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May 19, 2023
Amended June 14, 2023

To:

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You are hereby notified that the Court has entered the following AMENDED order (amended to add and revise separate writings):

Nos. 2022AP2042 Jane Doe 4 v. Madison Metropolitan School District
2023AP305 L.C. #2020CV454
2023AP306

The court having considered the petition to bypass the court of appeals, the motion for a temporary injunction pending appeal, the motion for leave to file a reply in support of the petition for bypass, and the motion for leave to file a reply in support of the motion for a temporary injunction pending appeal, all submitted on behalf of plaintiff-appellant-petitioner, Jane Doe 4, as well as the response to the petition to bypass and the response to the motion for a temporary injunction pending appeal submitted on behalf of defendant-respondent, Madison Metropolitan School District, and intervenors-defendants-respondents, Gender Equity Association of James

Madison Memorial High School, Gender Sexuality Alliance of Madison West High School, and Gender Sexuality Alliance of Robert M. LaFollette High School;

IT IS ORDERED that plaintiff-appellant-petitioner's motion for leave to file a reply in support of the petition for bypass and her motion for leave to file a reply in support of the motion for temporary injunction pending appeal are granted, and the replies are accepted as filed; and,

IT IS FURTHER ORDERED that the petition to bypass is denied, with no costs; and,

IT IS FURTHER ORDERED that the motion for an injunction pending appeal is denied.

BRIAN HAGEDORN, J. (*concurring*). This petition to bypass the court of appeals comes to us after the case was dismissed on the grounds that the plaintiff does not have standing to raise her claims. Ordinarily, a case in this posture would proceed as normal in the court of appeals. The question before us is whether this case demands our intervention on an expedited basis. It is my judgment, for a number of reasons I need not explain here, that the normal litigation process is the best path forward. I write separately, however, to address the sweeping assertions in the dissent.[1]

I

The broader claim underlying this case strikes at some of the most explosive debates facing our culture. This is lost on no one. Although the dissent presents the legal issue as cut and dried, the claim here raises novel legal questions that deserve careful consideration: how does the generally recognized but vaguely defined unenumerated right to parent one's child intersect with a school district's policy on sex and gender expression? The answer to this question could have far reaching impact beyond this case. But given the procedural posture, we're not at the point of addressing these issues head on. The dissent is unmoved, and suggests procedural questions should not prevent us from forging ahead, resting on a conception of the judicial role that merits unpacking.

The dissent here and in the cases it cites presents an approach that goes something like this. When important fundamental rights are at stake, courts must act—and act quickly. In particular, the Wisconsin Supreme Court must be the principal judicial actor ensuring a timely and correct legal result, skipping lower courts when necessary. Original actions, petitions for bypass, and petitions for a supervisory writ should be common and granted liberally. This court can and should dispense with normal judicial processes to ensure the rights a majority of this court are passionate about receive effective and prompt judicial relief. Standard procedures and prerequisites must take

[1] Following the release of this order, Justice Rebecca Grassl Bradley determined she wished to engage with my concurrence. I respond only to the Chief Justice's dissent, however, because I see no need to substantially rewrite a concurrence to an already-released order that has no effect on the parties' ongoing litigation. Thus, when this concurrence refers to the dissent, it refers to the Chief Justice's dissent.

I also do not respond to this supplemental writing because of its abandonment of basic judicial decorum. Knives-out bluster may scratch the itch of political activists lusting for the fight, but it does not serve the rule of law. There are important debates to be had over how this court carries out its duties, and spirited intellectual sparring is fair game. I will not, however, further dignify a writing that engages in personal attacks rather than a respectful debate over ideas.

a back seat, and we cannot trust the lower courts to handle important questions. That's our job. And failure to take up this charge is "abdicating responsibility" or "shirking our duty."

I take this view of our role as one offered in good faith. But it is a stark departure from the past, has no basis in the Wisconsin Constitution, and is rooted in a view of judicial supremacy that consolidates power in the judicial branch generally, and in this court in particular. It is no wonder our supreme court races are seen as high stakes affairs when this court is seen as willing—even eager—to dispense with standard procedures and forcefully insert itself into the latest hot-button political issues. This case presents a prime example.

Lest the reader be confused, the way litigation normally works is that cases are filed in the circuit court. The circuit court usually compiles a record of the facts and makes a decision. From there, losing parties can ask the court of appeals to review the decision. After the court of appeals has ruled, parties can petition for review in this court. Our review is discretionary; we only take cases we believe are worth taking and present questions where the law needs clarification. While this court can take cases in the first instance—called original actions—we do so rarely. By design, we are a slow-moving court with few mechanisms for resolving factual disputes. This way, we can focus on answering purely legal questions after the issues have been clarified and the facts established by lower courts. Parties can also ask to bypass the court of appeals, which we typically do in unique circumstances—for example, a claim only we could address asking that a case from this court be overruled.

This case has not resulted in a decision on the underlying claim in the circuit court, which the dissent laments. The first stumbling block to resolution of the merits, however, came as a result of the plaintiffs'[2] efforts to bring this case anonymously.[3] The circuit court determined that the plaintiffs could have their identities shielded from the public due to the risk of harassment.[4] But the court required disclosure to itself and the attorneys in the case.[5] The plaintiffs disagreed and decided to appeal this collateral issue. They sought an interlocutory appeal and argued that they should be able to proceed anonymously, hiding their identities from the other attorneys in the case.[6] While this issue was being litigated, the circuit court did grant the plaintiffs some injunctive

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[2] When we saw this case the first time, there were additional plaintiffs. In the current procedural posture, only one plaintiff, Jane Doe 4, remains.

[3] See Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, 403 Wis. 2d 369, 976 N.W.2d 584.

[4] Id., ¶6.

[5] Id.

[6] Id., ¶7.

relief.[7] It enjoined school district staff from concealing information or answering parents' questions untruthfully, including the names and pronouns their children used at school.[8]

After the circuit court's initial decision on anonymity and its partial grant of injunctive relief, the plaintiffs sought additional injunctive relief while appealing the anonymity question.[9] The court of appeals did not grant additional relief pending appeal, so the plaintiffs asked us to step in.[10] We declined, with only one justice dissenting at this stage.[11] Thus, the dissent's current protestation—that we are shirking our duty by failing to move this case along on an expedited basis—is more than a bit ironic. Two of the court's dissenters, including the author, did not dissent from our decision to do just that.[12]

The court of appeals later affirmed the circuit court's decision on anonymity,[13] and the plaintiffs followed with a second petition for review in this court, which we accepted and heard in the ordinary course.[14] We affirmed the circuit court's anonymity decision.[15] We further concluded that the motion for relief pending appeal was moot given our decision on the appeal and that the underlying request for injunctive relief remained pending before the circuit court.[16] The dissent in that case developed an entirely new argument not made by the parties, advocating the use of our constitutional superintending authority to decide the underlying questions anyway and ensure the

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[7] Id., ¶8.

[8] Id., ¶8.

[9] Id., ¶9.

[10] Id., ¶10.

[11] Doe 1 v. Madison Metro. Sch. Dist., No. 2020AP1032, unpublished order (Wis. Mar. 2, 2021).

[12] Id.

[13] Doe 1 v. Madison Metro. Sch. Dist., 2021 WI App 60, 399 Wis. 2d 102, 963 N.W.2d 823.

[14] Doe 1, 403 Wis. 2d 369, ¶10.

[15] Id., ¶¶1, 41.

[16] Id., ¶¶2, 41.

plaintiffs received the relief they were seeking.[17] This dramatic intervention into a case at its preliminary stages was justified only by the dissent's appeal to the importance of the issues presented.[18] In other words, if four members of this court feel passionately about the legal issues in a case, the court can and should dispense with normal judicial processes and grant extraordinary relief, whether asked for or not.

Of course, the plaintiffs were entirely within their rights to appeal the anonymity issue. But doing so risked a significant delay on the merits of their claim. That's the sort of strategy call litigants make all the time, and I'm not sure why the dissent blames the court system for it. Moreover, if the issues were obvious and the need for extraordinary intervention so necessary, one would think the dissenters would have voted to address the injunction pending appeal the first time it was presented to us.

To be sure, the issues here are serious, and the policy at the heart of this case raises colorable constitutional claims. The circuit court's standing decision deserves careful review as well. None of this should be taken as a comment on the merits of the plaintiff's various claims. My concern, however, is with how we as a court conduct our business. After all, "Litigation rules and processes matter to the rule of law just as much as rendering ultimate decisions based on the law."[19] We must be a court that gives everyone the same shot; no litigant should have a leg up or leg down on another. Even when important constitutional rights are implicated, courts must not decide how a case should come out and then adjust judicial methods to ensure the "right" outcome is achieved. And here, allowing the court of appeals to address the procedural and standing questions now at issue is not an abdication of our duty; giving preferential treatment to favored litigants and issues, however, is.

II

The dissent also wishes to add this denial order to its growing anti-canon of cases where it believes this court demonstrated "an unwillingness to fulfill its responsibilities and resolve significant legal issues of statewide importance."[20] But let's take a look and see whether its charges bear under the weight of scrutiny, or tell another story.

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[17] Id., ¶¶73, 86-95 (Roggensack, J., dissenting).

[18] Id., ¶88 (Roggensack, J., dissenting) ("The administration of justice requires that we not ignore the parents' plea for a judicial decision, as the majority opinion has done.").

[19] Id., ¶39.

[20] Following the release of this opinion, the Chief Justice added a response to her dissent saying it was "derogatory" to label this recurring list of cases an "anti-cannon." It is true that some

Beyond the prior ruling in this case, where the dissent openly advocated outcome-focused judicial intervention, the dissent's anti-canon falls into four buckets.

In the first bucket, the dissent cites several cases dealing with the 2020 presidential election. In Trump v. Evers,[21] we denied an original action by the Trump campaign, but we did grant a petition for bypass just a few days later after the circuit court completed its work.[22] So what is the dissent's complaint here? Apparently, democracy is in danger if we let lower courts sort through the facts and issues first. The dissent also lists the case we granted bypass on—Trump v. Biden—where the dissenters were prepared to throw out votes in just two counties on issues that could and should have been raised before the election and were largely statewide in application.[23]

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scholars have compiled competing lists of cases into a category of grievously incorrect constitutional decisions. This is not that, of course. It is the dissenters who continue to cite the same list of cases they feel were egregiously wrong—not, in most cases, on the merits of a judicial opinion, but because this court declined to hear them on an expedited basis. I'm confident the reader can follow the logic, and ignore the dissent's hyperbole.

[21] No. 2020AP1971-OA, unpublished order (Wis. Dec. 3, 2020).

[22] Trump v. Biden, 2020 WI 91, ¶5, 394 Wis. 2d 629, 951 N.W.2d 568.

[23] Id., ¶¶61-106 (Roggensack, C.J., dissenting); id., ¶¶107-39 (Ziegler, J., dissenting); id., ¶¶140-57 (Rebecca Grassl Bradley, J., dissenting).

The Chief Justice revised her dissent following release of this order and now takes umbrage at my characterization of this case. It will come as quite a surprise to any careful reader of Trump v. Biden that the court actually had a kumbaya moment. In this telling, the court unanimously agreed the Trump campaign was not entitled to the relief it sought—striking votes in Dane and Milwaukee County. Except, that's not what happened.

You will search in vain for any discussion in the dissents that explains why the Trump campaign appropriately lost the case. It's nowhere to be found. The writings themselves also agree with two of the challenges and argue that the only appropriate remedy is not counting the votes. Id., ¶63 (Roggensack, C.J., dissenting); id., ¶135 (Ziegler, J., dissenting); id., ¶144 (Rebecca Grassl Bradley, J., dissenting). When justices agree on the outcome, but would reach the same mandate on other grounds, we have a word for that: it's called a concurrence. Yet all three justices dissented from the court's mandate, which affirmed the recount of votes in Dane and Milwaukee County.

(continued)

The dissent cites two other original action petitions—Wisconsin Voters Alliance v. Wisconsin Elections Commission and Mueller v. Jacobs—that raised either fantastical claims or even more fantastical relief seeking to overturn the results of the 2020 presidential election.[24] Despite the fact that these claims could have been brought in circuit court (and far more appropriately, before the election), our failure to drop everything and entertain these petitions was also shirking our duty in the dissent's view. I think our constitutional order was well-served by their denial.

The dissent further names Hawkins v. Wisconsin Elections Commission.[25] There we declined to grant an original action because the appealing parties—who supposedly wanted to be president and vice president of the United States—sat on their hands rather than seek prompt relief.[26] The dissents would have rewarded this dilatory behavior and disrupted an election already under way.[27]

The second bucket of the dissent's anti-canon are two cases that concerned challenges to local health orders in the midst of the COVID-19 pandemic: Gymfinity, Ltd. v. Dane County and Stempski v. Heinrich.[28] The dissenters took the view in those cases that this court should be the court of first resort for every pandemic related question.[29] Although we granted a number of

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No, Trump v. Biden was not a picture of a unified court disagreeing only over the importance of issuing advisory opinions on various election administration questions. The court was debating whether votes cast in two counties—in reliance on well-known processes—should be counted. The majority said yes, and three justices dissented from that decision.

[24] Wis. Voters All. v. WEC, No. 2020AP1930-OA, unpublished order (Wis. Dec. 4, 2020); Mueller v. Jacobs, 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020).

[25] 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877.

[26] Id., ¶¶3-5.

[27] Id., ¶¶14-28 (Roggensack, C.J., dissenting); id., ¶¶29-83 (Ziegler, J., dissenting); id., ¶¶84-86 (Rebecca Grassl Bradley, J., dissenting).

[28] Gymfinity, Ltd. v. Dane County, No. 2020AP1927-OA, unpublished order (Wis. Dec. 21, 2020); Stempski v. Heinrich, No. 2021AP1434-OA, unpublished order (Wis. Aug. 27, 2021).

[29] Gymfinity, Ltd., No. 2020AP1927-OA, unpublished order (Roggensack, C.J., dissenting); Stempski, No. 2021AP1434-OA, unpublished order (Ziegler, C.J., dissenting); id., (Roggensack, J., dissenting); id., (Rebecca Grassl Bradley, J., dissenting).

original actions on pandemic-related legal issues,[30] this court began to reasonably and responsibly remind litigants that lower courts exist, have authority to decide legal questions, and should be where nearly all cases begin.[31]

The third bucket contains two cases where we denied a petition for bypass, but later granted a petition for review after the court of appeals issued its decision. In Zignego v. Wisconsin Elections Commission, this court denied a petition for bypass that sought emergency treatment for review of a circuit court decision ordering the Commission to remove people from the voter rolls.[32] The order was contrary to law, as the court of appeals unanimously held, and as we confirmed.[33] This issue therefore was addressed. Thus, the dissent's claim once again is not that issues aren't addressed, but that they aren't addressed immediately through an expedited, emergency process by this court. The dissent's real complaint has to do with how quickly this court intervenes, and how much special solicitude we give to certain litigants or issues.

The same is true for Gahl v. Aurora Health Care, Inc.[34] There, three members of this court were prepared again to intervene in dramatic fashion after the court of appeals stayed a circuit court order that required Aurora Hospital to administer a medication it believed was below the standard of care for one of its patients.[35] Earlier this month, this court confirmed 6-1 that the circuit court order lacked legal authority.[36] If anything, the emergency petition cited by the dissent demonstrates that this court is not at its best when acting on an emergency basis. When this court gets caught up in the fervors of the moment, we make mistakes. When we allow the judicial

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[30] See, e.g., Wis. Leg. v. Evers, No. 2020AP608-OA, unpublished order (Wis. Apr. 6, 2020); Wis. Leg. v. Palm, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; Jefferson v. Dane County, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556; Fabick v. Evers, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856; James v. Heinrich, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350.

[31] See also Gymfinity, Ltd., No. 2020AP1927-OA, unpublished order (Hagedorn, J., concurring).

[32] Zignego v. WEC, No. 2019AP2397, unpublished order (Wis. Jan. 13, 2020).

[33] State ex rel. Zignego v. WEC, 2020 WI App 17, 391 Wis. 2d 441, 941 N.W.2d 284; State ex rel. Zignego v. WEC, 2021 WI 32, 396 Wis. 2d 391, 957 N.W.2d 208.

[34] No. 2021AP1787, unpublished order (Wis. Oct. 25, 2021).

[35] Id. (Rebecca Grassl Bradley, J., dissenting).

[36] Gahl v. Aurora Health Care, Inc., 2023 WI 35, __ Wis. 2d __, 989 N.W.2d 561.

process to operate as designed, however, we are far more likely to give the legal questions the kind of dispassionate attention they deserve.

Finally, the dissent cites State ex rel. Vos v. Circuit Court for Dane County.[37] This was a petition for a supervisory writ—another extraordinary action. As I pointed out in concurrence, the petition quite obviously did not meet the statutory standard.[38] The dissent did not make an argument otherwise; instead, it was again so motivated by the underlying issues that it was prepared to disregard the plain words of the statute governing supervisory writs so we could address the issues in the case.[39]

The last several years have seen a veritable explosion of emergency actions and requests that the normal process be short-circuited. By my count, since I joined the Wisconsin Supreme Court less than four years ago in August 2019, we have ruled on 39 petitions for original action, granting 11. In the 12 years prior, we ruled on 56 original action petitions in total, granting only three. There is simply no precedent for what happened. And any suggestion that this court has always operated the way the dissent proposes does not match the facts. Some of the increase in direct pleas to this court was warranted by a pandemic that tested the emergency powers of government in new ways. Divided government and political polarization have also meant that what used to be (and largely should be) resolved through the political process has increasingly been punted to the judiciary. Somewhere along the way, however, some members of this court came to believe that all of this is normal, and should establish a new paradigm for the way we handle our docket. The dissenters here and in the cases they cite consistently argue this court has a duty to take significant legal questions out of the hands of lower courts and address them immediately and on an emergency basis.

As I reflect on these developments, I am thankful we have returned to normal business. Nothing in our constitution or tradition suggests this court alone should decide significant constitutional questions, and do so first.[40] Experience teaches that most of the time, even on issues

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[37] No. 2022AP50-W, unpublished order (Wis. Jan. 11, 2022).

[38] Id. (Hagedorn, J., concurring).

[39] Id. (Ziegler, C.J., Roggensack, and Rebecca Grassl Bradley, JJ., dissenting).

[40] See Wis. Const. art. VII, § 2 ("The judicial power of this state shall be vested in a unified court system consisting of one supreme court, a court of appeals, a circuit court, such trial courts of general uniform statewide jurisdiction as the legislature may create by law, and a municipal court if authorized by the legislature . . . ."); id. art. VII, § 3 (explaining this court's jurisdiction); id. art. VII, § 5(3) (explaining the court of appeals' jurisdiction); id., art. VII, § 8 (explaining the circuit court's jurisdiction).

of statewide public importance, the law is well served by allowing the litigation process to develop. This is how legal issues are refined and tested. When the claim involves novel questions, as in this case, hearing from other capable judges will almost certainly strengthen the quality and clarity of any decision we make. Permitting lower courts to hear and address significant legal issues does not mean those rights are given "second class" treatment, as the dissent suggests. It means we as the judicial branch take them seriously enough to give them serious consideration.

III

The dissent closes with a famous quote from Marbury v. Madison that it repeats in many of the orders mentioned above: "It is emphatically the province and duty of the judicial department to say what the law is."[41] The dissent seems to think this is the nail in the coffin for its argument. But the dissent misses the mark. This statement in Marbury affirmed the foundational principle that the judiciary has an independent obligation to interpret the law when deciding cases; it does not defer to the political branches when legal questions come before it.[42] Thus, while Marbury reminds us it is most assuredly our duty to say what the law is, Marbury does not mean it is our duty alone to say what the law is or to do so first. Rather, independently interpreting the law is the province and duty of the entire "judicial department"—all judges.[43]

In the end, nothing in Marbury supports the notion that this court should grant more original actions, petitions for bypass, or supervisory writs. Nor does Marbury suggest that matters of standing, remedies, and procedural compliance must be thrust aside so judges may "declare the law." The dissent's effort to clothe itself with Chief Justice Marshal's robe, as it has over and over, fails under even the faintest bit of scrutiny.

So yes, let us read the law faithfully, independently, and fearlessly. But let us not unwittingly further the aggrandizement of power in the judicial branch that characterizes American democracy today. The judiciary will only fulfill its calling as "the least dangerous" branch[44] when we in the judiciary embrace the more modest role assigned to us in our constitutions.

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[41] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

[42] Id. at 177-78.

[43] Id. at 177.

[44] See The Federalist No. 78, at 464 (Clinton Rossiter ed. 2003).

ANNETTE KINGSLAND ZIEGLER, C.J. (*dissenting*). "There you go again."[45] Today, this court fails the parents of Wisconsin and abdicates its responsibility, for the second time in this case, to decide some of the most important issues of our time.[46] In short, this case concerns whether parents have the constitutional right to parent their own children and whether they are presumed to act in their children's best interests. Schools are responsible for many things, namely teaching course material like reading and mathematics. But is a school also legally endowed, through a self-created policy, with the right to facilitate gender transition absent a parent's

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[45] Public Broadcasting Service, Debating Our Destiny: The Second 1980 Presidential Debate (2000), http://www.pbs.org/newshour/debatingourdestiny/80debates/cart4.html (per Ronald Reagan).

[46] The court today adds to the list of recent decisions where it has shown an unwillingness to fulfill its responsibilities and resolve significant legal issues of statewide importance. Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, ¶¶42-99, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting); Hawkins v. Wis. Elections Comm'n, 2020 WI 75, ¶¶29-83, 393 Wis. 2d 629, 948 N.W.2d 877 (Ziegler, J., dissenting); Trump v. Biden, 2020 WI 91, ¶¶107-39, 394 Wis. 2d 629, 951 N.W.2d 568 (Ziegler, J., dissenting); Gymfinity, Ltd. v. Dane County, No. 2020AP1927-OA, unpublished order (Wis. Dec. 21, 2020); Trump v. Evers, No. 2020AP1971-OA, unpublished order (Wis. Dec. 3, 2020); Wis. Voters All. v. Wis. Elections Comm'n, No. 2020AP1930-OA, unpublished order (Wis. Dec. 4, 2020); Mueller v. Jacobs, No. 2020AP1958-OA, unpublished order (Wis. Dec. 3, 2020); Zignego v. Wis. Elections Comm'n, No. 2019AP2397, unpublished order (Wis. Jan. 13, 2020); Stempski v. Heinrich, No. 2021AP1434-OA, unpublished order (Wis. Aug. 27, 2021); Gahl v. Aurora Health Care, Inc., No. 2021AP1787, unpublished order (Wis. Oct. 25, 2021); State ex rel. Robin Vos v. Circ. Ct. for Dane Cnty., No. 2022AP50-W, unpublished order (Wis. Jan. 11, 2022). I similarly disagree with the concurrence's derogatory characterization of these cases as an "anti-canon." See Justice Rebecca Grassl Bradley's dissent infra at 54.

Additionally, the assertion that I, along with Justices Roggensack and Rebecca Grassl Bradley, "were prepared to throw out votes in just two counties on issues that could and should have been raised before the [2020] election" is patently false. As I explained at the time, "Even if the court does not conclude that relief should be granted, this lawsuit is the opportunity to declare what the law is—which is our constitutional duty—and will help the public have confidence in the election that just occurred and confidence in future elections." Trump v. Biden, 2020 WI 91, ¶134, 394 Wis. 2d 629, 951 N.W.2d 568. Each of our dissents in Trump v. Biden made abundantly clear that we expressed no opinion on whether any requested relief should have ultimately been granted. We instead dissented based on the majority's failure to address difficult and important legal questions on the merits, which the majority repeats here. See id., ¶¶73, 105 (Roggensack, C.J., dissenting); id., ¶¶107, 111, 117, 129, 134, 138 (Ziegler, J., dissenting); id., ¶¶140, 151, 152, 153, 156 (Rebecca Grassl Bradley, J., dissenting).

knowledge and approval? Again acting as if somehow procedurally required, this court shirks its constitutional responsibility to declare what the law is. Justice delayed may be justice denied.

Ours is not a court of "no resort." We are a court of last resort. Being a court of last resort does not mean that, in all cases, each and every procedure must be exhausted before this court can declare the answer to a purely legal question. While a majority of my colleagues disagree, I conclude that we should answer this pressing legal question. Unlike many cases where factual development and the honing of legal issues is critically important to the development of the issues that will ultimately be decided by this court, in this case the issues do not require that kind of fact-finding or honing. Clearly, procedure does allow this court to take up these issues, and that is demonstrated by the fact that the court has done so previously and recently, utilizing a variety of procedural methods over the years. See Wis. Const. art. VI, § 3; Wis. Stat. §§ 809.60-62; 809.70-71; Petition of Heil, 230 Wis. 428, 284 N.W. 42, 50 (1938) (concluding this court has exclusive jurisdiction when "the questions presented are of such importance as under the circumstances to call for [a] speedy and authoritative determination by this court in the first instance"); State ex rel. Ozanne v. Fitzgerald, 2011 WI 43, ¶7, 334 Wis. 2d 70, 798 N.W.2d 436 ("grant[ing] the petition for an original action because one of the courts that we are charged with supervising has usurped the legislative power which the Wisconsin Constitution grants exclusively to the legislature"). This case is fully ripe for determination, and allowing it to languish seemingly has served to deter and discourage the parties rather than refine the case for review.

While it is true that this court has the procedural ability to choose not to decide, it is also true that procedurally such indecision is not required. In fact, this court has and regularly employs a variety of procedures to accept and decide issues without delay. It is also true that often cases require factual determinations or the court could benefit from legal issues being honed below, but none of that is required in this case. As a result, once again, I find myself in dissent, lamenting that this court refuses to decide these pressing constitutional and legal issues.

In this particular case, since early 2020, a group of parents asked for legal determinations concerning, among other things, their right to parent their children in light of school policies which they assert occurs without parental knowledge or approval and undermines their constitutional and legal rights. While some on this court argue that it is procedurally appropriate to require these parents to continue to wait, these parents—now only one parent remaining—have waited what is for some of them almost the entire duration of their children's high school education.[47] For these

[47] As was expressed in Justice Roggensack's dissent when this case was last before the court, who the parties are is of little moment to the constitutional and legal questions at stake. Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, ¶43, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting). This court should have decided these issues a year ago.

litigants and for the people of this state, this case has languished far too long without this court abiding by its constitutional responsibility to declare what the law is.

To reiterate Justice Roggensack's thoughtful dissent from the last time this case came before us, "[f]or hundreds of years, parents' right to direct the upbringing and education of their children has been a fundamental and protected right under Article I, Section 1 of the Wisconsin Constitution and the Due Process Clause of the Fourteenth Amendment." Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, ¶77, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting). "Serving as a foundation of this right is the presumption that parents 'possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions.'" Id., ¶80 (Roggensack, J., dissenting) (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)). Without parental knowledge, consent, or any authority whatsoever, are schools undertaking the role of a parent to decide what is in the child's best interests when it comes to gender issues? Typically, no governmental agency, entity, or person, other than the parent, possesses the right to parent a child unless the State has demonstrated that the parent is unfit under the appropriate legal standard in a court of law. Under the law, parents are presumed to act in their children's best interests. Does allowing the school to engage and counsel students in gender reassignment decisions, without parental consent, presume that the parents do not have the right to parent their own children and usurp any constitutional right to parent as well as the legal principle that parents act in their children's best interests? This, again, is left for another day. This court shirks its constitutional and procedural authority, at the expense of Wisconsin's families.

I. MMSD'S POLICY

Madison Metropolitan School District's ("MMSD's") "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" (the "policy") permits MMSD staff to aid students in "[s]ocial transition," which the policy defines as "includ[ing] a name change, change in pronouns, and/or change in gender expression (appearance, clothes, or hairstyle)."[48] With regard to name changes, the policy permits MMSD to change students' names as used in email addresses, school publications, student ID's, standardized tests, and diplomas. The policy also mandates that "[s]tudents will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in MMSD systems" (emphasis added). The policy recommends that MMSD staff work with students who identify as transgender to create a "Gender Support Plan," which "is a document that creates shared understanding about the ways in which a student's authentic gender will be accounted for and supported at school."

The policy provides also that "[s]chool staff shall not disclose any information that may reveal a student's gender identity to others, including parents or guardians and other school staff,

[48] The entire policy, which was attached to Jane Doe's complaint as Exhibit 1, is also attached to this dissent.

unless legally required to do so or unless the student has authorized such disclosure" (emphasis added). It further instructs, "If a student chooses to use a different name, to transition at school, or to disclose their gender identity to staff or other students, this does not authorize school staff to disclose a student's personally identifiable or medical information." The policy lists these rules in the section labeled "Federal Laws" without reference to any supporting legal authority.

Though the policy states communication with students' families is "essential," it comes with a strong caveat. At a student's request, MMSD staff must keep the student's transition hidden from their parents because, according to MMSD, disclosure to parents "can pose imminent safety risks, such as losing family support and housing." In the event parents do discover their child is transitioning at school, the policy requires staff to create "contingency plans."

II. PROCEDURAL IRREGULARITIES

To date, Jane Doe has yet to receive any ruling on her actual legal claim against MMSD: that it has violated—and is currently violating—her "constitutional right to direct the upbringing of [her] children."

Jane Doe filed her complaint and motion for a preliminary injunction in Dane County circuit court more than three years ago in February 2020.[49] The injunction sought to prevent the MMSD from enforcing the policy as a whole, which included not only hiding information from parents, but also facilitating gender transition without parental consent or notification. MMSD responded with a motion to dismiss and request that its motion be decided before Jane Doe's motion for a preliminary injunction. The circuit court scheduled MMSD's motion to dismiss first even though the two motions could be resolved simultaneously because a preliminary injunction requires a finding by the circuit court that "it appears from a party's pleading that the party is entitled to judgment." Wis. Stat. § 813.02(1)(a). The circuit court further refused to rule on the preliminary injunction motion both until it decided whether the plaintiffs at the time could proceed under pseudonyms and all appeals on that issue had been exhausted, despite the fact that circuit courts have authority to issue preliminary injunctions while an appeal is pending. See Wis. Stat. § 808.07(2)(a)3.

Yet to receive any ruling on her motion for a preliminary injunction, Jane Doe filed a motion for injunction pending appeal. The circuit court granted partial relief, enjoining MMSD from enforcing its policy "in any manner that allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask." This order did

[49] The parents previously filed a petition for review with this court in December 2020, which we denied. Doe 1 v. Madison Metro Sch. Dist., No. 2020AP1032, unpublished order (Wis. Mar. 2, 2021). There are a variety of reasons we might have had for denying the petition for review at the time, but two years later there is still no resolution of the underlying claim.

not address the harm Jane Doe sought to prevent—facilitating her child's transition without parental consent. It only allowed Jane Doe to determine whether she was suffering that harm, and only if she asked. At a hearing on the matter, the court made clear it only wanted to discuss "whether teachers can conceal information in response to direct questions by parents." The court had one response to arguments that, even if parents could request information, an injunction was necessary to prevent MMSD's policy from causing harm by facilitating gender transition without parental notice or permission: "I'm not talking about those today." Because the motion for a preliminary injunction remained undecided, there was no order on that motion from which she could appeal.

This court furthered this trend in Doe 1, 403 Wis. 2d 369. There, this court "decline[d] to address whether the circuit court's decision to wait to adjudicate this motion was erroneous." Id., ¶35. The court then used that determination to avoid granting any meaningful resolution, asserting we could not possibly decide whether an injunction is necessary to prevent an unnoticed, hidden violation of constitutional rights because "such a motion is pending and unresolved before the circuit court." Id., ¶37. In further delaying any discussion of parents' constitutional rights, this court failed to recognize that the circuit court likely erroneously exercised its discretion by prioritizing several substantively similar motions over the more pressing motion for a preliminary injunction, and it "ignore[d] the circuit court's failure to meet its obligations under SCR 70.36(1)(b), which required a decision on the motion for a temporary injunction within 180 days." Id., ¶72 (Roggensack, J., dissenting) (footnote omitted).

On remand, the circuit court set a briefing schedule so it could finally rule on Jane Doe's motion for a preliminary injunction. While discovery was still ongoing, the circuit court directed the parties to focus their briefing on whether Jane Doe had standing. The circuit court characterized her claims as "equally important to every other member of the public who also disapproves of their local school board," and directed her instead to the election process. Jane Doe appealed to the court of appeals and filed a petition for bypass.

III. THIS COURT'S ABDICATION

By denying Jane Doe's petition for bypass, which is an available statutory procedural option, this court further delays resolution of her important constitutional claims and, with every passing day, if she is correct, increases the possibility that MMSD is actively infringing on Jane Doe's constitutional right to parent her own child.

There are four issues in Jane Doe's petition for bypass: whether the circuit court erred in failing to grant Jane Doe a preliminary injunction, whether Jane Doe has standing, whether the circuit court made erroneous discovery rulings regarding Jane Doe's expert witness after dismissal, and whether the circuit court erred in ordering that the deposition of Jane Doe's expert witness be sealed. Jane Doe first filed her complaint more than three years ago, and still no court has addressed her constitutional claims in any substantive manner. This case "cries for judicial

resolution," just like it did when Jane Doe first filed her complaint and just like it did more than a year ago when we first heard this case in Doe 1. 403 Wis. 2d 369, ¶47 (Roggensack, J., dissenting).

These litigants have been waiting for this court to exercise our constitutional responsibility and declare what the law is. The right to parent one's children is a fundamental liberty interest protected by the Constitution of the United States, and no parent can be denied that liberty "without due process of law." U.S. Const. amend XIV, § 1. No such proceedings have happened here. As the United States Supreme Court has explained,

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. More than 75 years ago, in Meyer v. Nebraska, 262 U.S. 390, 399, 401 (1923), we held that the "liberty" protected by the Due Process Clause includes the right of parents to "establish a home and bring up children" and "to control the education of their own." Two years later, in Pierce v. Society of Sisters, 268 U.S. 510, 534–535 (1925), we again held that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control." We explained in Pierce that "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." Id., at 535. We returned to the subject in Prince v. Massachusetts, 321 U.S. 158 (1944), and again confirmed that there is a constitutional dimension to the right of parents to direct the upbringing of their children.

Troxel v. Granville, 530 U.S. 57, 65 (2000).

The Court has explained on numerous occasions that neither the government nor anyone else can disturb the constitutional right to parent, unless in a court of law tested evidence of parental unfitness is demonstrated to a high burden of proof. See id. at 68 (reasoning that "there is a presumption that fit parents act in the best interests of their children" and concluding that giving grandparents greater access to grandchildren, despite the choices of the parent, unconstitutionally required the parent to "disprov[e] [that access to the grandparents] would be in the best interest of her daughters"); see also Santosky v. Kramer, 455 U.S. 745, 765 (1982) (explaining that a governmental policy to sever parental rights must be proven on greater than a preponderance of the evidence because that standard wrongly "reflects the judgment that society is nearly neutral between erroneous termination of parental rights and erroneous failure to terminate those rights"). "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (citation omitted). The State has no authority to enter this realm "unless shown to be

necessary for or conducive to the child's protection against some clear and present danger." Id. at 167.

Jane Doe has had to wait too long to vindicate these fundamental rights. It is time. This litigation has transpired for three years and constantly fallen on deaf ears. Will we wait until no one remains in this lawsuit? No court has examined her constitutional claim. As Jane Doe explains, preliminary relief is necessary now:

> [T]here is now evidence that the District is currently violating parents' constitutional rights. The District admits that it has and is facilitating gender transitions at school without the parents' awareness for students under eighth grade, though even it claims not to know how often it has done so or is currently doing so.

If it is indeed true that the Constitution protects Jane Doe from presently suffering this harm, the court's refusal to even hear the case is utterly inexcusable. By responding to Jane Doe's plea for at least temporary relief with nothing more than a shrug, the court treats parents' rights to direct their children's upbringings as "second class" among those rights enshrined in our state and federal constitutions.

Wisconsin's courts have failed Jane Doe. It is axiomatic that justice delayed is justice denied. This court stands in justice's way by continually failing to do the one thing it was made to do: say what the law is. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) (emphasis added) ("It is emphatically the province and duty of the judicial department to say what the law is."). [50]

For these reasons, I respectfully dissent.

I am authorized to state that Justices PATIENCE DRAKE ROGGENSACK and REBECCA GRASSL BRADLEY join this dissent.

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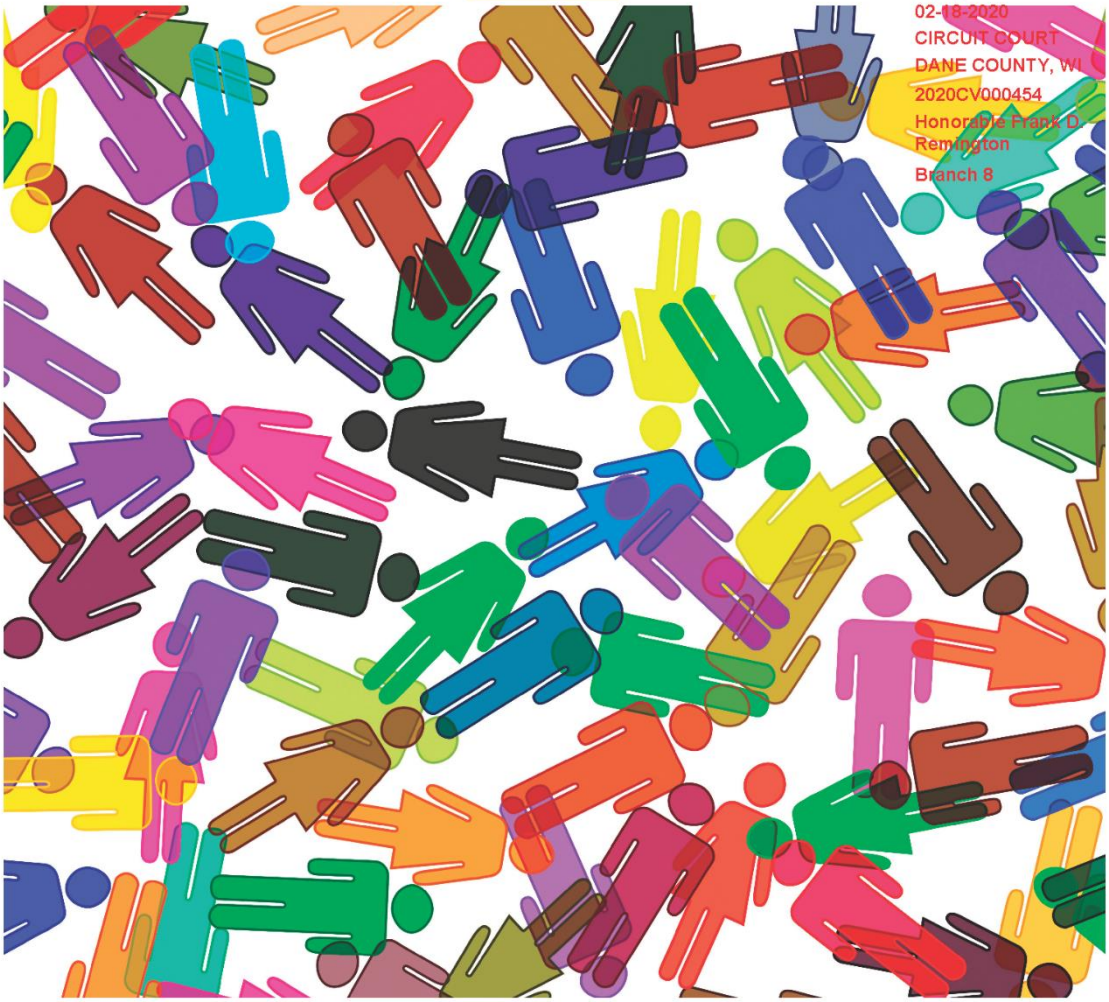
[50] I agree that it is not our duty to alone say what the law is. Unfortunately, no other member of the judicial department has done so in this case.

EXHIBIT 1

FILED
02-18-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV000454
Honorable Frank D. Remington
Branch 8



MADISON METROPOLITAN SCHOOL DISTRICT

Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students

April 2018

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Message from Superintendent

Dear Madison Community,

As a school district, MMSD is committed to creating inclusive and welcoming learning communities to ensure that all students are able to graduate college, career, and community ready. We take seriously our responsibility to provide safe and nondiscriminatory environments for all students.

We have incredible transgender, non-binary, and gender-expansive students, staff, and families throughout our district, and we want our schools to be places where every child thrives.

To that end, we have worked hard to support transgender, non-binary, and gender-expansive youth in MMSD.

- We have progressive, enumerated policies in place to prevent bullying, harassment, and discrimination.
- We have expanded our Welcoming Schools program, committed to building a new generation of students who embrace diverse identities and are allies to their peers.
- We are training all of our student services staff on strategies to support our transgender, non-binary, and gender-expansive youth so they can guide student gender transitions with ease.
- We are committed to training MMSD staff on this expanded guidance so they have the knowledge and skills to not only support our transgender, non-binary, and gender-expansive youth, but to promote gender-inclusive practices districtwide.
- We have single-stall All Gender Restrooms in every MMSD school building.

We are proud to present this guide as a resource for schools, families, and youth to ensure all students' identities are recognized and treated with respect and fairness at school. We also want to ensure that all students have access to the support they need to thrive.

In this guide you will find information on creating inclusive classroom environments, district policies and practices, and additional resources or places to seek support.

The Madison Metropolitan School District will not waver in our commitment to providing all students access to an inclusive education that affirms all identities. It is our goal that these resources will improve our efforts to provide safe, healthy and positive school environments for all transgender, non-binary, and gender-expansive youth.

Sincerely,

Jennifer Cheatham
Superintendent

"We have incredible transgender students, staff and families throughout our district. We will always support and be proud of our trans communities. We are also dedicated to creating inclusive and welcoming learning communities and we take seriously our responsibility to provide safe and nondiscriminatory environments for all students, including students of all gender identities. This includes our practice of allowing students to use facilities consistent with their gender identity.

We will not waver in our commitment to this and all other inclusive practices in our schools."

2 | MMSD

Purpose of this Guidance

In an effort to support all students in MMSD, it is essential that we provide comprehensive guidance for youth, families, and staff so that students who identify as transgender, non-binary, and gender-expansive experience an inclusive, equitable, and high-quality education.

This guide provides:

- The rationale for inclusive policies and practices to support transgender, non-binary, and gender-expansive students.
- Detailed information on protective federal, state, and district laws and policies.
- Educational resources to build knowledge and inclusive language around gender identity.
- Best practice guidelines to support students' school-based gender transitions including: gender support planning, confidentiality, name/pronoun changes, and restrooms/changing spaces.
- Inclusive classroom and schoolwide practices that affirm students of all gender identities.

Staff Training & Professional Development

The district shall conduct ongoing training for all staff members so they can best support and affirm students of all gender identities. Training needs to include professional learning on the policies and best practices found within this guidance document.

Professional development shall include, but not be limited to:

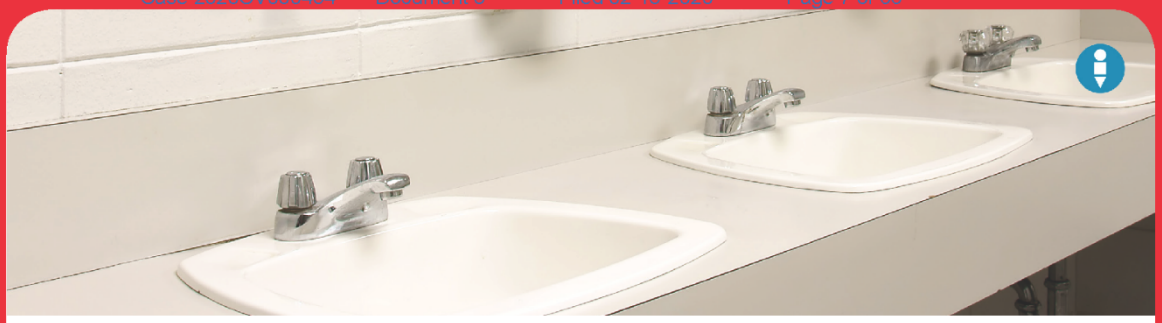
- Classroom engagement strategies, curriculum, and resources that educators can integrate into their classrooms to help foster a more gender-inclusive environment for all students.
- School and district policies regarding bullying, harassment, discrimination, and suicide prevention as well as strategies for prevention and intervention.
- Terms, concepts, and current developmental understandings of gender identity, gender expression, and gender diversity in children and adolescents.
- Strategies for communication with students and families to support transgender, non-binary, and gender-expansive youth.

Rationale/Data

Based on the adverse health outcomes for transgender youth as indicated in the Dane County Youth Assessment and the Gay Lesbian Straight Education Network's (GLSEN) National School Climate Survey, we consider it our obligation to ensure safe, affirming learning environments for our transgender youth in MMSD.

As reported on the 2015 Dane County Youth Assessment (DCYA) , MMSD high school students who identified as transgender had adverse outcomes compared to their cisgender peers. Please note we do not have data on non-binary or gender-expansive youth because there is not research available at this time. The 2018 Dane County Youth Assessment (DCYA) will be inclusive of multiple gender identities, and we will update our data once it is available.

Dane County Youth Assessment Cis vs. Trans Comparison	Cisgender Youth	Trans Youth
Family Support & Home Experiences		
• Homeless in last 12 months	4%	19%
• Parents talk with me about future plans	98%	71%
• Hit by a parent	9%	27%
School Experiences & Connectedness		
• In Special Education	10%	32%
• Skipped school in past month	32%	45%
• I have an adult I can talk to	82%	59%
Mental Health		
• Report having long-term mental health problems	27%	38%
Physical Safety and Systems Involvement		
• Carried a weapon to school in last month out of fear for safety / need for protection	5%	29%
• Juvenile corrections for 30+ days in past year	1%	9%



The National School Climate Survey is administered every other year by GLSEN (Gay Lesbian Straight Education Network) and documents the experiences of LGBTQ+ youth. The most recent survey was done in 2015 and published in 2016; the final sample included over 10,000 students with a spectrum of gender identities in grades 6 to 12 from all 50 states and the District of Columbia from more than 3,000 unique school districts. The following are the themes, identified by GLSEN, based on the 2015 survey administration:

Safety

- Three-quarters of transgender students felt unsafe at school because of the way they expressed their gender. Of the youth who identified as "another gender" or "genderqueer," 61% felt unsafe at school.
- Two-thirds (65%) of transgender and non-binary students report being verbally harassed at school; one in four (25%) were physically harassed. One in ten (12%) were physically assaulted.

Lack of Support

- Almost two-thirds (60%) of transgender students had been denied access to restrooms or locker rooms consistent with their gender identity.
- Half (51%) of transgender students were prevented from using their names or pronouns that align with their gender identity.
- One out of four (28%) transgender students had been prevented from wearing clothes that aligned with their gender expression.
- 63.5% of LGBTQ+ students who had reported an incident said that school staff did nothing in response.
- The most common reasons given for not reporting incidents of victimization to school personnel were:
  - doubts that staff would effectively address the situation and
  - fears that reporting would make the situation worse

Negative Remarks
About Gender Expression

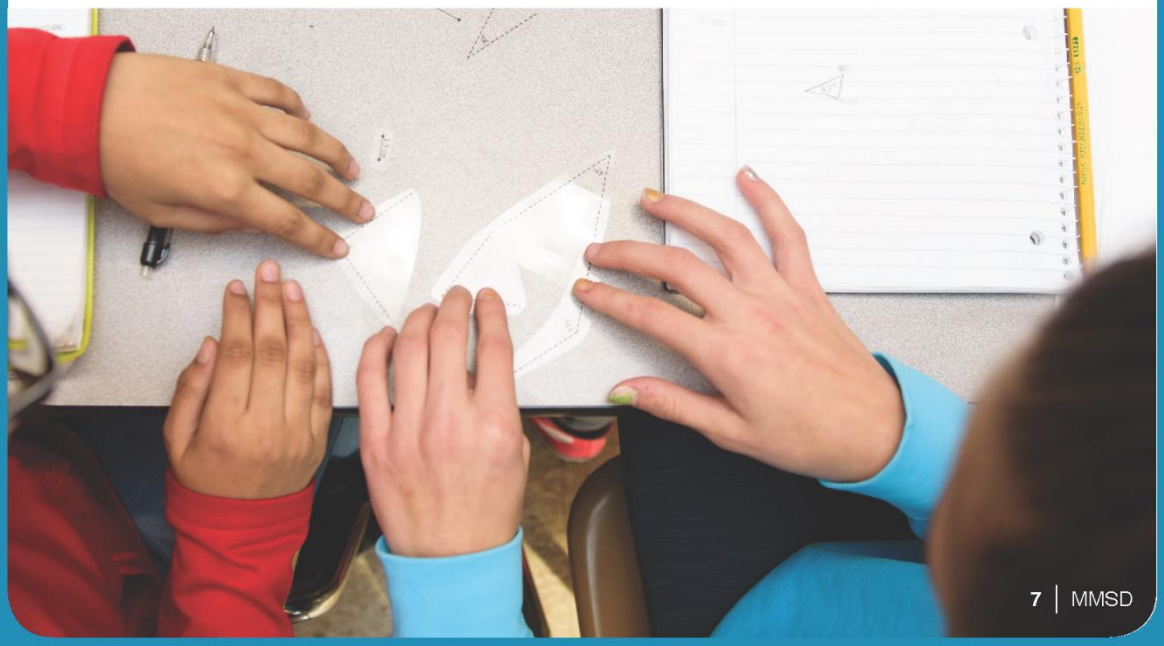
Virtually all LGBTQ+ students heard negative remarks about gender expression sometimes (not acting "masculine enough" or "feminine enough") with two-thirds hearing them regularly.

One in ten heard these kinds of remarks regularly from their teachers or other school staff.

Effects on School Achievement

LGBTQ+ students who experienced higher levels of victimization because of their gender identity and/or gender expression:

- Were almost three times as likely to have missed school in the past month than those who experienced lower levels (59.6% vs. 20.8%).
- Had lower GPAs than students who were less often harassed (2.9 vs. 3.3).
- Were twice as likely to report that they did not plan to pursue any post-secondary education (e.g., college or trade school; 9.5% vs. 5.4%).
- 42.5% of LGBTQ+ students who reported that they did not plan to finish high school, or were not sure if they would finish, indicated that they were considering dropping out because of the harassment they faced at school.



Data in support of LGBTQ+ Inclusive Curriculum and Positive School Climate

Based on the National School Climate Survey, one strategy that educators can employ to promote safe and affirming school environments is including positive representations of LGBTQ+ people, history, and events in the curriculum. Among the LGBTQ+ students in GLSEN's 2009 National School Climate Survey, attending a school with an LGBTQ+ inclusive curriculum was related to a less-hostile school experience for LGBTQ+ students as well as increased feelings of connectedness to their school communities.

1. Inclusive curriculum contributes to a safer school environment for LGBTQ+ youth.

- GLSEN's 2009 National School Climate Survey revealed that when educators include positive representations of LGBTQ+ people, history, and events in their curricula, students experienced school as a less-hostile place.
- Less than a fifth of students at schools with inclusive curriculum reported high levels of verbal harassment, physical harassment, and physical assault, compared to about 1 in 3 other students. LGBTQ+ students in schools with an inclusive curriculum were also:
  - Half as likely to experience high levels of victimization because of sexual orientation or gender expression.
  - About half as likely to miss school because of feeling unsafe or uncomfortable. Less than a fifth (17.1%) of students with inclusive curricula stayed home from school for at least one full day, compared to nearly a third (31.6%) of other students.

2. Inclusive curriculum helps LGBTQ+ students feel more connected to their schools.

- Students in schools with an inclusive curriculum feel a greater sense of connectedness to their school communities than other students.
- By including LGBTQ+ related content in their curriculum, educators can send a message that they are a source of support for LGBTQ+ students.
  - For example, almost three-quarters (73.1%) of students with an inclusive curriculum felt comfortable talking to a teacher about LGBTQ+ related issues, compared to half (50.1%) of students without this resource in school.

3. Inclusive curriculum can reinforce peer acceptance of LGBTQ+ students.

- The inclusion of LGBTQ+ people, history, and events in the classroom curriculum educates all students about LGBTQ+ issues and may help to reduce prejudice and intolerance of LGBTQ+ people.
  - When educators work to cultivate greater respect and acceptance of LGBTQ+ people among the student body, their efforts can result in a more positive school experience for LGBTQ+ students.
  - GLSEN research consistently shows that an inclusive curriculum is associated with increased peer support for LGBTQ+ students.

Policies & Laws

Federal Laws

Family Educational Rights and Privacy Act of 1974 (FERPA):
FERPA protects the privacy of student educational records, and prohibits the improper disclosure of personally identifiable information from students' records. FERPA allows parents of students under 18 years of age to obtain their child's educational records and seek to have the records amended. Former or current students have the right to seek to amend their records if the information in present records is "inaccurate, misleading, or in violation of the student's rights of privacy" (34 C.F.R. § 99.7(a)(2(ii)).

Guidance for Schools, Students, and Families: Educational Records
Students have the right to change their name and/or gender marker on their educational records under this federal law. If under the age of 18, students need the permission of one parent or legal guardian. For more information, please see MMSD-Based Name Change section.

Confidentiality
The district shall ensure that all personally identifiable and medical information relating to transgender, non-binary, and gender-expansive students shall be kept confidential in accordance with applicable state, local, and federal privacy laws. School staff shall not disclose any information that may reveal a student's gender identity to others, including parents or guardians and other school staff, unless legally required to do so or unless the student has authorized such disclosure.

Transgender, non-binary, and gender-expansive students have the right to discuss and express their gender identity and expression openly and to decide when, with whom, and how much to share private information. If a student chooses to use a different name, to transition at school, or to disclose their gender identity to staff or other students, this does not authorize school staff to disclose a student's personally identifiable or medical information.

Title IX, Education Amendments of 1972:
Title IX ensures that no person is discriminated against because of their gender in any academic program including, but not limited to, admissions, financial aid, academic advising, housing, athletics, recreational services, health services, counseling and psychological services, classroom assignment, grading, and discipline. Although Title IX does not expressly address gender identity or expression, this law has been used in the protection of students who are transgender and gender-expansive against discrimination because discrimination based on gender identity qualifies as sex discrimination.

State Laws

Wisconsin Statute 118.13:
This state statute prohibits discrimination against students. It states that no one "may be denied admission to any public school or be denied participation in, be denied the benefits of or be discriminated against in any curricular, extracurricular, pupil services, recreational or other program or activity because of the person's sex, race, religion, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability."

Wisconsin Statute 118.46:
This state statute explains Wisconsin school districts must have student anti-bullying policies and what must be included in such policies.

Wisconsin Administrative Code Chapter 9:
This administrative code establishes procedures for enforcing Wisconsin Statute 118.13. It also indicates when the Wisconsin Department of Public Instruction may review discrimination complaints.

District Policies

Student Anti-Bullying Board Policy 4510:
The Madison Metropolitan School District strives to provide an environment where every student feels safe, respected and welcomed and where every staff member can serve students in an atmosphere that is free from significant disruptions and obstacles that impede learning and performance.

Bullying can have a harmful social, physical, psychological and/or academic impact on students who are the victims of bullying behaviors, students who engage in bullying behaviors and bystanders that observe acts of bullying. The Madison Metropolitan School District does not allow bullying behavior toward or by students, school employees or volunteers on school/District grounds, at school/District-sponsored activities or in transportation to and from school or school/District-sponsored activities.

MMSD defines bullying as the intentional action by an individual or group of individuals to inflict physical, emotional or mental harm or suffering on another individual or group of individuals when there is an imbalance of real or perceived power. Bullying behavior creates an objectively hostile or offensive environment. Such an environment may cause, or be likely to cause, negative and harmful conditions.

District Policies

Guidance for Schools, Students, & Families:
Based on the MMSD Anti-bullying policy above, MMSD must protect our transgender, non-binary, and gender-expansive students from bullying and harassment. Bullying incidents should be reported to a school staff member (by the student who is being targeted, another student, a family member, or staff member) and will be investigated by school staff promptly to determine if bullying exists. We will consider the needs of the targeted student a priority in bullying incidents. Staff will respect student confidentiality throughout the investigation, be careful not to "out" students while communicating with family/peers, and involve the targeted student throughout the intervention process.

Additional resources:
MMSD Anti-bullying Website
MMSD Anti-bullying Report Form
Flowchart for Bullying Investigation
MMSD Bullying Booklet
FAQ for Families

Student Non-discrimination Board Policy 4620:
The Madison Metropolitan School District strives to provide an environment where every student feels supported, respected, and welcomed and where every student can learn in an atmosphere that is free from harassment and discrimination. Discrimination and harassment can have a harmful social, physical, psychological, and/or academic impact on students who are the victims of these actions, students who engage in these behaviors, and bystanders that observe discriminatory and/or harassing acts.

The Madison Metropolitan School District does not allow discrimination or harassment toward or by students on school/district grounds, at school/district-sponsored activities, or in transportation to and from school or school/district-sponsored activities. District policy protects students from discrimination and harassment regarding a person's sex, race, color, age, national origin, ancestry, religion, creed, pregnancy, marital status, parental status, homelessness, **sexual orientation, gender identity, gender expression**, or disability including their physical, mental, emotional, or learning disability and/or retaliation as defined in this policy.

Guidance for Schools, Students & Families:
Based on the MMSD Student Non-discrimination policy above, MMSD must protect our transgender, non-binary, and gender-expansive students from discrimination and harassment. Discrimination should be reported to the MMSD Title IX Investigator and will be investigated to determine if discrimination occurred.

Additional resources:
Equal Opportunity Office Website
Discrimination Complaint Form
MMSD Student Non-discrimination Policy (Full Policy)

Dress code:

Students have the right to dress and present themselves in a way that is consistent with their gender identity, as long as they follow the dress code for all students. The MMSD Dress Code states that students may dress in any style they desire as long as their chosen attire does not cause a disruption or distraction in the school environment, reveal intimate body parts, or pose a safety risk to the student or others.

Schools may enforce dress codes in accordance with MMSD policy, but any such dress codes should not be based on gender. Students shall have the right to dress in accordance with their gender identity and expression, including maintaining a gender-neutral appearance within the constraints of the dress codes adopted by the school. School staff shall not enforce a school's dress code more strictly against transgender, non-binary, or gender-expansive students than other students. Gender-neutral dress codes apply to regular school days as well as special events, such as dances and graduation ceremonies.

Gender 101

Agender: A term that describes a person who does not identify with any gender.

Cisgender: A term that describes a person whose gender identity aligns with the sex assigned to them at birth.

Coming Out: The process in which a person first acknowledges, accepts and appreciates their sexual orientation or gender identity and begins to share that with others.

Gender: A person's internal sense of self as male, female, both or neither (gender identity), as well as one's outward presentation and behaviors (gender expression). Gender norms vary among cultures and over time.

Gender-expansive: An umbrella term used for individuals that broaden their own culture's commonly held definitions of gender, including expectations for its expression, identities, roles, and/or other perceived gender norms. Gender-expansive individuals include those with transgender and non-binary identities, as well as those whose gender in some way is seen to be stretching society's notions of gender.

Gender Expression: How a person expresses their gender through outward presentation and behavior. This includes, for example, a person's clothing, hairstyle, body language and mannerisms.

Gender Fluid: People who have a gender or genders that change. Gender fluid people move between genders, experiencing their gender as something dynamic and changing, rather than static.

Gender Identity: An internal, deeply felt sense of being male, female, a blend of both or neither—how individuals perceive themselves and what they call themselves. One's gender identity can be the same as or different from their sex assigned at birth.

Gender Spectrum: The broad range along which people identify and express themselves as gendered beings or not.

Genderqueer: People that typically reject the binary categories of gender, embracing a fluidity of gender identity. People who identify as "genderqueer" may see themselves as being both male and female, neither male nor female or as falling completely outside these categories.

Gender Transition: The process by which some people strive to more closely align their outward identity with the gender they know themselves to be. To affirm their gender identity, people may go through different types of transitions.

- **Social transition:** This can include a name change, change in pronouns, and/or change in gender expression (appearance, clothes, or hairstyle).
- **Legal transition:** The process of updating identity documents, such as birth certificates and drivers' licenses, to reflect a person's authentic gender and name.
- **Medical transition:** For adolescents in the early stages of puberty, this may include the use of puberty blockers to pause puberty. Medical supports may also include gender-affirming hormones to foster secondary sex characteristics (such as breasts, facial hair, and laryngeal prominence, or an "Adam's apple") that are aligned with the teen's gender identity. Some adults may undergo gender-affirmation surgeries.

LGBTQ+: An acronym for lesbian, gay, bisexual, transgender, queer and/or questioning. Additions to this acronym can include A, for "asexual" or "ally," and I, for "intersex."

Non-binary: An umbrella term for gender identities that are not necessarily boy/man or girl/woman. People who identify their gender as non-binary may feel they have more than one gender, don't identify with a specific gender, or something else all together.

Outing: Exposing someone's sexual orientation or gender identity to others without their permission.

Queer: A term some people use to identify themselves with a flexible and inclusive view of gender and/or sexuality. Also used interchangeably with LGBTQ+ to describe a group of people such as "queer youth." It is also seen in academic fields, such as queer studies or queer theory. Historically it has been used as a negative term for LGBTQ+ people. Some people still find the term offensive while some embrace the term as an identity.

Sexual Orientation: Describes a person's emotional, romantic, or sexual attraction to other people. Some examples of sexual orientations are gay, lesbian, bisexual, asexual or pansexual.

Sex Assigned at Birth: This is generally determined by external genitalia at birth—female, male, or intersex.

Transgender or Trans: A term used to describe people who identify as a different gender from the sex they were assigned at birth. Being transgender does not imply any specific sexual orientation; transgender people may identify as straight, gay, lesbian, bisexual, etc.

Transphobia: The fear or hatred of, or discomfort with, transgender people.

Two-Spirit: An umbrella term indexing various indigenous gender identities in North America.

*Please keep in mind that language around gender and sexual orientation is continually evolving, thus compelling us to be ongoing learners. This list has been compiled with resources from Welcoming Schools and Gender Spectrum as of February 2018.

Best Practices for Student Gender Transitions

Gender Support Plan

When a student comes out as transgender, non-binary, genderfluid, etc., we strongly recommend the completion of a gender support plan. A Gender Support Plan is a document that creates shared understanding about the ways in which a student's authentic gender will be accounted for and supported at school. School staff, caregivers, and the student can work together to complete this document. All MMSD Student Services staff have been trained to support transgender youth and gender support planning; additional assistance can be provided through the MMSD LGBTQ+ Lead.

Gender Support Plans include:

- Student's gender identity, name, and pronouns
- Level of privacy desired
- Staff communication / Communication to peers
- Key contacts at home and at school
- Curriculum considerations
- Access to restrooms, locker rooms, and other school activities
- District policies and guidance that support trans transgender, non-binary, and gender-expansive youth
- Staff professional development

Family Communication

Families are essential in supporting our LGBTQ+ students. We believe that families love their children, have incredible dreams for them, and hope to keep them safe from harm. We know that family acceptance continues to have a profound impact on the physical and mental health outcomes of our LGBTQ+ young people. In MMSD, with the permission of our students, we will strive to include families along the journey to support their LGBTQ+ youth.

Communication with Families

We strive to include families in the process of supporting a student's gender self-determination, including transition.

- Families should be made aware of the policies, practices, and guidance that support and protect their child. Families are encouraged to advocate for their child's educational success.
- During a gender support plan meeting, it is best practice to establish a communication plan that meets the needs of the family-school team.
- Families can request a meeting to review their child's gender support plan at any time.

Disclosure to Families

Students identified as transgender, non-binary, and gender-expansive may have not come out to their families regarding their gender identity. Disclosing a student's personal information such as gender identity or sexual orientation can pose imminent safety risks, such as losing family support and housing.

- All staff correspondence and communication to families in regard to students shall reflect the name and gender documented in Infinite Campus unless the student has specifically given permission to do otherwise. (This might involve using the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family).
- In the event that a student insists on maintaining privacy from their family, student services staff shall discuss with the student contingency plans in the event that their privacy is compromised.
- Student services staff shall provide support and access to resources for transgender, non-binary, and gender-expansive students and their families. The district LGBTQ+ Lead is also available for consultation and support.

Privacy & Confidentiality

Staff Communication
In some cases there may only be one or two staff members who know a student's gender story and directly support that student. It is up to the student and their family to decide who at school is informed. Schools must ensure confidentiality by adhering to FERPA guidelines.

Substitute Teachers
To avoid harmful misgendering or misnaming, teachers should ensure that all information shared with substitute teachers is updated and accurate. For example, make sure attendance rosters, shared include accurate student names and pronouns, keeping in mind that not all students have their affirmed names and genders updated in Infinite Campus.

Coming out to Staff and Peers
It takes a lot of courage and interpersonal strength to socially transition in school, and every student's journey is unique. When/if ready, we want to support our students to identify a safe, individualized plan for how they will inform their teachers and peers about their transition, if they choose to do so. Transgender, non-binary, and gender-expansive students may request time to address their class about their gender identity and pronouns. Students may share this information with their classes based on the student's preferences or as outlined in their gender support plan. Students have the right to speak freely about their identity, but school staff do not.

Please see appendix for additional resources from Gender Spectrum: "Communicating a Change in Gender Status" and "Student Gender Communication Plan"

Names & Pronouns

Having one's gender identity recognized and validated is important. All MMSD staff will refer to students by their affirmed names and pronouns. Staff will also maintain confidentiality and ensure privacy. Refusal to respect a student's name and pronouns is a violation of the MMSD Non-discrimination policy.

MMSD-Based Name Change

MMSD students have the right to change their name and/or gender in district systems (e.g., Infinite Campus) to their affirmed name and pronouns with the permission of one parent/legal guardian.

- At this time, Infinite Campus (IC) only allows for binary gender classification (Female or Male).
- At MMSD, we are committed to developing an inclusive database that affirms the many genders and pronouns of our students. We intend to roll this out during 2018-19 registration.
- Students will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in MMSD systems. See privacy section for additional information.
- For changes in Infinite Campus, please use this Name/Gender/Email Change Form.
- Once the form is completed, please scan and send to MMSD's LGBTQ+ Lead. It typically takes 3-5 business days to complete the name/gender change.

Legal Name Change

Students and families may choose to consider a legal, court-based name change with the Clerk of Courts office in their county.

- Linked here is the Name Change Procedure in Dane County; if born outside Wisconsin, students will need to file with the Clerk of Courts in their birth state.
- A legal name change becomes especially important for many high school students when applying for post-secondary education to ensure that records on MMSD transcripts, ACT/SAT tests, financial aid documents, and applications are all consistent.
- Students may need assistance and information about the legal name change process, especially if they are over 14 years old and pursuing a legal name change on their own. Students might need support filling out court documents, accessing the cost of court filing fees, and advocating for confidential name changes (without publication). Student Services personnel are available to help students and their families navigate this process.

Email Address

Students can have their school-based email address changed when they complete their Name/Gender/Email Change Form.

- Changes take 3-5 business days to complete.
- Students will receive an email notifying them when their email address has been changed. All emails, contacts, and Google Drive contents will be transferred.
- Please contact the LGBTQ+ Lead for assistance.

School Publications

After a student transitions their name and/or gender, they may need assistance updating their name and/or gender in school-based student publications, such as yearbooks.

- These changes are completed at the student's school.
- When completing a gender support plan, it is important that a school-based staff member is assigned to assist them in changing their name/picture in publications in a time-sensitive manner.

Student ID

After a student transitions their name and/or gender, they may need an updated student ID and picture.

- These changes are completed at the student's school.
- When completing a gender support plan, it is important that a school-based staff member is assigned to assist them in accessing a new photo ID in a time-sensitive manner.

Transcripts

MMSD uses a program called Parchment to capture all student transcripts.

- Parchment records will have students' MMSD-based name and gender information, which may or may not be consistent with a student's legal name and gender.
- This can become confusing for some students when applying for post-secondary education, since they would like to have consistent student information on records.
- Some students may choose to consider a legal, court-based name change to alleviate this concern. Others may choose to change their name back in Infinite Campus (IC) for a short period of time.
- MMSD is advocating for changes with IC so that this barrier does not exist for our transgender and non-binary youth.

MMSD alumni who have transitioned are welcome to request an updated transcript with their affirmed name and gender.

- Alumni must first update their information with MMSD on Infinite Campus. This requires submitting their updated birth certificate, state ID, or passport to the LGBTQ+ Lead, who will work with the MMSD Registrar to adjust their legal name in school records.
- Alumni can then register on Parchment with their affirmed name and gender, and access updated transcripts.

Diplomas

Students can request to have their affirmed name listed on their high school diploma.

- Students who have obtained a legal name change or have made an MMSD-based name change will have their affirmed name on their diploma.
- Students under the age of 18 who have not completed an MMSD-based name change may still have their affirmed name read during graduation and listed on their diploma.
  - As a universal practice, schools shall inform all students about their right to have their affirmed name on their diploma and communicate the process for requesting this accommodation.
  - When a student requests a diploma-based name change, it is best practice to connect them with a trusted student services team member to discuss potential outcomes with their family and support system.
- MMSD Alumni can request a new diploma by submitting their updated birth certificate, state ID, or passport to the LGBTQ+ Lead, who will work with the MMSD Registrar and former high school to obtain a new diploma.

Standardized Tests

We are committed to ensuring that our students have accurate identifying information on all standardized tests. To guarantee this and avoid harmful misgendering, the LGBTQ+ Lead, Registrar, and Assessment department communicate on a regular basis to make sure all student name and gender changes are updated on assessment labels.

Safety & Bullying

Transgender, non-binary, and gender-expansive students are disproportionately targeted for teasing, bullying, harassment, and physical violence. MMSD staff must consistently confront and report suspected bullying or other behaviors that contribute to an unsafe school community. This may include name calling, misgendering, microaggressions, and bullying based on gender stereotypes, gender identity, and/or gender expression.

The district is responsible for providing a safe and supportive environment for all students. To help meet this responsibility, the district has created a student anti-bullying policy (#4510) and a bullying policy to protect staff (#8013). You can find more information on student anti-bullying here. More information is available under the "Policies and Laws" section above.

School Facilities

Restrooms

Having safe and respectful access to restroom facilities is important to the health and wellbeing of those who identify as transgender, non-binary, or gender-expansive. Students shall have access to the restroom that corresponds to their gender identity consistently asserted at school.

All MMSD schools have at least one single stall All Gender Restroom in their building that all students have the right to use. No student shall be required to use such a restroom. The All Gender Restroom may not be given as the only option for students who identify as transgender, non-binary, or gender-expansive.

It can be emotionally harmful for transgender, non-binary, and gender-expansive youth to be questioned or interrogated when using the restroom. We shall assume that our students are using the restroom that is consistent with their gender identity. Therefore, staff shall not confront students about their gender identity upon entry to the restroom. Only if there are behavioral incidents in the restroom should administration resort to the implementation of the Behavior Education Plan.

Changing Areas

All students must have access to changing facilities that correspond to their gender identity. MMSD is committed to having safe all gender changing areas. This will be assessed in the 2017-18 school-year and implemented during the 2018-19 school year. Students will have access to changing spaces that ensures safety and success for the course.

For detailed information specific to physical education, athletics, and extra-curricular activities, please see "Physical Education" section below.

Inclusive Classroom Practices

Welcoming Schools

Welcoming Schools is a comprehensive approach to creating respectful and supportive elementary schools with resources and professional development to:

- **Embrace Family Diversity**
- **Create LGBTQ+ inclusive schools**
- **Prevent bias-based bullying**
- **Create Gender-Inclusive Schools for all students**
- **Support transgender, non-binary, and gender-expansive students.**

We are committed to the Welcoming Schools approach and believe it is a valuable, proactive social-emotional learning program that embraces the diverse identities of our students, staff, and families. As of the 2017-2018 school year, we have 16 MMSD partner schools dedicated to this important equity work, and we will continue to grow Welcoming Schools districtwide. For more information on Welcoming Schools lessons, books, and overall program, visit our website at mmsd.org/welcoming-schools.

Course Accessibility & Instruction
Students have the right to equitable learning opportunities in their school. Students shall not be required to take and/or be denied enrollment in a course on the basis of their gender identity in any educational and academic program.

Language

In MMSD, we will strive to model gender-inclusive language that affirms the gender diversity of our MMSD students, staff, and families and disrupts the gender binary.

Adapted from Gender Spectrum's 12 Easy Steps towards Gender Inclusion, here are some ideas:

- Teach about gender! Include books and lessons that are inclusive of all identities and send messages of empowerment to students.
- Do not use gender as a way to divide groups, tasks, or people. (e.g., In addition to not grouping by gender, we will not say "boys will bring crayons and girls will bring markers" on a school supply list).
- Limit gendered and binary language, because it excludes people. When referring to the whole group, use "students" or "scholars" instead of "boys and girls" or "ladies and gentlemen."
- Model the use of non-binary pronouns (e.g., they/them/theirs and ze/hir/hirs) and non-binary honorifics (e.g., Mx.)
- Ask all students to share their affirmed names and pronouns, either in writing or aloud.
- Have visual images and posters that send messages of gender inclusion.
- When hearing misconceptions about gender or language that reinforces the gender binary, find a way to be an ally and disrupt it! Use the opportunity as a teachable moment, address it with the group, or have a conversation in private – but do something.
- When hearing biased language, bullying, or harassment, follow MMSD policy and address immediately.

Grouping

Teachers should use non-gendered methods for grouping students. Instead of grouping by boys and girls, ideas might include birth month, length of hair, color of clothing, favorite season, shoelaces versus no shoelaces, count off by numbers, clock partners, pre-planned groups, etc. Asking your students for suggestions of grouping is a great way to gain more ideas as well.

Physical Education

Participation in physical activity plays an integral role in developing a child's fitness and health, self-esteem, and general well-being. Physical Education teachers in MMSD are committed to ensuring all students learn in a safe, inclusive environment where gender does not play a role in student learning expectations or structure of activities for learning.

Physical Education teachers should evaluate all activities, rules, policies, and practices to ensure that gender-inclusive practices are in place.

Fitness Testing

By performing health-related fitness assessments, one is able to identify strengths and areas in need of improvement relating to physical health. Teachers are encouraged to use fitness testing results as a way for students to set personal fitness goals to strive for improvement versus meeting a gendered healthy fitness zone score. Fitness testing software often identifies healthy fitness zones in a binary capacity, only offering male or female options. Students who identify as transgender, non-binary, or gender-expansive should be able to use the healthy fitness zones that are consistent with their gender identity. MMSD is committed to establishing healthy fitness zones that do not categorize students based on gender.

Clothing

Per Board Policy 3651, students must come to physical education class in appropriate clothing consistent with the health, safety, and instructional needs of the program. Appropriate attire includes athletic shoes and clothing that allows for full movement in class activities. This may not require students to physically change clothing prior to class. If other accommodations are needed, students should consult their physical education teacher or the LGBTQ+ Lead.

Physical Education attire should not be gendered. For example, teachers can list the type of attire that is appropriate for swimwear, but shall not say "girls must wear x and boys must wear y."

Swimming

MMSD strives to ensure all students have access to all curricular opportunities for learning where they are safe and supported. Some students who identify as transgender, non-binary, and gender-expansive may require accommodations to access participating in swimming. Examples of accommodations include alternative swimwear, smaller environments, and privacy for changing. Communication between students, teachers, and families is encouraged to develop a plan to meet the needs of the individual student.

For our transgender, non-binary, and gender-expansive youth who are experiencing body dysphoria, swimming might not be a safe, affirming option for them. In these cases, we will offer students an alternative learning opportunity aligned with student learning outcomes. For additional guidance around this topic, students and families can contact their building administrator or LGBTQ+ Lead.

Changing Areas

All students must have access to changing facilities that correspond to their gender identity. MMSD is committed to having safe all gender changing areas; this will be assessed in the 2017-18 school year and implemented during the 2018-19 school year. Students will have access to changing spaces that ensure safety and success for the course.

Universal Practices for Inclusion:

- At the start of each semester, Physical Education teachers will have a whole-class discussion to inform all students of behavioral expectations as well as all available options for changing areas.
  - Review expectations for respecting the privacy and personal space of other people in the changing area. Make clear what appropriate conduct is in spaces where students are changing clothes and consequences for not adhering to them.
  - For example: The girls changing area is located _____, the boys changing area is located _____. An all gender changing area is located _____ for any student seeking additional privacy.
- The teacher will also invite students to communicate with the teacher if additional accommodations are needed or if they have any questions.

Student Accommodations:

- When requested, schools will provide access to a reasonable alternative changing facility that is more private and not gendered. This is an accommodation we would provide for any of our MMSD students, not just students who identify as transgender, non-binary, and gender-expansive.
- Reasonable accommodations may include:
  - Single, locked stalls within binary changing spaces.
  - Separate changing spaces that are not gendered; also including single, locked stalls. These all gender spaces should be located in proximity to Physical Education class and/or extracurricular activities.

Considerations:

- Students who are asking for accommodations should have voice in determining the changing area that best fits their individual needs.
- Students' needs may change, so it is important to check in regularly to determine if their gender support plan needs to be updated.
- Keep in mind that spaces inside of binary changing areas may not feel comfortable to some students, including transgender and non-binary youth; therefore, this may require a separate space where students do not have to enter through a binary changing area.

Health Education

All students will have access to high-quality Human Growth & Development curriculum that focus on student skill-development to promote lifelong healthy lifestyles. MMSD is committed to providing Health Education curricula that provides students with skills-based learning opportunities that are inclusive, age-appropriate, medically accurate, and non-stigmatizing.

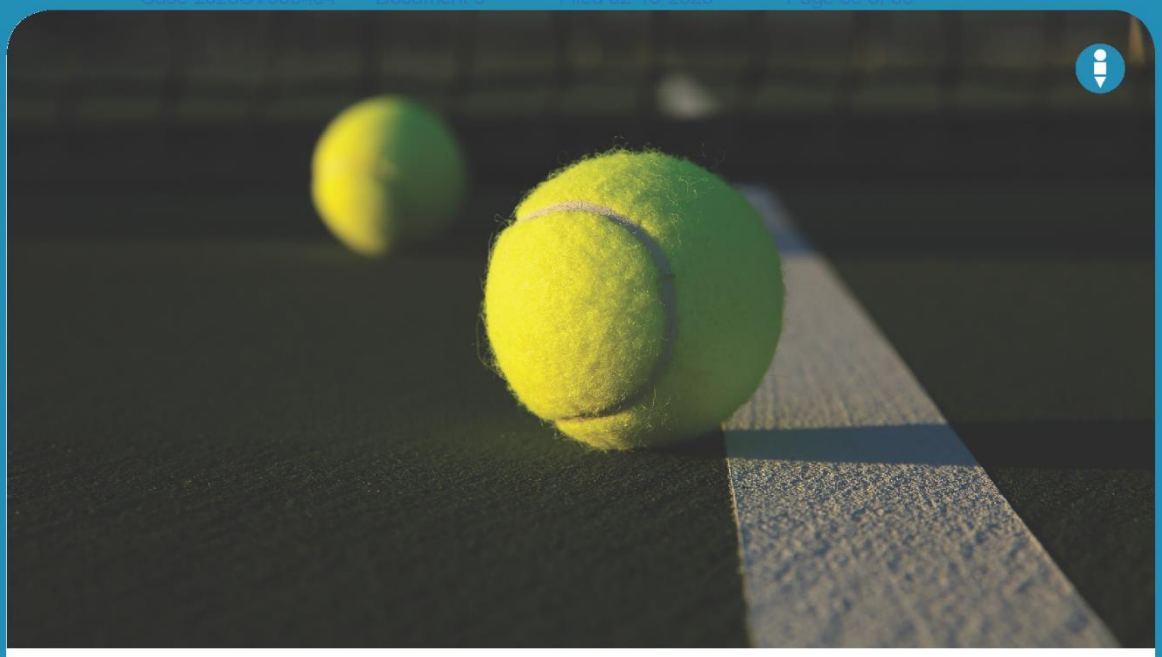
Health education teachers should evaluate all curricular materials, such as lesson activities, assessments, videos, and so on to ensure that gender-inclusive practices are in place. It is essential that LGBTQ+ students see themselves in the curriculum.

Human Growth and Development
Instruction should include educating students on various vocabulary related to biology, gender identity, gender expression, and sexual orientation.

Examples of inclusive practices:.

- When teaching about bodily changes with biological sex relating to puberty, use terms such as “people with penises” and “people with vaginas/vulvas/uteruses” instead of “girls and boys” or “girl-bodied / boy-bodied.”
- When teaching about families and relationships, discuss the concept of multiple pathways to relationships and family. Include multiple family structures – people who are raised by adopted parents, foster parents, grandparents/family members, single-parent household, same-sex parents, divorced parents, etc.
- When age-appropriate, educate students on the multiple pathways to family, including concepts of In vitro fertilization, artificial insemination, adoption, etc.

For more information on health education curriculum, contact the Physical Education, Health, and Wellness Coordinator.



Athletics

MMSD, in collaboration with the Wisconsin Interscholastic Athletic Association (WIAA), is committed to increasing the participation of students who identify as transgender, non-binary, or gender-expansive in athletics.

- Students are able to participate on a team consistent with their gender identity.
- At this time, we do not have many non-binary athletic options for our students; therefore, students who identify as non-binary or gender-expansive can participate on the team that feels like the best fit for them.
- There are some circumstances where students may participate on the team consistent with the sex they were assigned at birth in order for them to feel safe, supportive, and successful. Open communication is encouraged among the student, their family, and their coach to ensure the best option for the student based on their individual goals.
- If students, families, or educators need support in this area, please contact the MMSD Physical Education, Health, and Wellness Coordinator.

If more information is needed, contact your administrator to seek guidance from Central Office Student Services.

Clubs and Extracurricular Activities

All students of all genders should have access to opportunities for clubs and extracurricular activities to enrich their educational experience.

Inclusive Access and Participation in Clubs & Activities:

- Model inclusive messaging when promoting clubs and extracurricular activities to encourage access and participation for our gender-expansive students. Sometimes clubs and activities might be marketed specifically to "boys" or "girls." This practice excludes many of our transgender, non-binary, and gender-expansive youth.

  Examples:
  - All genders are encouraged to participate in Ultimate Frisbee.
  - Handing out the karate club flyer to all students, not just the boys (even if the host organization asks you to just send out to "boys")
  - A poster that is representative of diverse students to promote math club.

Inclusive Language and Practice in Clubs & Activities:

- Make sure club leaders are aware of MMSD policies and guidance to support our transgender, non-binary, and gender-diverse youth.
- Leaders should review all club materials to ensure they are inclusive of gender-diverse youth.
- Model gender-inclusive language that affirms the gender diversity of our MMSD students, staff, and families and disrupts the gender binary. See Language section for additional examples.
- Clubs and activities are not to be separated by gender.
  - Make sure all genders have access to all clubs and activities.
  - Avoid using gender as a characteristic for divisions.
  - For clubs that have been traditionally divided by binary gender (e.g., Boy Scouts, Girl Scouts, Girls on the Run), we must not discriminate against or exclude our transgender, non-binary, and gender diverse youth. Students should be able to participate in all desired clubs and activities. See Title IX policies for additional information.

Field Trips

It is the responsibility of the adult in charge of the trip to guarantee the safety and inclusion of all students. This includes checking in advance for all gender restrooms, all gender changing facilities, and inclusive room assignments.

Day Field Trips

- Gender should not be used when dividing students into groups on field trips, and field trips must be accessible and planned to be inclusive for students of all gender identities.
- If a location does not have accessible facilities (all gender restrooms, private changing areas, etc.), communicate in advance with all of your students in case accommodations are needed.
- Accessibility should be a consideration when choosing a field trip site.

Overnight & Extended Field Trips

As a universal practice, staff shall begin by developing expectations for appropriate conduct with all students (i.e. respect for privacy, personal space, and boundaries; modesty; physical contact).

- When traveling on overnight school-related trips where room sharing may be required, our transgender, non-binary, and gender-expansive students' comfort level with sleeping arrangements will largely dictate the manner in which related issues are addressed
- It is strongly recommended to first ask the student their rooming preference.
  - Transgender students have the right to room with other students who share the gender identity they consistently assert at school.
  - Transgender, non-binary, and gender-expansive students should be able to have options such as friend, social, or leadership pairings.
  - In some cases, a student may want a room with fewer roommates or another alternative suggested by the student or the student's family. Trip organizers will work with the student, school staff, and/or the student's parents/guardians to make appropriate arrangements. The school should honor these requests whenever possible. In all circumstances, the arrangements are to be made with the student's consent.
- Regardless of whether any roommates know about the student's gender identity, the school has an obligation to maintain the student's privacy and cannot disclose information about the student's identity.
- If students who identify as transgender or non-binary, or gender-expansive are uncomfortable with all options above regarding changing facilities and travel accommodations, it is strongly recommended that the student be able to choose other activities in lieu of activities requiring changing facilities or room shares. It is recommended that all reasonable alternatives suggested by the student or parents/guardians be considered.

School Dances, Courts, and Other Historically Gender-Based Traditions

School traditions are important to all students. Transgender, non-binary, and gender-expansive students are no exception. The First Amendment and the right to equal protection grant transgender, non-binary, and gender-expansive students protection from discrimination based on sexual orientation and gender identity and allow students the right to authentically show their gender identity and gender expression at prom, homecoming, and similar school events.

- With an expectation of inclusivity, schools shall evaluate school traditions such as dances, homecoming/prom courts, etc. to determine whether these activities are inclusive for all genders. Schools may decide to revise existing traditions or establishing new traditions.
  - For example, the tradition of having a male homecoming king and a female homecoming queen and gendered court was once commonplace. Most MMSD schools have moved away from binary gender courts because they exclude the gender diversity of their student body. Instead of electing a homecoming king and homecoming queen, some schools have chosen to nominate "prom ambassadors," "homecoming court," or "homecoming royalty."
- Transgender, non-binary, or gender-expansive youth have the right to fully participate in all school activities and social events without discrimination.

Acknowledgements

MMSD would like to acknowledge the support from across the country that has influenced and enhanced this guidance document. Thank you to the following school districts and organizations for the best practice recommendations, model policies, and support:

- ACLU
- DC Public Schools
- Gay, Lesbian, Straight, Education Network (GLSEN)
- Gender Spectrum
- Los Angeles Unified School District (LAUSD)
- Minnesota School Safety Technical Assistance Council
- Minus18
- Welcoming Schools

We would also like to thank the MMSD Action Team to Support Transgender, Non-binary, and Gender-expansive Youth. Representatives include participants from:

- GSAFE: Creating Just Schools for LGBTQ+ Youth
- MMSD Building Services
- MMSD Chief of Schools Office
- MMSD Curriculum & Instruction
- MMSD Legal Services
- MMSD Office of the Registrar
- MMSD Student Leaders
- MMSD Student Services
- MMSD Superintendent's Office
- Transparent Group of Wisconsin

Resources

1. **Gender 101 Concepts & Vocabulary**
   - Welcoming Schools' Definitions to help understand gender and sexuality
   - Genderbread Person from It's Pronounced Metrosexual
   - Trans 101 video from Minus18
   - What are Pronouns? article, app, & video from Minus18

2. **MMSD Gender Support Resources**
   - MMSD Gender Support Plan
   - MMSD Name/Gender/Email Change Form
   - MMSD flowchart to guide gender transition process
   - Communicating a Change in Gender Status from Gender Spectrum
   - Student Gender Communication Plan from Gender Spectrum

3. **Local Resources for Students and Families**
   - Madison Metropolitan School District Resources
     - Your child's School Team
     - Districtwide resources: LGBTQ+ Lead, Title IX, Coordinator of PE/Health/Wellness
   - Community Resources in Madison
     - Youth Resource List
     - Transparent Group

4. **National Resources on Gender Inclusive Schools for Educators and Administrators**
   - Welcoming Schools' Checklist for a Welcoming and Inclusive School Environment
   - Gender Spectrum's Schools in Transition: A Guide to Supporting Trans Youth
   - Gender Spectrum video: How to design a Gender Support Plan
   - Supporting & Caring for Transgender Children

5. **Resources for Families**
   - Local
     - Transparent Group: Monthly Support Group & Google Group
     - Pediatric & Adolescent Transgender Health (PATH) Clinic
     - PFLAG Monthly Support Group
     - GSAFE: Creating Just Schools for LGBTQ+ Youth
     - Orgullo Latinx
   - National
     - Advocates for Youth~ 10 Tips for Parents of LGBTQ+ Youth
     - Welcoming Schools~ Gender Inclusive Schools & Supporting Transgender and Non-binary Youth
     - Gender Spectrum
     - GLSEN
     - The Family Acceptance Project
     - PFLAG: Guide to be a Trans* Ally
     - Trans Youth Family Allies
     - Families in Transition: A Resource Guide for Parents of Trans Youth

6. **Policies**
   - Board Policy 4510: Student Anti-Bullying
   - Board Policy 4620: Student Non-Discrimination
   - Board Policy 8012: Staff-Visitors Non-Discrimination
   - Board Policy 8013: Workplace Bullying

REBECCA GRASSL BRADLEY, J. (*dissenting*).[51]

> [A]s the vilest Writer has his Readers, so the greatest Liar has his Believers; and it often happens, that if a Lie be believ'd only for an Hour, it has done its Work, and there is no farther occasion for it. Falsehood flies, and the Truth comes limping after it; so that when Men come to be undeceiv'd, it is too late; the Jest is over, and the Tale has had its Effect[.]

Jonathan Swift, The Art of Political Lying, The Examiner, Nov. 9, 1710.

Fake news has plagued the truth for centuries, an irresponsible and politically-motivated press peddles it, and sometimes judicial opinions regurgitate it. The public deserves better.

Chief Justice Annette Kingsland Ziegler's dissent catalogs cases in which a majority of this court demonstrates "an unwillingness to fulfill . . . [this court's] responsibilities and resolve significant legal issues of statewide importance." Justice Brian Hagedorn takes umbrage with this recitation of fact, provocatively labeling the collective separate writings of Chief Justice Ziegler, Justice Patience Drake Roggensack, and mine "the dissent's anti-canon" while misrepresenting what we actually wrote and questioning our motives and integrity. For context, the actual anti-canon comprises what are universally considered to be the worst United States Supreme Court decisions of all time. Drawing the comparison adds irony to the insult; the decisions of the actual anti-canon trampled the rights and liberties of oppressed people. They include:

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[51] In purportedly declining to respond to this dissent, Justice Brian Hagedorn disingenuously suggests I delayed my decision to write until after the release of this order. As Justice Hagedorn is well aware, the order was released without my knowledge or my vote. Justice Hagedorn also derides my opinion as an "abandonment of basic judicial decorum" and nothing more than "personal attacks." His response brings to mind an ancient lesson:

> Why do you look at the speck of sawdust in your brother's eye and pay no attention to the plank in your own eye? How can you say to your brother, 'Let me take the speck out of your eye,' when all the time there is a plank in your own eye? You hypocrite, first take the plank out of your own eye, and then you will see clearly to remove the speck from your brother's eye.

Matthew 7:3–5. Justice Hagedorn fired the first shot; given his own rhetoric, he cannot claim the moral high ground.

- Dredd Scott v. Sandford, in which the Court denied citizenship to Black people. 60 U.S. (19 How.) 393 (1857), superseded by constitutional amendment, U.S. Const. amends. XIII, XIV.
- Plessy v. Ferguson, in which the Court held states may codify racial segregation. 163 U.S. 537 (1896), overruled by Brown v. Bd. of Ed., 347 U.S. 483 (1954).
- Buck v. Bell, in which the Court held the Fourteenth Amendment to the United States Constitution does not prohibit states from forcibly sterilizing intellectually disabled people. 274 U.S. 200 (1927).
- Korematsu v. United States, in which the Court upheld the internment of Japanese Americans during World War II based on "[p]ressing public necessity[.]" 323 U.S. 214, 216 (1944), abrogated by Trump v. Hawaii, 585 U.S. __, 138 S. Ct. 2392, 2423 (2018).

Justice Hagedorn deems my writing unworthy of a response while doubling down on this insulting analogy, claiming, "[i]t is the dissenters who continue to cite the same list of cases they feel were egregiously wrong[.]" True, but no dissenter has ever referred to that list as the "anti-canon." This foolish hyperbole demeans the people who suffered atrocities at the hands of the government instituted to serve them while supplying the media with further fodder for degrading the judiciary as an institution. See Patience Drake Roggensack, Tough Talk and the Institutional Legitimacy of Our Courts, Hallows Lecture (Mar. 7, 2017), in Marq. Law., Fall 2017, at 45, 48 ("[S]arcastic writings that come from within a court of last resort give others license to choose disrespectful terms when speaking of the courts[.]").

After chastising his colleagues for the unspeakable offense of defending the law, Justice Hagedorn spreads disinformation regarding our body of opinions. He begins by discussing two cases involving challenges to the 2020 Presidential election:

> In Trump v. Evers, we denied an original action by the Trump campaign, but we did grant a petition for bypass just a few days later after the circuit court completed its work. So what is the dissent's complaint here? Apparently, democracy is in danger if we let lower courts sort through the facts and issues first. The dissent also lists the case we granted bypass on—Trump v. Biden—where the dissenters were prepared to throw out votes in just two counties on issues that could and should have been raised before the election and were largely of statewide application.

"What is the dissent's complaint here?" Really?

Justice Hagedorn and the rest of the majority in those cases hindered this court's ability to declare the law by denying Evers. "[J]ust a few days" significantly undersells the time constraints this court faced. Every day mattered. For possibly the first time in Wisconsin history, this court heard oral argument on a Saturday. A majority opinion was patched together largely over the weekend. Dissents followed. The majority infamously issued its decision in Biden on a Monday,

two days after oral argument and less than an hour before the law required the Electoral College to meet. Apparently, not every member of this court even read the separate writings before the decision had to issue. So much for collegial decisionmaking.

The rush to render a decision in Biden diluted the quality of the majority opinion's craftsmanship. As just one example, that majority trivialized voting rights with a sports metaphor: "Our laws allow the challenge flag to be thrown regarding various aspects of election administration. The challenges raised by the Campaign in this case, however, come long after the last play or even the last game; the Campaign is challenging the rulebook adopted before the season began." Trump v. Biden, 2020 WI 91, ¶32, 394 Wis. 2d 629, 951 N.W.2d 568; see also id., ¶34 (Dallet & Karofsky, JJ., concurring) ("To borrow Justice Hagedorn's metaphor, Wisconsin voters complied with the election rulebook. No penalties were committed and the final score was the result of a free and fair election."). "[T]he majority compared voting—the foundation of free government—to a football game[.]" Teigen v. WEC, 2022 WI 64, ¶127, 403 Wis. 2d 607, 976 N.W.2d 519 (Rebecca Grassl Bradley, J., concurring). Never mind that Biden was among the most important cases this court ever decided. As I wrote at the time: "How astonishing that four justices of the Wisconsin Supreme Court must be reminded that it is THE LAW that constitutes 'the rulebook' for any election—not WEC guidance—and election officials are bound to follow the law, if we are to be governed by the rule of law, and not of men." Biden, 394 Wis. 2d 629, ¶147 (Rebecca Grassl Bradley, J., dissenting). Justice Hagedorn, the majority author, did not respond. In Teigen v. WEC, three justices called for Biden to be overruled because it elevated WEC's guidance about the law to law itself. 403 Wis. 2d 607, ¶118. Only then did Justice Hagedorn address his concerning metaphor—by clawing it back—writing this court should not ascribe WEC guidance "legal force[.]" Id., ¶202 (Hagedorn, J., concurring). This about-face illustrates the wisdom of the maxim "say what you mean and mean what you say."

Justice Hagedorn claims, "the dissenters [in Biden] were prepared to throw out votes," repeating a farcical talking point of liberal partisans in the media and beyond. In a dissent joined by all dissenters, then-Chief Justice Roggensack explained the dissenters would, in the custom of a law declaring court, simply declare the law:

> If WEC has been giving advice contrary to statute, those acts do not make the advice lawful. WEC must follow the law. We, as the law declaring court, owe it to the public to declare whether WEC's advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect WEC advice. The remedy Petitioners seek may be out of reach for a number of reasons.

Biden, 394 Wis. 2d 629, ¶73 (Roggensack, C.J., dissenting) (quoting Trump v. Evers, No. 2020AP1917-OA, unpublished order (Wis. Dec. 3, 2020) (Roggensack, C.J., dissenting from the denial of the petition for leave to commence an original action); id., ¶135 (Ziegler, J.,

dissenting) ("The majority uses the potential remedy, striking votes, as an equitable reason to deny this case." (emphasis added)).

Justice Hagedorn responds with an overtly political reproach bearing no relationship to the actual issues in the case. He states, "[y]ou will search in vain for any discussion in the dissents that explains why the Trump campaign appropriately lost the case." In the course of suggesting the dissenters are now lying about the meaning of their dissents (so much for "judicial decorum"), Justice Hagedorn seems to struggle to understand them. Legal scholars, in contrast, have had no trouble understanding the dissenters' position:

> Much was made of a three-judge dissenting opinion, chastising the majority for relying on laches to dismiss two claims that the dissenting justices believed had merit. Importantly, though, these dissenting justices did not support the requested relief. "We, as the law declaring court," the dissenters wrote, "owe it to the public to declare whether [the state election commission's] advice is incorrect. However, doing so does not necessarily lead to striking absentee ballots that were cast by following incorrect . . . advice. The remedy Petitioners seek may be out of reach for a number of reasons."

Steven Semeraro, SCAM: The 2020 Post-Election Litigation Wasn't About Counting Legal Votes, 43 T. Jefferson L. Rev. 15, 40 (2021) (quoting Biden, 394 Wis. 2d 629, ¶73 (Roggensack, C.J., dissenting)) (ellipsis and modifications in the original). As that scholar continued, "[t]he dissenting opinions . . . only questioned technical issues of state law and did not suggest that . . . [President Trump] had won, much less in a landslide, or endorse overturning the election. . . . [The dissenters] agreed with the majority that the requested relief was not appropriate[.]" Id. at 38–39 nn.121, 130.

Why Justice Hagedorn deems it necessary to mischaracterize the Biden dissents is unclear. Whether "the dissenters were prepared to throw out votes" is wholly extraneous to his larger point that this court should significantly delay performing or even decline to perform its law-declaring function. See generally Cook v. Cook, 208 Wis. 2d 166, ¶51, 560 N.W.2d 246 (1997) (explaining this court "has been designated by the constitution . . . as a law-declaring court" and "oversee[s] and implement[s] the statewide development of the law" (quoted sources omitted)).

Next, Justice Hagedorn asserts Mueller v. Jacobs and Wisconsin Voters Alliance v. WEC raised "fantastical claims"—a fantastical assertion given that this court never heard these cases. When the court finally got around to deciding some of the legal issues raised in those cases, Justice Hagedorn ostensibly decided they were not so fantastical. He ruled in favor of the positions advanced by the petitioners in the rejected cases.

In Mueller, the petitioner argued so-called "ballot drop boxes" are illegal, and many votes in the fall 2020 election were therefore cast in an unlawful manner. When this court finally performed its duty and addressed the issue two years later, it concluded "drop boxes are illegal under Wisconsin statutes." Teigen, 403 Wis. 2d 607, ¶4 (majority op.). It also noted 528 drop boxes were utilized during the fall 2020 election. Id., ¶8. Justice Hagedorn agreed, joining the mandate and large parts of the majority opinion.

In Wisconsin Voters Alliance, the petitioners alleged, among other things, that "Dane County election officials violate[d] Wisconsin Law in allowing individuals to apply for indefinitely confined status based on COVID." In Jefferson v. Dane County, issued shortly after the denial of Wisconsin Voters Alliance, this court held the conduct unlawful. 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556. Justice Hagedorn joined the majority opinion.[52]

The petitioners further alleged the Milwaukee Election Commission "instruct[ed] clerks reviewing absentee envelope certifications to fill in missing information on the return envelope." The petitioners included a link to a YouTube video in which the administrator of the Milwaukee Election Commission instructed clerks reviewing absentee ballot envelopes, with regard to witness addresses, as follows: "Some of these items like witness address may be written in red and that is because we were able to locate the witnesses' address for the voter."[53] In a recent case, a circuit court temporarily enjoined WEC, barring its guidance on ballot curing. White v. WEC, No. 22-CV-1008, Dkt. 167 (Sept. 7, 2022). WEC withdrew its guidance the following week. Elections Commission Withdraws Guidance on Curing of Absentee Ballot Envelopes, WisPolitics (Sept. 14, 2022), https://www.wispolitics.com/2022/elections-commission-withdraws-guidance-on-curing-of-absentee-ballot-envelopes.

The petitioners also asserted "private money" from the Center for Tech & Civic Life (CTCL) was "gifted" to several cities, "all Democratic Party strongholds," so that "those cities . . . [could] facilitate the use of absentee voting in violation of Wisconsin law." The legality

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[52] For context, the petition for original action in Wisconsin Voters Alliance explains the Dane County clerk had "advised voters that they could apply for indefinitely confined status based solely on fear of COVID prior to the April 7, 2020 presidential preference primary election." On March 31, 2020, this court enjoined the clerk, requiring him to cease issuing such advice pending this court's ultimate ruling on its legality. The petitioners in Wisconsin Voters Alliance noted, however, the injunction did not require the clerk to remove electors from the list of indefinitely confined voters who did not qualify as indefinitely confined. "As a result, persons who had applied for indefinitely confined status during the April 7, 2020 election and whose application was approved and who voted in that election, would be automatically issued an absentee ballot for the November 3, 2020 Presidential election."

[53] https://www.youtube.com/watch?v=hbm-pPaYIqk.

of using private money to facilitate voting is questionable, but Justice Hagedorn's assertion that it did not happen is simply wrong. The CTCL documents on its website: "[T]he mayors of Wisconsin's five largest cities announced they secured $6.3 million in grant funds from . . . CTCL . . . to support election administration in the midst of the COVID-19 pandemic." CTCL Partners with 5 Wisconsin Cities to Implement Safe Voting Plan, CTCL (July 7, 2020), https://www.techandciviclife.org/wisconsin-safe-voting-plan/. A white paper by the Wisconsin Institute for Law & Liberty argues:

> Whether CTCL grants were made in an ostensibly nonpartisan manner or not, the municipalities they went to had an outsized impact on election results in Wisconsin. For better or worse, Wisconsin's elections are run largely by clerks at the local level. For some of these clerks, this is a part-time, unpaid job. This creates a fundamental unfairness in the voting system, where residents of larger municipalities with full-time elections staff are more likely to enjoy the benefits of election grants than residents of small town or rural parts of the state. . . .
>
> CTCL contributions were not the non-partisan civic beneficence that they were claimed to be. They were close to a thinly disguised and undisclosed independent partisan expenditure, mostly partially a ground game in heavily Democratic areas. It is not surprising that they were perceived as unfair. They were unfair.

Will Flanders, Cori Petersen & Kyle Koenen, Finger on the Scale: Examining Private Funding of Elections in Wisconsin 15 (2021), https://will-law.org/wp-content/uploads/2021/06/WillLawFINGER-ON-THE-SCALE.9.pdf.

Justice Hagedorn claims the relief sought in both cases was also "fantastical[.]" In Mueller, the petitioner primarily sought the following: "[A] declaratory judgment that . . . [WEC] lacked the authority to place ballot drop boxes anywhere in the state of Wisconsin and to tell or insinuate to county election officials, that they could legally place ballot drop boxes throughout their jurisdiction in order to collect ballots." This court provided nearly identical relief in Teigen—with Justice Hagedorn joining the majority opinion on that score. The petitioner also sought the removal of votes cast via the 500+ drop boxes from the vote counts so as to avoid the dilution of lawfully cast votes. See Teigen, 403 Wis. 2d 607, ¶25 (lead op.) ("Unlawful votes do not dilute lawful votes so much as they pollute them, which in turn pollutes the integrity of the results." (cited sources omitted)). If that remedy were not possible, the petitioner asked for extraordinary relief: the nullification of the fall 2020 election and a declaration that the legislature could appoint members of the Electoral College. Justice Hagedorn latches onto this last requested remedy and treats it as if it were first and only. In Wisconsin Voters Alliance, the only relief specifically requested was indeed extraordinary; however, as then-Chief Justice Roggensack explained: "Justice Hagedorn has the cart before the horse in regard to our consideration of this petition for original action. We grant petitions to exercise our jurisdiction based on whether the legal issues

presented are of state wide concern, not based on the remedies requested." No. 2020AP1930-OA, unpublished order, at 4 (Wis. Dec. 4, 2020) (Roggensack, C.J., dissenting from the denial of the petition for leave to commence an original action) (citing Petition of Heil, 230 Wis. 428, 284 N.W. 42 (1938)).

Justice Hagedorn also mischaracterizes Hawkins v. WEC, 2020 WI 75, 393 Wis. 2d 629, 948 N.W.2d 877. In that case, WEC committed blatant legal error in denying a small third party ballot access. It did so at a hearing on August 20, 2020. Id., ¶22 (Roggensack, C.J., dissenting). On August 26, WEC certified the independent candidates for President and Vice President of the United States. Id., ¶23. On September 3, the petitioners filed for leave to commence an original action. Id., ¶24. This court then "sat on its hands" until September 14 when it denied the petition. In the denial order, the majority claimed the petitioners took too long to file. Justice Hagedorn now says the petitioners "sat on their hands rather than seek prompt relief." If a mere two weeks (assuming petitioners could have even filed on August 20) constitutes dilatory behavior, attorneys beware. Ironically, this court took nearly as long to simply deny the petition. Incentivizing attorneys to file hastily drafted pleadings to satisfy the majority's distorted vision of timeliness bodes ill for the administration of justice in this state and effectively forecloses appellate review to the poor who cannot afford to keep a team of high priced lawyers on retainer to vindicate their rights.

In discussing another election case, Zignego v. WEC, Justice Hagedorn resorts to personal attacks against his colleagues, impugning our motives and integrity. He claims to know our subjective intent, confidently proclaiming, "the dissent's real complaint has to do with how quickly this court intervenes, and how much special solicitude we give to certain litigants or issues." Justice Hagedorn similarly claims the dissenters in State ex rel. Vos v. Circuit Court for Dane County were "so motivated by the underlying issues" that they were "prepared to disregard the plain words of the statute[.]" In referencing yet another case, he accuses us of failing "to give the legal questions the kind of dispassionate attention they deserve." He insidiously insinuates some of his colleagues are biased in favor of some parties, noting "no litigant should have a leg up or leg down on another. Even when important constitutional rights are implicated, courts must not decide how a case should come out and then adjust judicial methods to ensure the 'right' outcome is achieved."

An allegation of judicial bias is a serious charge for which Justice Hagedorn offers no evidence. Such accusations increasingly permeate a biased media, propounded by political partisans bent on tearing down the judiciary as an institution whenever a court reaches outcomes disfavored by the progressive political movement. When they infect a judicial opinion, they are:

> a poor substitute for legal argument. Such personal aspersions have no place in a judicial opinion. . . . [It] do[es] real damage to the public's perception of this court's

> work. We must aspire to be better models of respectful dialogue to preserve the public's confidence on which this court's legitimacy rests.

Teigen, 403 Wis. 2d 607, n.29 (modifications in the original) (quoted source omitted). "Political talking points are no substitute for legal analysis." Id.

Justice Hagedorn also faults the dissenters for wanting to protect liberty during a once-in-a-century emergency. One United States Supreme Court justice recently explained, citing events in Wisconsin and elsewhere:

> Since March 2020, we may have experienced [one of] the greatest intrusions on civil liberties in the peacetime history of this country. Executive officials across the country issued emergency decrees on a breathtaking scale. Governors and local leaders imposed lockdown orders forcing people to remain in their homes. They shuttered businesses and schools, public and private. They closed churches even as they allowed casinos and other favored businesses to carry on. They threatened violators not just with civil penalties but with criminal sanctions too. They surveilled church parking lots, recorded license plates, and issued notices warning that attendance at even outdoor services satisfying all state social-distancing and hygiene requirements could amount to criminal conduct. They divided cities and neighborhoods into color-coded zones, forced individuals to fight for their freedoms in court on emergency timetables, and then changed their color-coded schemes when defeat in court seemed imminent.

Arizona v. Mayorkas, 598 U.S. __, 143 S. Ct. 1312, 1314–15 (2023) (statement of Gorsuch, J.). My desire to promptly hear cases challenging such chilling abuses of governmental power during the COVID-19 pandemic stemmed from a "special solicitude" for one thing: liberty. After all, our constitutions protect it, and we all swore an oath to support them. We owe that to the public. See generally Lindsay F. Wiley & Stephen I. Vladeck, Coronavirus, Civil Liberties, and the Courts: The Case Against "Suspending" Judicial Review, 133 Harv. L. Rev. Forum 179, 195 (2020) ("[R]obust judicial review not only helps to smoke out pretext for government actions during an emergency, but also has value for the government—which can use the case law its policies generate to help define the boundaries of its future approaches."). Much like Goldilocks' view on porridge, a case has to be "just right" to interest Justice Hagedorn. The Three Bears (Golden Press 43d prtg. 1982). File too early, and he will reject the case as not ripe; file too late, and he will reject the case as time-barred or moot.

Justice Hagedorn also misrepresents Gahl v. Aurora Health Care, Inc., 2023 WI 35, __ Wis. 2d __, 989 N.W.2d 561. He claims:

> There, three members of this court were prepared again to intervene in dramatic fashion after the court of appeals stayed a circuit court order that required Aurora Hospital to administer a medication it believed was below the standard of care for one of its patients. Earlier this month, this court confirmed 6-1 that the circuit court order lacked legal authority. If anything, the emergency petition cited by the dissent demonstrates that this court is not at its best when acting on an emergency basis. When this court gets caught up in the fervors of the moment, we make mistakes. When we allow judicial process to operate as designed, however, we are far more likely to give the legal questions the kind of dispassionate attention they deserve.

Here's the truth:

> [T]he modified order does not compel any healthcare provider to administer treatment. The court of appeals nevertheless accepted the appeal on an interlocutory basis and effectively answered the question in Aurora's favor, but with no analysis, and also issued a stay of the circuit court's order the court of appeals hadn't even seen—a stay that no one requested. The modified order reflecting the parties' agreement did not compel Aurora (or any other unwilling provider) to administer the treatment prescribed by Mr. Zingsheim's physician. Aurora itself acknowledges the legal issue in this case "transcends" the treatment Mr. Zingsheim individually receives. Of course, for Mr. Zingsheim the importance of that legal issue pales in comparison to the immediate resolution of a medical dispute over his wish to try potentially life-saving treatment. Seemingly recognizing this, Aurora never asked the court of appeals to stay the circuit court's order, never urged this court to maintain the stay, and took no position on the petition to bypass; instead, Aurora urged the court to afford the parties sufficient opportunity for thorough briefing necessary for careful consideration of the legal question it poses. And rightly so. The issue presented is unquestionably of great significance and importance to health care providers, patients, and their families statewide, particularly during an ongoing pandemic for which much of the medical community offers no remedy.

Gahl v. Aurora Health Care, Inc., No. 2021AP1787, unpublished order, at 4 (Wis. Oct. 25, 2021) (Rebecca Grassl Bradley, J., dissenting from the denial of the petition to bypass). Just because a majority of this court later rejected Gahl's argument does not mean denying bypass was wise. A man's life was at stake.

Setting aside his distortion of several cases, Justice Hagedorn fundamentally misunderstands the judicial role. Justice Hagedorn is first and foremost a judicial minimalist but has never reconciled that view with originalist principles. Justice Hagedorn's concurrence leaves the impression the dissenters have not just acted imprudently but improperly. For example, Justice

Hagedorn claims "normal process" has been "short-circuited"—as if this court has no process to hear cases on original action and bypass. He incorrectly claims any view other than his "has no basis in the Wisconsin Constitution, and is rooted in a view of judicial supremacy that consolidates power in the judicial branch generally, and in this court in particular." Notably, he provides little to no analysis to support this claim. Apparently Justice Hagedorn is content to let the other branches run roughshod over the people's rights. But the people established a judiciary to protect their rights—not to turn a blind eye toward every encroachment.

When the Wisconsin Constitution was first adopted, the provision regarding this court's jurisdiction read:

> The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be coextensive with the state; but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control over all inferior courts; it shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, and to hear and determine the same.

Wis. Const. art. VII, § 3 (1848), as reprinted in Attorney Gen. v. Blossom, 1 Wis. 317, 318 (1853).[54] In 1874, this court held this provision made this court "a court of first resort on all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." Attorney Gen. v. Chicago & N.W. Ry., 35 Wis. 425, 518 (1874) (citing Blossom, 1 Wis. 317) (emphasis added). This holding has been repeated multiple times over the last 149 years. Heil, 230 Wis. at 436 ("[T]he purpose of the constitution was, 'To make this court indeed a supreme judicial tribunal over the whole state; . . . a court of first resort on all questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of its people.'" (quoting Chicago & N.W. Ry., 230 Wis. at 518) (emphasis added)); see also Wis. Legislature v. Palm, 2020 WI 42, ¶10, 391 Wis. 2d 497, 942 N.W.2d 900 (quoting Heil, 230 Wis. at 436).

If any doubt existed as to the legitimacy of this court's original jurisdiction, it ended with a 1977 amendment to the Wisconsin Constitution. Article VII, Section 3(2) now reads: "The supreme court has appellate jurisdiction over all courts and may hear original actions and

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[54] Interestingly, the 1848 Wisconsin Constitution posted on the Wisconsin Historical Society's website reads quite differently: "The supreme court, except in cases otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, but in no case removed to the supreme court shall a trial by jury be allowed. The supreme court shall have a general superintending control." Wis. Const. art. VII, § 3 (1848), https://content.wisconsinhistory.org/digital/collection/tp/id/71786.

proceedings. The supreme court may issue all writs necessary in aid of its jurisdiction." As one legal scholar wrote:

> The plain language of Article 3(2), section 3(2) indicates the incredible breadth of the Wisconsin Supreme Court's original jurisdiction. Indeed, the text of section 3(2) does not place any limits on it. All section 3(2) says on the topic is that "[t]he supreme court . . . may hear original actions and proceedings." As indicated by the use of the word "may," the Wisconsin Supreme Court has "absolute discretion" in determining whether to grant a petition for leave to commence an original action.

Skylar Croy, As I See It: Examining the Supreme Court's Broad Original Jurisdiction, Wis. Law. (July 2021), https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=94&Issue=7&ArticleID=28514#a (quoting William A. Bablitch, Court Reform of 1977: The Wisconsin Supreme Court Ten Years Later, 72 Marq. L. Rev. 1, 18–19 (1988)). This court has explained its original jurisdiction is "clearly plenary," and one professor noted it is "practically unlimited in scope[.]" State ex rel. Swan v. Elections Bd., 133 Wis. 2d 87, 93, 394 N.W.2d 732 (1986) (per curiam); Jay E. Grenig, 1 Wisconsin Pleading and Practice Forms § 2:34 (5th ed. updated June 2022).

The amendment in question emerged during a broader reform of the Wisconsin Court System, which was spurred by the public's concern that this court was deciding "[c]ases involving major questions of substantive law . . . on the basis of superficial issues." Citizens Study Comm. on Judicial Org., Report To Governor Patrick J. Lucey 78 (1973). "It is only human for a justice who is behind in his assigned work to choose less important procedural errors on which to base a decision, permitting a rapid disposition of the appeal. . . . Terse or incomplete opinions create uncertainty as to the case law and encourage more litigation." Id. Voiced 50 years ago, this concern resonates again. The court of appeals was created, and other structural reforms enacted, so that this court could focus on its law-developing function. See Matthew E. Garbys, Comment, A Shift in the Bottleneck: The Appellate Caseload Problem Twenty Years After the Creation of the Wisconsin Court of Appeals, 1998 Wis. L. Rev. 1547, 1548–49.

This court's broad jurisdiction "helps it serve the public," which was central to the people's design when they amended the Wisconsin Constitution. Croy, Examining the Supreme Court's Broad Original Jurisdiction. "Sometimes, the mere uncertainty of the answer to a legal question causes irreparable harm. Cases presenting these kinds of questions are like untreated wounds, which fester over time. The longer the case goes without a final resolution, the more damage occurs." Id. Waiting for a case to proceed through the lower courts can frustrate the performance of this court's law-developing function (like it did in Biden) and subject the public to avoidable confusion regarding the state of the law. Justice delayed is often justice denied. For scholarly and

capable justices, the decisionmaking process in cases involving novel legal questions is, as an empirical matter, often not aided by these cases first proceeding through the lower courts.

The misbranded "anti-canon" lamented by Justice Hagedorn concerns such cases. Most of the cases involved serious election disputes, which undoubtedly "affect[] the sovereignty of the state, its franchises or prerogatives[.]" Chicago & N.W. Ry., 35 Wis. at 518 (citing Blossom, 1 Wis. 317). It is absurd to reorder the judicial system to empower a single judge in a single county to decide election law for an entire state—a decision to govern all future elections until an appellate court says otherwise. Other cases involved some of the most fundamental questions of liberty this court ever faced. Justice Hagedorn decries the recent increase in original actions but ignores the world around him, which has been in a state of chaos for three years. See Croy, Examining the Supreme Court's Broad Original Jurisdiction ("2020 was not an ordinary year. The outbreak of COVID-19 and the presidential election caused numerous legal issues. In turn, the Wisconsin Supreme Court was inundated with petitions for leave to commence an original action.").

Justice Hagedorn's limited conception of the judicial role is not rooted in the text of the Wisconsin Constitution, its history, or traditional judicial values. Rather, he adopts a view that came into being primarily during the Progressive Era, "when judges abandoned their obligation to uphold the Constitution in extreme deference to majoritarian impulses, thereby elevating legislative acts over the Constitution—at the expense of individual rights and liberty." James v. Heinrich, 2021 WI 58, n.18, 397 Wis. 2d 517, 960 N.W.2d 350 (lead op.) (Randy E. Barnett, Our Republican Constitution: Securing the Liberty and Sovereignty of We the People 122–53 (2016)). Justice Hagedorn struggles unsuccessfully to ground his view in Marbury v. Madison. See 5 U.S. (1 Cranch) 137 (1803). Marbury was an original action in which the United States Supreme Court concluded it lacked subject matter jurisdiction—and therefore could not provide a remedy—but only after declaring several important points of law. Had the early justices of the United States Supreme Court embraced the minimalist principles often expounded by Justice Hagedorn, "the great opinion . . . in Marbury . . . would never have been written." James, 397 Wis. 2d 517, n.18 (quoting Gabler v. Crime Victims Rts. Bd., 2017 WI 67, ¶52, 376 Wis. 2d 147, 897 N.W.2d 384). As Justice Neil Gorsuch has observed:

> [W]hen a case or controversy comes within the judicial competence, the Constitution does not permit judges to look the other way; we must call foul when the constitutional lines are crossed. Indeed, the framers afforded us independence from the political branches in large part to encourage exactly this kind of "fortitude . . . to do [our] duty as faithful guardians of the Constitution."

Gundy v. United States, 588 U.S. __, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (quoting The Federalist No. 78, at 470 (C. Rossiter ed. 1961) (Alexander Hamilton)) (ellipsis and second modification in the original).

On a final note, Justice Hagedorn's commentary on parental rights is deeply disconcerting. He admits the rights are "generally recognized" but claims they are "vaguely defined," feeling a need to emphasize they are "unenumerated[.]" No self-proclaimed originalist could reconcile the policy at issue in this case with the federal or state constitutions. "For hundreds of years, parents' right to direct the upbringing and education of their children has been a fundamental and protected right under Article I, Section 1 of the Wisconsin Constitution and the Due Process Clause of the Fourteenth Amendment." Doe 1 v. Madison Metro. Sch. Dist., 2022 WI 65, ¶77, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting) (citations omitted). Indifference toward such policies prevails among well-off elites in every branch of government, who enjoy the luxury of enrolling their children in private schools. People without the financial means to make that choice will suffer injustice and concrete harm, along with their children. The justice system should be accessible to anyone whose constitutional rights have been trampled by public actors.

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Justice Hagedorn accuses three of his colleagues of giving "special solicitude" to "certain litigants," lacing his concurrence with vaguely sexist suggestions that we "get[] caught up in the fervors of the moment" and would "intervene in dramatic fashion" rather than give the law "dispassionate attention." Setting aside those insults, anyone who actually takes the time to read our dissents in the identified cases would readily understand our concerns focus on declaring the law so that the other branches of government will follow it. Resolving cases takes on greater urgency when parties bring credible claims of constitutional infringements.

Discussions of "values" have crept into our judicial elections over the last five years. A calamitous development for the rule of law, it entails judges and justices aligning themselves with one political party and its policy positions. There is but one overriding value judges should espouse on the campaign trail and in the performance of judicial duties: supporting the Constitution of the United States and the Constitution of the State of Wisconsin, in defense of the people's liberty. The majority should revisit the judicial oath and resign if unwilling to fulfill it.

I am authorized to state that Justice PATIENCE DRAKE ROGGENSACK joins this dissent.

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