In the Supreme Court of Wisconsin

JANE DOE 4,
PLAINTIFF-APPELLANT-PETITIONER,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
DEFENDANT-RESPONDENT,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL, and GENDER SEXUALITY ALLIANCE OF ROBERT M. LA FOLLETTE HIGH SCHOOL,
INTERVENORS-DEFENDANTS-RESPONDENTS.

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

REPLY IN SUPPORT OF AN INJUNCTION PENDING APPEAL

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INTRODUCTION

Defendants spend most of their response attempting to persuade this Court not to reach Plaintiff's injunction motion, and for good reason: they have no persuasive defense of the Policy, the District is currently treating children as the opposite sex without the parents' awareness, and their own expert [redacted] Their attempts to avoid the motion are all meritless and a sideshow. Most importantly, they cannot explain how parents are to protect their decision-making role without an injunction, given the District's Policy to conceal what is happening at school. Indeed, without even a shred of irony, Defendants argue that "neither Plaintiff nor her counsel have located th[e] parent[s]" whose rights are currently being violated. Resp. 33. That is because *those parents do not know who they are—only the District does*. This Court should grant an injunction.

ARGUMENT

I. Plaintiff Is Harmed by the Policy, and This Court Can and Should Also Consider the Harms to All Parents

Plaintiff's standing and harm for purposes of an injunction are based on three simple points: (1) a child can begin struggling with gender identity at any time, unbeknownst to parents; (2) the District will treat children as the opposite sex without parental notice or consent; and (3) many experts believe that an "affirmed" transition can cause long-term harm to minors. Pl's Mem. 35–38; 53–55. The first and second points are undisputed, and the third is undisputable.

Plaintiff provided expert and anecdotal evidence that this can arise "out of the blue" to parents, and Defendants' expert [redacted] Pl's Mem. 20. Defendants' one-sentence response—that Plaintiff "supplies no evidence for that assertion," Resp. 30—is bizarre given that Plaintiff cited this evidence.

As to the District's current application of its Policy, Defendants respond that there are "only two situations" where it has treated a child as the opposite sex without parental notice and consent. Resp. 3–4. That is not true. As Plaintiff explained, while the District admitted to only two situations *with a gender support plan*, it claims not to know how often it does this *without a plan* (and there is evidence it does so regularly). Pl's Mem. 10–11. And even as to situations with a plan, the District has yet to explain what it did to search or whether it completed its search. *Id.* Defendants do not address either point. Regardless, those two situations alone warrant an injunction—they are both *under eighth grade*.

As to the effects of a transition on minors, it is indisputable that many experts *believe* a social transition during childhood can cause long-term harm. Many have said so publicly, Pl's Mem. 11–15, and even Defendants' expert [redacted] Pl's Mem. 16–17, *infra* Part III. Whether they are right or not remains an open question, because there is insufficient evidence yet to answer it—which Defendants do not dispute—given how novel a phenomenon this is. Pl's Mem. 13; 17. But the experimental nature of this only magnifies the risk of harm. Thus, there is an imminent risk of substantial harm at all times —for Plaintiff as with all District parents—that can only be prevented with a preemptive injunction, given the secrecy policy.

Defendants' primary argument is that Plaintiff is not harmed because, when she was deposed, she acknowledged she did not have any indications that her child was dealing with gender identity issues. That is irrelevant for multiple reasons. First, it was based on *her knowledge*. If the District is concealing this from her—as it is in some situations—she would not necessarily know about it, as she testified. R.231 110:13–111:6. Second, it was a snapshot of one point in time, now half a year ago. Children change. As she testified [redacted],

she does not know the future. Pl's Mem. 21.[1] Her child may have begun struggling with this since, might currently be, or might soon. Third, the existence of the policy, which she and her child are subject to, creates a present and ongoing "concern" that the District is or will "conceal[ ] [this] from [her] purposely." R.23 ¶¶ 21–22; R.231 181:7–9, 195:6–11.

Finally, an injunction requiring parental notice and consent is perfectly tailored to preventing the harm and preserving the status quo.[2] If a child never seeks to change name and pronouns, the injunction will not require anything at all. If the parents are already aware and on board, the injunction will not require anything different. It would only have force in situations where a child wants to change name and pronouns at school and the District would otherwise do so without parental notice and consent.

Even setting aside the harm to Plaintiff, it is beyond dispute that the District is currently treating some children as the opposite sex without parental notice or consent. Defendants argue this Court should disregard this ongoing constitutional violation because Plaintiff has not proven she is one of those parents (although only the District has access to which parents' rights it is violating). This Court can and should consider the harm to all parents, for multiple reasons.

First, it is not unusual for individual plaintiffs to seek an injunction that would apply beyond them. When a policy is unlawful, Courts typically enjoin *the defendant* from applying it to anyone. In

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[1] Defendants falsely assert that Plaintiff testified "she does not believe … her child will *ever* do any of those things." Resp. 36. She did not. Rather, she testified: "All I can say is I don't know now. … At this time I don't think so, but I can't really predict where [my child will] be at in the future." R.231 109:15–110:8.

[2] Defendants argue that the relevant status quo is the District's unconstitutional policy. Resp. 22–25. That cannot be right. If a challenged illegal act becomes the "status quo," no one would ever get an injunction. As Plaintiff explained, an injunction will prevent the District from *changing* a child's sexual identity at school without parental consent—i.e., it will preserve the status quo. Pl's Mem. 56.

James v. Heinrich, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350, for example, this Court considered a challenge to an unlawful school-closure order. This Court enjoined the defendant, Dane County, from enforcing the order—and the injunction benefitted all schools, not just those that had sued. *Id.* ¶ 14. Similarly, in *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261, the Court of Appeals issued an injunction (which this Court affirmed) against an indoor gathering ban that was "invalid and unenforceable"—and the injunction was, again, against the defendant, and not limited to the plaintiff who sued. *Id.* ¶ 12. These are just two recent examples, there are undoubtedly many more.

More importantly, and perhaps unique to this case, the parents whose rights are currently being violated *do not know who they are*. To hold that the only parents who can sue and obtain injunctive relief are those who do not know they need to sue, because the District is hiding it from them, would effectively immunize the District's unconstitutional Policy. Courts regularly allow individual plaintiffs to bring claims for declaratory and injunctive relief against unlawful policies without requiring a class action. Pl's Bypass Reply at 4 n.2 (listing cases). The Policy is equally unconstitutional as to all parents in the District; requiring each sue separately is unmanageable and unnecessary.

Defendants suggest that considering all parents is inappropriate because some unidentified "other parents" might *want* the District to hide decisions about their own children from them. Resp. 39. This argument would be laughable if the issues were not so serious. Even if such parents exist, nothing prevents them from affirmatively authorizing the District to make this decision for them and keep it a secret from them—that is what parental consent forms do. But a school district cannot unilaterally usurp parents' decision-making authority.

Third, limiting an injunction to Plaintiff is not possible without violating the Circuit Court's protective order that this Court affirmed

(but declined to expand). That order limits disclosure of Plaintiff's identity to the *attorneys*, but does not allow District staff to learn who she is, to protect her and her child from retaliation for participating in this lawsuit. R.84; 95:24; 197:4–5. An injunction limited to Plaintiff alone would require District staff to learn who she is. The Circuit Court acknowledged this point when it issued a partial injunction last time this case was on appeal (which is no longer in place) and held it applicable to all parents, for precisely this reason. R.157 (order); R.153:46.

Defendants' argument that Plaintiff's child will not attend the District next year, citing a social media post from her ex-husband, is not true. Resp. 36. As Defendants know from the divorce agreement Plaintiff provided in discovery, she has final decision-making authority over education decisions. *See* R.231 99:11–13, 103:21–104:4. She has not decided yet what school her child will attend next year, but explained that Madison schools are the leading option. *Id*. 127:6–128:8.

Finally, Defendants argue that Jane Doe 4's ex-husband provides an example, that some of his past behaviors would warrant excluding him from this decision.[3] Resp. 5–6. If anything, this argument only reinforces Plaintiff's standing. And it also perfectly illustrates why the District's Policy is unconstitutional. While Plaintiff disagrees with some of her ex-husband's parenting, he has never physically abused their child, R.231 42:10–11, 43:9–11, he retains his parental authority, *id*. 139:1–139:8, and Plaintiff does not want the District withholding information from him, *id*. 104:8–15. A school district does not have power to act as an ad hoc family court, re-litigating family law issues and/or deciding on its own, independent of any court process, which parents

[3] As an aside, he is not a party and this case has nothing to do with him or their relationship. Including these details is entirely inappropriate. Plaintiff moved to seal this irrelevant, sensitive information about her ex-husband, R.264:3–6, 316, but the Circuit Court denied her motion, R.356:32–34—and then a few days later granted Defendants' motion to seal their expert's deposition transcript, even though his admissions are highly relevant and not sensitive in any way. R.359:30–35.

have authority over which decisions. Indeed, Defendants even invoke some of his social media posts as justification for usurping his parental authority. Resp. 6. The idea that a school can review parents' social media and on that basis exclude them from decisions involving their own children is, to put it mildly, terrifying.

II. Defendants Cannot Justify Concealing a Major Mental-Health Decision From Parents.

Defendants devote just four pages to defending the constitutionality of the Policy, and they respond to straw men. Resp. 43–46. They concede parents "have a fundamental right '*to make decisions*'" concerning their own children, Resp. 43, but argue Plaintiff must be more specific—even though that is exactly how this Court and the United States Supreme Court have articulated the right. *E.g.*, *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 20, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Troxel v. Granville*, 530 U.S. 57, 72–73 (2000) (plurality op.)).

In reality, they define the right too broadly, not Plaintiff. They argue that parents "do not have a constitutional right to control each and every aspect of their children's education." Resp. 45–46. That is not Plaintiff's position. As she explains, courts have defined the right in terms of decision-making authority. Pl's Mem. 40–49; *e.g.*, *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) ("the primary role in decisions"); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("broad parental authority"). Plaintiff does not seek "to direct how a public school teaches [her] child," Resp. 45, but she does expect that, when there is a decision to be made about her child, school officials will defer to her.

None of the cases they cite involved an infringement on parents' core decision-making role. They are almost all challenges to school curriculum. *Larson v. Burmaster*, involved a challenge to "summer homework." 2006 WI App 142, ¶ 1, 295 Wis. 2d 333, 720 N.W. 134. The Court rightfully held there is no right to a "homework-free summer" because "[d]ecisions as to what the curriculum offers or requires are

uniquely committed to the discretion of local school authorities." *Id.* ¶¶ 41–42. The federal cases are similar: *Leebaert* involved a challenge to a health class, 332 F.3d 134 (2d Cir. 2003); *Torlakson*, to social sciences curriculum, 973 F.3d 1010 (9th Cir. 2020); and *Blau*, to school dress codes, 401 F.3d 381 (6th Cir. 2005). None of these involved a school district making a significant and controversial health-related decision for a particular child without their awareness. One case even draws this distinction, emphasizing that a survey in school is not "of comparable gravity" to "depriv[ing] [parents] of their right to make decisions concerning their child"—exactly what is at stake here. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184–185 (3d Cir. 2005).

Defendants argue Plaintiff has cited "no case" applying parental rights in this context, Resp. 43 n.15, but they ignore *Ricard*, *Tatel*, and the *Kettle Moraine* case, Pl's Mem. 24, 45–46; App. 17–21. The only reason there are no published appellate cases (yet) on this topic is because schools have never—until recently—adopted official policies to conceal a major health-related decision from parents.

Confusingly, Defendants assert that Plaintiff "cites no authority … that the strict scrutiny test applies here." Resp. 44. Plaintiff cited *A.A.L.*, where this Court unanimously held just that. 2019 WI 57, ¶¶ 18–22. Defendants simply have no response.

Defendants argue that this Court should give "no credence" to Plaintiff's argument that a social transition is a major, health-related decision, yet they have no answer to the many experts who have written publicly that addressing a child as the opposite sex is an "active intervention" and "a form of psychosocial treatment." Pl's Mem. 11–15. In any event, whether characterized as medical treatment or not, this a serious decision, exactly the kind that parents "can and must make." *Parham*, 442 U.S. at 603. Their comparison to nicknames, Resp. 46, is frivolous. It is not difficult to distinguish between a nickname and

gender-identity change (the pronouns alone are an easy giveaway), and these are not remotely comparable in terms of their gravity.[4]

As to Plaintiff's Article I, § 18 claim, Defendants falsely assert that she did not plead such a claim. Resp. 43 n.14. As they know, there was a typo in the original complaint, but Plaintiff fixed that by filing an amended complaint, *with Defendants' consent*. R.261; 262. Their only other response is that Plaintiff is still able to "teach her child her religious beliefs." Resp. 43 n.14. That ignores the gravamen of Plaintiff's argument. The District's policy violates her right to *make decisions* for her child in accordance with her religious beliefs, and her ability to counsel and guide her child *in the moment of decision*. Pl's Mem. 42, 49. Defendants do not respond to her actual argument.

Defendants elsewhere hint at various justifications for their Policy. They suggest it is necessary to comply with "state and federal anti-discrimination laws," Resp. 24 and n.5, 41, but they do not cite any law (or case) that requires hiding this decision from parents. *Bostock*, 140 S. Ct. 1731 (2020), involved an adult with an employment-discrimination claim, and in *Whitaker*, the parents were involved, 858 F.3d 1034, 1040 (7th Cir. 2017). The idea that requiring parental consent is somehow "discriminatory" does not even make sense. Plaintiffs are not asking for some students to be treated differently than others—all minor students must obtain parent permission before school staff treat them as the opposite sex, just like they need permission to change their name in school records or take medication at school. Pl's Mem. 52. Some parents

[4] The injunction Plaintiff requests would not prohibit the use of a "gender-neutral nickname." Resp. 8. Moreover, the District does not treat nicknames and "affirmed" transgender names equally. If a teacher has any questions about a nickname, they can ask the parents, whereas the Policy *prohibits* staff from asking parents about a child's requested name if it would "reveal a student's gender identity." R.10:14 (Policy); R. 253:7 n.6 (many District trainings); R.184:2 (email to staff to "not volunteer information"). The injunction Plaintiff requests would allow staff to communicate with parents about their children—just like they can about "gender-neutral nicknames."

will say yes and others no, but the District cannot override parents in the name of uniformity. *See Parham*, 442 U.S. at 603.

Finally, truly exposing the constitutional problem, Defendants argue that the Policy is necessary to keep children safe, Resp. 4, 24, 40—which can only mean safe *from their own parents*. That is what this case boils down to. The District believes it knows better than parents how to respond when a child expresses a desire to change gender, and it will always say yes, though many experts believe it can be appropriate to say no. The District flips the presumption that parents will act in their child's best interests on its head and usurps their role without notice, a hearing, any evidence or allegation of harm, or any other procedural protection typically required to displace parents.

III. Defendants' Attempts to Minimize the Seriousness of Transitioning Fall Flat.

To distance themselves from the many professionals who explain that a childhood social transition is a major decision with long-term implications, Pl's Mem. 11–16, Defendants assert, citing Dr. Leibowitz, that "name and pronoun usage at school is not itself social transition." Resp. 8. But Plaintiff already explained that his quirky definition of "social transition" is inconsistent with how most experts use that phrase (even WPATH). Pl's Mem. 12 n.7, 19–20.

In any event, to avoid Dr. Leibowitz's definitional dodge, Plaintiff asked specifically about "adopting a name [and pronouns] associated with the opposite biological sex," and Dr. Leibowitz [redacted] Thus, it is not Plaintiff who misrepresents Dr. Leibowitz's testimony, but Defendants.

Defendants appear to concede that a social transition is a form of "medical treatment" when *discussed* with a mental-health professional

"in a clinical setting," Resp. 11, but somehow is not when facilitated secretly by untrained school staff. This distinction is incoherent. A social transition (even under Dr. Leibowitz's definition) does not occur in a "clinical setting," it occurs in the child's various social environments (like school), and the discussion Dr. Leibowitz has with parents, [redacted]

Defendants assert that Plaintiff "misstated" Dr. Leibowitz's testimony on the issue of whether a social transition contributes to persistence of gender dysphoria, citing, not his deposition, but his original affidavit. Resp. 11. Plaintiff simply pointed out, that, during his deposition, Dr. Leibowitz [redacted] Defendants do not explain how this was a misstatement of anything.

IV. Defendants' Various Attempts to Evade Resolution of This Motion Are Meritless.

Defendants argue Plaintiff waived any argument for an injunction pending appeal because her motion was short. Resp. 18–20. As Plaintiff already explained, she incorporated her arguments as to each of the factors from her prior briefing. Pl's Mem. 57.

Defendants suggest, however, that Plaintiff "failed to present these legal and factual arguments below even when the Circuit Court invited her to" during a status conference. Resp. 18. That seriously mischaracterizes what happened. The Court began by *thanking* Plaintiff for being concise: "your brief, thank you, was a picture of brevity, succinct and to the point." R.356:42. If the motion itself were not clear, Plaintiff reiterated that each factor "has been fully and sufficiently briefed … [and] the Court can rely on that briefing," especially given that "the [preliminary injunction] analysis … mirrors that for an injunction pending appeal." R.356:44, 48. The only difference, counsel explained, is that *Waity* requires "the court [ ] to consider separately the likelihood of

success on appeal." R.356:49. The Circuit Court did not, at any point, indicate that it would not permit Plaintiff's counsel to incorporate her arguments from her prior briefs, and had frequently directed the parties not to repeat arguments. *E.g.*, R.288:8, 11.

The Court did ask whether Plaintiff wanted to supplement her brief, but only as to one question: whether it "would be totally inconsistent with my conclusion on standing" to conclude that the Policy "will create a serious risk of irreparable harm for Jane Doe and her child." R.356:42. Plaintiff agreed it would be inconsistent, but noted that she disagreed with the holding on standing, *id.*, and later circled back to explain that *Waity* required the Court to consider appellate review of that decision, R.356:48–49; R.369:1 (flagging *Waity* again in reply). Plaintiff declined to supplement her initial brief to avoid more delay and because she answered the question orally.

Plaintiff's suggestion that the Circuit Court enter a prompt order denying her motion, *see* Resp. 1, 14, 18, was an attempt to avoid even more delay, given the Court's clear indication it would deny her motion. Although the Court was fully aware of the issues given that it had just considered her preliminary injunction motion, it set a hearing date for two months later, prompting Plaintiff to object and ask for a prompt decision, even if that meant denying her motion. R.356:45–49.

Defendants' argument that parties cannot file a motion with a bypass petition, Resp. 17–18, is equally meritless. They cite nothing for this proposition, and their logic make no sense. They concede that parties can file a motion in conjunction with a petition for review or for an original action—even though, as with a bypass petition, the *filing* of such petitions does not guarantee the Court will grant it. In any event, this Court has recently considered and decided motions submitted with a bypass petition without noting any jurisdictional problem. *Waity*, 2022 WI 6, ¶ 16; *Teigen v. WEC*, No. 22AP91, Order Dated 1/28/22.

Likewise, Defendants cite nothing to support their argument that a dismissal on standing somehow prevents appellate courts from granting an injunction pending an appeal, Resp. 21, and the text of Wis. Stat. § 808.07(2)(a)(2) contradicts their argument, as Plaintiff explained (among other reasons why this is wrong). Pl's Mem. 58–59.

Finally, Defendants' argument that Plaintiff is violating a court order by citing Dr. Levine's affidavit on appeal is also frivolous for many reasons. For one, the order itself did not purport to dictate what can or cannot be cited on appeal, R.357—nor do Defendants cite any authority for the proposition that a circuit court has such unilateral power over the Wisconsin Supreme Court. The strike order itself was erroneous, and *is one of the issues on appeal.* Pl's. Opening Br. Part III.D. Plaintiff also argued this issue *in her injunction motion*, Pl's Mem. 59–62, and Defendants do not even attempt to respond for purpose of this motion.

CONCLUSION

This Court should grant an injunction pending appeal.

Dated: March 31, 2023.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this reply conforms to the rules contained in Wis. Stat. § 809.81 for a document produced with a proportional serif font. The length of this reply is 3,912 words.

Dated: March 31, 2023.

LUKE N. BERG