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 BYPASS

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ARGUMENT

A few of Defendants' arguments warrant a short reply.

On the standing question, Defendants have no meaningful response to the split among circuit courts in this State on the purely legal question about whether parents have standing to challenge a school policy they are subject to that usurps their parental decision-making role and threatens serious harm to them and their children. Resolving this split is precisely the kind of question that calls for this Court's "law defining and law development" role. *Cook v. Cook*, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997); Wis. Stat. § 809.62(1r)(c). Defendants argue there is no split because the Kettle Moraine case is "different," Resp. 8, but they do not make any attempt to explain how. It is not meaningfully different (as to Plaintiffs P.W. and S.W. in that case); this Court can confirm by reviewing the decision. App. 21. And, if anything, Plaintiff's standing is even stronger here, because the District's written policy is to *conceal* the constitutional violation when it is occurring.

As to the injunction question, Defendants do not even attempt to rebut that this case involves a novel and significant question of constitutional law, with statewide importance (given the other school districts in the State with similar policies). Wis. Stat. § 809.62(1r)(a), (c); Pl's Mem. 22. Nor do they dispute that the injunction question is properly presented. Pl's Mem. 25. They attempt to reframe this case as being "about one plaintiff and her child," but this is just a diversionary tactic; this case has always been about the constitutionality of the District's Policy.[1] Plaintiff, like all parents with children in the District, is subject to the policy and harmed by it. Pls. Mem. 20–22, 36–40; 53–55. It is

[1] Even if it mattered, and it does not, this case was originally brought by *fourteen* parents, most of whom withdrew solely because their children left the District during the last three years. The fact that only one remains is irrelevant.

entirely ordinary for an individual plaintiff subject to an unlawful government policy to seek declaratory and injunctive relief against that policy without bringing a class action (which are generally for aggregating diffuse monetary damages), Resp. 13—this Court has considered multiple cases in that posture in recent years.[2] Most of Defendants' response goes to arguing that Plaintiff is not harmed by the policy and that this Court should not consider the District's admissions in discovery that it is currently applying its policy to violate parents' rights (which parents, only the District knows). Those arguments are wrong, but they go to the merits, not whether this Court should accept the case on bypass, so Plaintiff will not respond here.

Finally, Defendants mischaracterize the expert discovery issues as "fact-specific," rather than the important legal questions they are, to evade this Court's review. In doing so, they misrepresent the procedural history below. As to the work-product doctrine, Defendants argued below that the doctrine *never applies* when an expert submits an affidavit in a case, and the Circuit Court accepted that argument. R.276:2–3 (arguing that "a party waives *any* work product protection covering those communications when it discloses that expert"); R.310:21 ("[O]nce you name someone as a testifying expert, you open up their file to discovery."); R.310:37–38 ("I agree with Ms. Zylstra's analysis … *Dudek* doesn't apply."). Defendants now back off that position, conceding that *Dudek* does apply to some materials exchanged with testifying experts, Resp. 16 (quoting some of the examples listed in *Dudek*), but that concession does not change the scope of the erroneous holding below.

[2] *See*, *e.g.*, *James v. Heinrich*, 2021 WI 58, 397 Wis. 2d 517, 960 N.W.2d 350; *Tavern League of Wisconsin, Inc. v. Palm*, 2021 WI 33, 396 Wis. 2d 434, 957 N.W.2d 261; *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856; *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519; *Jefferson v. Dane Cnty.*, 2020 WI 90, 394 Wis. 2d 602, 951 N.W.2d 556; *Becker v. Dane Cnty.*, 2022 WI 63, 403 Wis. 2d 424, 977 N.W.2d 390.

Plaintiff, by contrast, and contrary to Defendants' representation to this Court, never argued that "*any* communication between counsel and a disclosed expert is work product." Resp. 16–17. Rather, Plaintiff's separate, overarching objection was that Wis. Stat § 804.01(2)(d) does not generally authorize discovery of any and all attorney-expert communications, but only "facts known and opinions held" by an expert (a different, also purely legal issue). Plaintiff objected separately that most (but not all) of the communications Plaintiff's counsel had with the expert were protected by the work-product doctrine, and the remainder were irrelevant (like scheduling emails). Pl's Mem. 29.[3]

Due to the broad nature of Defendants' position and the Circuit Court's holding below—that every attorney communication with a testifying expert is automatically discoverable notwithstanding the work-product doctrine and the limited scope of § 804.01(2)(d)—the parties never reached any specific details about any particular communications. Thus, the purely legal questions for this Court are: (1) the scope of discovery under § 804.01(2)(d); and (2) whether the work-product doctrine applies to testifying experts. If this Court agrees with Plaintiff that § 804.01(2)(d) is limited to discovering "facts known and opinions held," or that the work-product doctrine does apply to testifying experts, then either holding alone would warrant reversing the Circuit Court's erroneous decision to the contrary, and would set an important and novel legal precedent about the scope of expert discovery in Wisconsin courts, exactly the kind of issue that warrants bypass. Wis. Stat. §§ 809.62(1r)(b), (1r)(c)2, (1r)(c)3.

[3] Defendants misleadingly assert that Plaintiff's counsel "did not even review the documents before refusing to produce them." Plaintiff's counsel explained that they knew the kinds of communications they had with Plaintiff's expert to properly object. R.310:17, 23, 27.

CONCLUSION

This Court should accept this appeal on bypass.

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 980 words.

Dated: March 31, 2023.

LUKE N. BERG