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.

REPLY IN SUPPORT OF PETITION FOR REVIEW

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* Pro hac vice motion granted. R. 31.

ARGUMENT

I. This Court Should Grant Review to Establish the Rule in Wisconsin for Anonymity Requests

In their Petition, Petitioners explained that this Court's review is warranted to establish a test for when plaintiffs in Wisconsin may sue anonymously. Pet. 9–16. Respondents do not dispute that the Court of Appeals rejected the test federal courts apply, while failing to clearly articulate an alternative test or rule for Wisconsin. Pet. 11. Respondents also do not dispute that the Court of Appeals excluded or limited multiple highly relevant factors, nor do they attempt to defend the exclusion of those factors. Pet. 12–13.

Instead, Respondents resurrect and argue for the Circuit Court's view (which the Court of Appeals rejected, *see* Pet. 7; App. 18 ¶ 31 & n.8), that "Wisconsin law does not allow" plaintiffs in Wisconsin *ever* to remain anonymous to all but the court. Resp. 8. But Respondents do not cite any case so holding or any statute that *prohibits* anonymous plaintiffs. Wisconsin appellate courts simply have not addressed this yet, which is exactly why this Court's review is warranted. Pet. 9. As further proof of the need for clarity, Petitioners cited another recent case in Dane County that *allowed* exactly what Petitioners requested. *See* Order Granting Petitioner's Motion to Proceed Anonymously, Dkt. 27, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Feb. 21, 2020) ("Petitioner may proceed anonymously in this action ... conditioned upon the Petitioner ... submitting to the Court an affidavit revealing the Petitioner's identity, *for the Court's eyes only*.") (Respondents mischaracterize this case, Resp. 11, so Petitioners have attached the order in that case to this reply).

Several of Respondents' other arguments in response are inaccurate and warrant correction. First, Respondents repeatedly state that Petitioners seek to "hide their identities from the court." *E.g.*, Resp. 8. They do not, as they explained in their Petition, Pet. 14, 15, and as they repeatedly told the Circuit Court, R. 45:24; R. 92:27; R. 93:11. Petitioners seek to remain anonymous to "all but the court," Pet. 15, given the significant risks to them and their children if their identities become known, Pet. 5, and given that their identities are completely irrelevant to the case, Pet. 13, which Respondents barely attempt to refute, *see infra* pp. 7–8.

Respondents also falsely claim that "the bulk of the federal cases cited by Petitioners" do not support their request. Resp. 12. Petitioners cited the following cases allowing plaintiffs to remain anonymous to opposing counsel and parties—the first six of which involve parent challenges to controversial school policies: *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721–24 (7th Cir. 2011); *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998); *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349, 351 (8th Cir. 2004); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 and n.1 (2000); *Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093, 1094 (E.D. Mo. 2006); *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667, 669–71 (E.D. Ky. 2000); *Roe v. Wade*, 410 U.S. 113, 124 (1973); *Doe v. Bolton*, 410 U.S. 179, 187 (1973); *Poe v. Ullman*, 367 U.S. 497, 498 and n.1 (1961); *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1245 (D.D.C. 1981); *Moe v. Dinkins*, 533 F. Supp. 623, 627 (S.D.N.Y. 1981); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n. 7 (S.D.N.Y. 1973) *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* Pet'rs Br. 25–28 (discussing these cases in more detail).

Petitioners do not seek "a ruling on [ ] discovery." *See* Resp. 14. But Respondents cannot generically invoke "discovery" as an automatic trump card against an anonymity request, without explaining their need to learn Petitioners' identities. *See, e.g.*, *Campbell*, 515 F. Supp. at 1245 (rejecting an opposition to anonymity because defendants failed to "ma[ke] a showing of necessity" to learn plaintiff's identity). Petitioners' identities are wholly irrelevant to whether the District's policy is constitutional, the only claim raised. And Petitioners have repeatedly offered to provide Respondents with any information they want and suggested options for discovery that would protect Petitioners' identities, but Respondents have yet to come up with anything or explain why the alternatives Petitioners have offered are insufficient. R. 5:16 n. 6; R. 45:24–26; Pet'rs. Br. 39–40.

Contrary to Respondents' assertion otherwise, Resp. 13–14, Petitioners have provided numerous reasons why the Circuit Court's protective order is insufficiently protective, including their unrefuted evidence of serious retaliation risks, *see* Pet. 5, as well as numerous examples of leaks in sensitive cases, Pet'rs. Br. 41–45, including a case like this involving a parent challenge to a controversial school policy, where a court was forced to threaten "the harshest possible contempt sanctions" after school district officials who "apparently neither agreed with nor particularly respected" the lower court's anonymity order attempted to "overtly or covertly ferret out the identities of the Plaintiffs," *see Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294 n.1. Petitioners also emphasized that the Circuit Court erroneously required them to disclose their identities to all staff at two large law firms representing *intervening* parties, Pet. 6, 15–16, which Respondents do not even attempt to defend.

Finally, Respondents' argument that the Circuit Court found, in the alternative, that Petitioners would not meet the criteria for anonymity under the federal balancing test, even if it were allowed in Wisconsin, is contradicted by the record. Resp. 11. The quote they cite, App. 9, came from the stay hearing, *after* Petitioners had filed an appeal arguing that the Circuit Court erred by concluding it lacked authority to grant Petitioners' request. R. 95:26; *see* Pet. 5–6 and n.4; App. 39 ("In the end, I'm bound by Wisconsin law."). Regardless, the Circuit Court never actually discussed or applied the balancing factors Plaintiffs had identified, even at the stay hearing, R. 95:26, and, in particular, stated on the record that it *would not* assess the key factor of whether Petitioners' identities are in any way relevant, Pet. 13, which Respondents do not dispute.

II. This Court Should Grant Review to Protect Parents' Rights and Prevent Long-term Psychological Harm to Children

The underlying claim in this case is that a public school district cannot constitutionally exclude parents from—and hide from them—a major psychotherapeutic intervention in their children's lives, but must defer to parents about what is best for their children. The question presented to this Court, at this stage in the case, is whether the District's extraordinary, what-happens-at-school-stays-at-school policy should be temporarily enjoined while this case proceeds. Answering that question necessarily involves a preliminary evaluation of the constitutionality of that policy, but the lower courts simply refused to *even consider* the lawfulness of that policy. The lower courts also failed to weigh the serious harms this policy can cause in the interim. Pet. 8–9, 19–20. Respondents now attempt to convert the lower courts' various

errors into reasons to deny review. This Court should not be fooled by this sleight of hand.

As Petitioners explained, the lower courts' primary error was to entirely ignore Petitioners' likelihood of success on the merits of their challenge to the District's policy when evaluating their injunction request. Pet. 7–9, 21–22. Respondents do not dispute that the lower courts never considered Petitioners' likelihood of success on the merits, but instead argue that the lower courts' disregard of that critical factor is now a reason for this Court *not* to grant the petition. *E.g.*, Resp. 19 n.3 (arguing that accepting review would amount to an "original action" because "neither of the lower courts have ... ruled on ... [the Policy's] constitutionality"). Nonsense. Accepting that argument would mean that the most egregious errors are insulated from this Court's review. This Court has long recognized that when a lower court "fail[s] ... to consider a matter relevant to the determination of the probability of the petitioners' success," reversal on appeal is warranted. *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 293 N.W.2d 540 (1980).

A similar theme in the response is that Petitioners are attempting to "sidestep" the lower courts and "shortcut their way to this Court." Resp. 2. Nothing could be further from the truth. At every possible opportunity, Petitioners sought to be heard on their temporary injunction motion in the Circuit Court. *See* R. 38; 92:2–5; 93:61–62; 94:49–53; 87:2–4; 95:4, :16–18 ("[W]e should at least be heard on our temporary injunction motion, and that's all we're talking about here; do we even get a hearing?") :25, :32–34. When it became clear that the Circuit Court would not hear their temporary injunction motion in a timely manner, Petitioners openly described how they intended to go next to "the appellate

courts," while reiterating that they "want[ed] [the injunction motion] to be heard [in the Circuit Court] first," R. 95:31. To give the Circuit Court and Respondents yet another opportunity, Petitioners noted that they would file an identical motion for an injunction pending appeal, R. 95:46–47; 88, and then did so, R. 90. The Circuit Court then agreed to schedule that motion, R. 95:47–49, but during the hearing on that motion, revealed that it would not evaluate the majority of their request. App. 56–57, 58–62 ("I'm not talking about those today."). After the hearing, Petitioners tried again, asking the Court to give its reasons for the partial denial to "aid appellate review," repeating again that they intended to appeal. Dkt. 155:2. Thus, characterizing this petition as an attempt to skip the lower courts is deeply unfair.

The procedural history above also disproves Respondents' assertion that they "have not yet even had the opportunity to respond to" Petitioners' request for an injunction. Resp. 20. Petitioners' motion for injunction pending appeal was, for all relevant purposes, *identical* to their initial temporary injunction motion. *Compare* R. 27 *with* R. 90; *see* R. 88 (explaining that the motions were "nearly identical" and "functionally equivalent"). And Respondents fully responded to Petitioners' motion, both with a lengthy brief and expert affidavit. Dkts. 140–41.[2] Likewise, Respondents filed an 80-page response brief at the Court of Appeals. Resps.' Mem. in Opp. to Pls.' Motion (filed Oct. 27, 2020). Thus, the temporary injunction question has been fully litigated at both the Circuit Court and Court of Appeals, and is ripe for appeal to this Court. The fact that the lower courts did not evaluate

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

Petitioners' motion under the proper standard is not a reason to *deny* review, but to grant it.

Respondents' argument that there has not yet been "full factual development" fails for the same reason. Resp. 16. A preliminary injunction is, by definition, preliminary. It is designed to prevent harm while a case proceeds through the court system, which sometimes takes a while, as this case has and will. There is never "full factual development" prior to a preliminary injunction. Respondents had a full opportunity to respond to Petitioners' injunction motion—and did. And if this Court grants review and ultimately reverses the denial of an injunction, that will not prevent Respondents from "fully developing" the facts before this case reaches final judgment. But it will protect parents' constitutional rights and avoid long-term psychological harm to children in the interim. Pet. 16–20.

Likewise, Respondents' argument that Petitioners' anonymity prevented them from defending the injunction motion, Resp. 24, is equally meritless. Petitioners' arguments as to harm were supported entirely by an expert affidavit, R. 28; *see* R. 90:30–38 (harm section of injunction brief), and Respondents fully responded with an expert affidavit of their own, Dkt. 141. Respondents simply have never been able to explain how Petitioners' identities are relevant. The only thing they can come up with is "standing." Resp. 24. Yet Petitioners' basis for standing is that they have children in the District (supported by short affidavits, *see* R.10–23), which is not reasonably disputable, and the fact that children can begin to deal with gender dysphoria at any time, even seemingly "out of the blue" (supported by Petitioners' expert, R. 28 ¶ 78). Petitioners' anonymity did not prevent Respondents from moving to dismiss on standing grounds,

R. 42:6–11—but they lost that motion, R. 71. Regardless, the notion that Petitioners lack standing is meritless: they and their children are subject to the challenged Policy and at risk of the serious harms Petitioners' expert details. R. 28 ¶¶ 60–69, 98–120.

Respondents' other main theme is that this Court should deny review because of the procedural posture—seeking review of the denial of a motion for injunction pending appeal, rather than a direct appeal from the denial of a temporary injunction motion, which is far more routine, *see* Pet. 25–26. Resp. 15–16. This argument, again, attempts to convert the lower courts' errors into reasons to avoid this Court's review, and this Court should reject it for that and many others reasons. There is no meaningful difference between a temporary injunction and an injunction pending appeal: the standards are the same, as everyone thus far has agreed (Respondents included), App. 32; 59; Resp. 20; and the practical effect is the same—to temporarily enjoin an unconstitutional and harmful policy while a case proceeds. Even if there were some difference, Petitioners have asked for both at every level. *See* App. 29 n.3, 31–32 and n.4.

Furthermore, the only reason for the unique procedural posture is that the Circuit Court *would not hear* Petitioners' initial temporary injunction motion in a timely manner, itself an error.[3]

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[3] Wis. Stat. § 808.07(2) provides that "[d]uring the pendency of an appeal, a trial court ... may ... grant an injunction." And Wis. Stat. § 808.075 reiterates that, "[i]n any case, whether or not an appeal is pending, the circuit court may act under ... [§] 808.07."). Given that circuit courts can grant an injunction, notwithstanding any appeal, litigants are surely entitled *to be heard* if they have requested one. *See also* R. 87:2–3. Yet the Circuit Court would not schedule a hearing on Petitioner's temporary injunction motion until *after* this

Respondents briefly suggest Petitioners could have sought a supervisory writ, Resp. 2, 19 n.3, but Petitioners chose to file a motion for injunction pending appeal precisely to allow the issue "to be heard [in the Circuit Court] first," R. 95:31, and because an injunction via that procedure would accomplish the same thing. After the Circuit Court heard and issued a decision on that motion, the next step was to appeal that decision, and Petitioners followed the process set forth in Wis. Stat. § 809.12 to appeal. Respondents seem to suggest that, by following this reasonable approach to *avoid* "sidestepping" the lower courts, Petitioners have somehow found themselves in a procedural no-man's-land, such that this Court's review is not available. This Court should not buy it.

CONCLUSION

This Court should grant Petitioners' Petition for Review.

Dated: September 8, 2021.

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appeal, effectively denying preliminary relief without a hearing. Pet. 7–8. Normally a temporary injunction motion is the first thing heard in a case—but it was not here, based on the Circuit Court's erroneous interpretation of Wis. Stat. 802.06(1)(b). Pet. 7.

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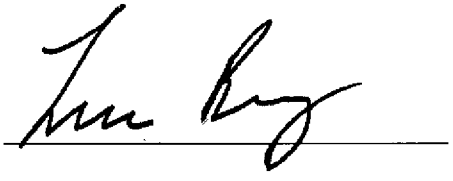
CERTIFICATION

I hereby certify that this reply conforms to the rules contained in 809.19(8)(b) for a brief produced with a proportional serif font. The length of this reply is 2,565 words.

Dated: September 8, 2021.



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