minnesota college, and her heirs

tried to get the will invalidated, claiming she lacked mental capacity and had been the victim of undue influence. *In re McNaughton's Will*, 138 Wis. 179 [headnote], 118 N.W. 997 (1908). At trial, the judge decided that the heirs had not met their burden as to either issue (diminished capacity or undue influence). *Id.* at [headnote]. On appeal, the Supreme Court agreed—sort of.

Three Justices voted to affirm the lower court; two voted to reverse on both issues; and one Justice each voted to reverse only on the issue of mental capacity or undue influence. *Id.* at 190. A clear majority believed the trial court erred and the will was invalid, but absent a majority agreement to reverse *as to a specific legal issue*, the Court deemed itself obliged to uphold the judgment below. "A majority must agree on some one specific ground of error fatal to the judgment or it must be affirmed. Otherwise, there would be a reversal without any guide for the trial court upon a new hearing." *Id.* at 191.

This issue-based approach to divided reasoning was consistent with the Court's prior practice. Nearly 50 years earlier, the Court heard a contract case, *Ford v. Mitchell*, 15 Wis. 304 (1862). Mitchell had sold Ford a debt for a $176 certificate of deposit issued by a "hopelessly insolvent" bank, and Ford sued to recover his money. *Id.* at 307. Chief Justice Luther S. Dixon's opinion held the contract enforceable, based on the original consideration offered for the debt. The opinion then went further, commenting on other contract-law issues Dixon saw as meriting reversal. *Id.* at 308-10. Unfortunately for him, brief concurrences by Justices Paine and Cole disclaimed these other conclusions, agreeing only that the contract could

be enforced "for the original consideration[.]" *Compare id.* at 308-10 *with id.* at 310 (Paine, J., concurring) *and id.* at 310 (Cole, J., concurring).

The Court treated *Ford*'s holding as limited to what the concurrences agreed with. Future cases citing *Ford* did not rely on it as authority for any proposition broader than the holding supported by all three Justices. *See, e.g.*, *Wagener v. Old Colony Life Ins. Co.,* 170 Wis. 1, 5, 172 N.W. 729 (1919); *Willow River Lumber Co. v. Luger Furniture Co.*, 102 Wis. 636, 638, 78 N.W. 762 (1899); *Challoner v. Boyington*, 83 Wis. 399, 408, 53 N.W. 694 (1892). The same was true in another case, where Justice Cole's concurrence denied one of the three conclusions in a "majority" opinion force of law, merely by Cole saying he had "not examined [it] sufficiently to express an opinion upon it." *Compare Wright v. Sperry*, 21 Wis. 331, 339 (1867), *with Burchard v. Roberts*, 70 Wis. 111, 119, 35 N.W. 286 (1887) (discussing *Wright*).

So far as we can tell, the Wisconsin Supreme Court had few opportunities to develop its approach to fractured decisions over the next several decades and many thousands of cases. The problem started to come into sharper relief in the mid-1980s. In *State v. Dowe*, a criminal defendant moved to force the State to disclose the identity of a confidential informant. 120 Wis. 2d 192, 193, 352 N.W.2d 660 (1984) (per curiam). The circuit court, applying a plurality opinion, found the State's refusal to do so a sufficient basis to dismiss the prosecution. *Id.* On appeal, the Supreme Court clarified that the earlier case could not mandate this result, because it featured a four-Justice concurrence proposing a different test for requiring the

disclosure of an informant's identity. *Id.* at 194-95 (citing *Outlaw*, 108 Wis. 2d 112, 321 N.W.2d 145 (1982)).

In language quoted by virtually every Wisconsin court thereafter to confront a fractured opinion, the *Dowe* Court stated:

> It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court. … Numerous cases have expressly held that a concurring opinion becomes the opinion of the court when joined in by a majority. … In *Outlaw*, the lead opinion represents the majority and is controlling on the issues of the state's burden and the existence of abuse of discretion by that circuit court. However, the concurring opinions represent the majority on the issue of the test to be applied and therefore control on this point.

Id. The principle that in Wisconsin only points of law that garner majority support create precedent remains good law. *See, e.g.*, *Koschkee v. Taylor*, 2019 WI 76, ¶5, 387 Wis. 2d 552, 929 N.W.2d 600; *Wis. State J. v. Blazel*, No. 2021AP1196, 2023 WL 2416209, at *8 (Wis. Ct. App. Mar. 9, 2023) (publication decision pending) (authored decision that may be cited for persuasive value even if unpublished).

Unlike Wisconsin, at least thirteen state Supreme Courts follow the approach the U.S. Supreme Court tried to establish in the 1977 case *Marks v. United States*, 430 U.S. 188 (1977). *See* Maxwell Stearns, *Modelling Narrowest Grounds*, 89 G. Wash. L. Rev. 101, 189, Appendix A (2021). In *Marks*, the defendants were convicted of transporting obscene materials. Their appeal centered on a then-gaping division in First Amendment jurisprudence, as the Justices had adopted divergent approaches to obscenity prosecutions in the 1950s and 1960s. *Roth v. United States*, 354 U.S. 476 (1957); *Memoirs v. Massachusetts*, 383 U.S. 413 (1966). When the

defendants had been trafficking their obscene materials, *Memoirs*' plurality decision was the most recent "statement" of law. Then, just after the defendants stopped publication, the Court in *Miller v. California*. 413 U.S. 15 (1973), adopted a more prosecution-friendly standard for identifying obscene materials. Unsurprisingly, the defendants preferred the older, more lenient standard.

As a prominent scholar recounts:

> In *Marks* the Court ruled in favor of the defendants on the theory that the *Memoirs* plurality set the governing law until *Miller*. The Court began by stating the precedential rule that the *Gregg* plurality had asserted just the year before … *Marks* then reviewed the opinions set out in *Memoirs*. A three-Justice plurality had adopted a multipart test offering First Amendment protection unless the expression [was] "utterly without redeeming social value." Two Justices had concluded that obscenity prosecutions were essentially imper-missible[. O]ne Justice had advanced a stringent test for obscenity prosecutions, allowing them only for "hard-core pornography." After summarizing these *Memoirs* opinions, the Court concluded: "The view of the *Memoirs* plurality therefore constituted the holding of the Court and provided the governing standards."

Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. 1932, 1950 (2019). Thus, the Court held that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority], the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (cleaned up).

II. The *Teigen* Decision Fractured on the Issue of Standing.

The circuit court here reached the correct decision on standing but misconstrued a recent fractured Wisconsin Supreme Court opinion.

In *Teigen*, our Supreme Court faced a challenge to the legality of two guidance documents issued by the Wisconsin Elections Commission in the months leading up to the 2020 presidential election: one regarding absentee ballot "drop boxes" and another regarding the ability of third-parties to return individual voters' absentee ballots. 2022 WI 64, ¶1 (lead op.). Two Wisconsin voters challenged the validity of WEC's guidance documents. *Id.* ¶2 (lead op.). The circuit court sided with the plaintiffs.

The Supreme Court granted bypass. Rejecting a robust challenge, the Court decided that the plaintiffs had standing, cobbling a majority from a three-Justice "lead" opinion and a concurrence signed only by Justice Hagedorn. Yet those opinions' followed extremely different paths to conclude that the plaintiffs had standing to seek declaratory relief.

The lead opinion took the position that Wisconsin's standing doctrine is purely "prudential," and that "typically" plaintiffs must "possess some personal stake in the case"—even a "trifling interest." ¶¶16-17 (lead op.). It further identified "judicial efficiency" as a "consider[ation]" that might support finding standing, without much explanation as to how and when or whether this is a necessary condition to finding standing. ¶18 (lead op.). The lead opinion then walked through the two traditional prongs of the standing test—injury-in-fact and whether the interest allegedly injured arguably falls within the zone of interests protected by the statute in question—and concluded that the plaintiffs had standing because Wis. Stat. § 6.84(1) codified an enforceable right.

By contrast, the concurrence focused on the declaratory-judgment statute's text, which created a "broad right to declaratory relief" where a challenged "guidance document [has] some practical and adverse effect on the party seeking relief." ¶159 (Hagedorn, J., concurring). Because Wis. Stat. § 5.06 requires local election officials to comply with the law, Hagedorn reasoned that, if the WEC guidance documents at issue "threaten[ed] to interfere with or impair Teigen's right to have local election officials comply with the law[,]" any voter in an area with officials who might be "persua[ded]" to follow them could challenge them via a declaratory judgment action. ¶¶165-66 (Hagedorn, J., concurring).

The lead opinion savaged the concurrence and also fully disclaimed Justice Hagedorn's reasoning. ¶¶32-36 (lead op.). Justice Hagedorn characterized the lead opinion's standing argument as "unpersuasive" and said it "does not garner the support of four members of this court." ¶167 (Hagedorn, J., concurring).

The only thing the opinions' discussion of standing share is the conclusion that the plaintiffs there had standing. Likewise, the dissent dismissed the reasoning of both the lead opinion and the concurrence on standing, aside from a statement in Justice Hagedorn's opinion that standing "serves as a vital check on unbounded judicial power." ¶¶210-15 & nn. 6-7 (A. W. Bradley, J., dissenting). Thus, no standing analysis garnered four votes and formed precedent.

III. The Circuit Court Reached the Correct Result, Despite Relying on the *Teigen* Concurrence as Precedent on Standing.

The circuit court correctly dismissed this case for lack of standing. In doing so, the court characterized "Justice Hagedorn's opinion [in *Teigen*] is binding precedent on the limited issue of standing." Circuit Court Decision and Order at 2 n.1. This assertion contravenes Wisconsin law on fractured opinions.

"It is a general principle of appellate practice that a majority must have agreed on a particular point for it to be considered the opinion of the court." *State v. Elam*, 195 Wis. 2d 683, 685, 538 N.W.2d 249 (1995) (citing *Dowe*, 120 Wis. 2d at 194-95). As we have demonstrated, the Wisconsin Supreme Court has repeatedly adhered to this principle. *See* Section I, *supra*; A-App., at 9-20.

The circuit court veered off-course due to *State v. Deadwiller*, which cited *Marks* explicitly and concluded that, "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." 2013 WI 75, ¶30, 350 Wis. 2d 138, 834 N.W.2d 362. Crucially, however, *Deadwiller* interpreted a decision of the U.S. Supreme Court, not a Wisconsin case. *Id.* (discussing opinions of Justices Thomas and Alito in *Williams v. Illinois*, 567 U.S. 50 (2012)).

Then-Chief Justice Abrahamson correctly noted that the Wisconsin Supreme Court follows *Marks* "in applying plurality decisions of the United States Supreme Court." *Id.* ¶55 (Abrahamson, C.J., concurring). She then attempted to extend *Marks*

to fractured Wisconsin cases. *Id.* But she lacked majority support for that extension, and the only authority she cited was two decisions applying fractured U.S. Supreme Court—not Wisconsin Supreme Court—opinions, plus Justice Crooks's solitary concurrence in *Tomczak v. Bailey*, 218 Wis. 2d 245, 283-84, 578 N.W.2d 166 (1998), where he acknowledged that *Dowe* is the controlling state case on interpreting lead opinions but argued the Court should *consider* adopting *Marks*. None of these citations establishes that Wisconsin follows *Marks*, much less overturns the state's actual practice over the past 175 years. *See* A-App., at 9-20.

In this case, the circuit court accepted *Deadwiller*'s description of the *Marks* rule, and the Abrahamson concurrence's erroneous claim that Wisconsin follows *Marks*, as gospel. But our article conclusively shows that state law does not support this view. The correct approach is to overlay the standing discussions in the lead, concurring, and dissenting opinions to determine whether any individual propositions of law garnered the support of four Justices.

As discussed above, the *Teigen* opinions' standing discussions contain no overlap in reasoning. Four Justices agreed that the plaintiffs had standing, but they explicitly disagreed about why. The result is that *Teigen* is not a precedential decision on the law of standing at all. *See, e.g.*, *Doe v. Archdiocese*, 211 Wis. 2d 312, 334-35 n.11, 565 N.W.2d 94 (1997) ("[N]one of the opinions [in a prior case that featured an irresolvable fracture, *In re Estate of Makos*, 211 Wis. 2d 41, 44, 564 N.W.2d 662 (1997)] … has any precedential value[.]")

Fortunately, Wisconsin's actual precedent on standing makes clear that the circuit court's dismissal should be upheld. A case like *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112, cited by Appellant in her opening brief, provides a recent, binding decision establishing the standard for standing: a plaintiff must show "(1) that they suffered or were threatened with an injury (2) to an interest that is legally protectable." *Id.*

Here, so far as *Amici* can tell from unsealed portions of the record, Appellant has not demonstrated in any way that MMSD's Policy will affect her. There is no apparent public evidence that her child is or is in any way plausibly likely to be transgender or identify as such in the future. *Compare with Norquist v. Zeuske*, 211 Wis. 2d 241, 249, 564 N.W.2d 748 (1997), cited by Appellant (landowner had standing to challenge freeze on property assessments because "property values may decrease resulting in higher real property taxes" given natural, documented market forces that affect value of agricultural land). This is also not a situation where a challenged policy speaks to something within Appellant's control and that could cause her to be affected by the policy down the line, since Appellant admits she "cannot know" whether her child is currently or might later identify as transgender. Br. of Appellant at 24; *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶45, 255 Wis. 2d 447, 649 N.W.2d 626 (customer had standing to challenge company's late-fee policy, since customer could control whether they were in compliance with policy).

Appellant's claimed injury in this matter is purely hypothetical. She lacks standing to challenge the District's Policy as a result. This Court should uphold the circuit court dismissal without relying on its application of the *Teigen* concurrence.

CONCLUSION

This Court should affirm the circuit court's dismissal order. It should refuse to upend 175 years of prior practice by treating the concurrence in *Teigen* as precedent on standing. Wisconsin does not follow the *Marks* rule for its own cases. Justice Hagedorn's *Teigen* concurrence is non-precedential. The sole remaining plaintiff in this matter lacks standing, and the case was rightly dismissed.

Dated: April 17, 2023.

By *Electronically signed by Jeffrey A. Mandell*
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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b), (bm), and (c) for a brief. The length of this brief is 2,972 words.

Electronically signed by Jeffrey A. Mandell
Jeffrey A. Mandell