No. 2022AP2042
No. 2023AP305
No. 2023AP306

IN THE WISCONSIN COURT OF APPEALS
DISTRICT IV

JANE DOE 4,
Plaintiff-Appellant,

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. LAFOLLETTE 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

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ORAL ARGUMENT AND PUBLICATION

The arguments put forward by Plaintiff-Appellant Jane Doe 4 on appeal are contrary to settled Wisconsin law on standing and the discovery issues. The Circuit Court's decision clearly comports with the relevant authorities, and Doe's arguments do not. Neither oral argument nor publication is warranted here.

INTRODUCTION

The main issue before this Court is a narrow one: did the Circuit Court abuse its discretion in denying Jane Doe's preliminary injunction after it found she lacked standing to challenge the District's "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" ("Guidance")? Since Doe admitted that she has no reason to believe the Guidance—which applies to students who want to use different names and/or pronouns—will ever apply to her child, she has no standing to challenge the Guidance. Yet Doe asks this Court to discard Wisconsin's standard for standing and allow anyone, anywhere, to challenge any policy they dislike. Courts exist to address a party's real and concrete injuries—not to give advisory opinions to a party, like Doe, who cannot show that she faces a real and concrete injury.

Because the Circuit Court correctly ruled that Doe lacks standing, it did not abuse its discretion in denying Doe's motion for a preliminary injunction. Moreover, even if Doe had standing, the

requirements for preliminary injunctive relief were not met. Finally, the Circuit Court properly disposed of the parties' discovery disputes.

STATEMENT OF THE CASE

A. Background Facts

1. *The District's Guidance.*

The District issued the Guidance in 2018 as part of its "efforts to provide safe, healthy and positive school environments for all transgender, non-binary, and gender-expansive youth." (R.230:¶4; R.3:1.) The District developed the Guidance based on evidence that transgender students have higher rates of suicide and suffer adverse outcomes at home and in school, including lower GPAs and an increased likelihood of abuse and harassment. (R.230:¶¶8-9; *see also* R.3:4-5.) The Guidance is intended to combat those adverse outcomes by describing best practices for fostering a gender-inclusive environment and providing information about policies that prioritize student safety and well-being. (R.230:¶¶5,8,10; R.3:3.)

The Guidance encourages District staff to include families in the process of supporting students who identify as transgender. (R.230:¶¶12-13.) In instances where a student wants to delay sharing with their family how they are referred to at school based on concerns about abuse or rejection, the Guidance encourages District staff to support the student with a Gender Support Plan and work toward making them comfortable sharing this information with their family. (*Id.*)

Instances in which a parent does not know of a student's Gender Support Plan are rare. Of more than 25,000 current students in the District, the record reflects only two situations where the District was not certain whether either parent was aware of the plan. (R.292:8; https://www.madison.k12.wi.us/about (last visited April 7, 2023); R.254, Ex.1,13-14.) And in one of those two situations, the student no longer has a Gender Support Plan because they returned to using their name or pronoun assigned at

birth. (*Id.*)[1] The remaining Gender Support Plan is not for Doe's child.

2. *Jane Doe Is Not Affected by The Guidance.*

Doe is a Christian who teaches religious beliefs to her child by reading the Bible to him/her, taking him/her to church, and enrolling him/her in Bible classes. (R.231, Ex. A at 200:13-201:17.)

[1] Thus, the District has ***not*** admitted "that it has and is facilitating gender transitions at school without the parents' awareness for students under eighth grade," as stated in Doe's Opening Brief (hereafter "Pl.Br.") at 1; rather, it stated only that it was not certain whether parents of two students were aware that those students had Gender Support Plans. (R.254, Ex. 1, at 18.) Doe's Opening Brief contains numerous other notable inaccuracies. Doe states she testified that "[i]f her child's 'gender expression [at school] w[ere] concealed from [her] purposefully,' *id*. 181:7-9, it would 'prohibit [her] from ... helping her child.'" *id.* 211:16-212:9. (Pl.Br., 17.) Doe actually testified that if the District teaches her child to call another student by pronouns that student desires, it does ***not*** interfere with her right to raise her child (R.231 Ex. A at 181:16-20). (*See also* Pl.Br., 9 (contending the Guidance "instructs staff to conceal" a student's gender identity when in reality "the Guidance encourages staff to disclose information that may reveal a student's gender identity to others if the teacher or staff member is legally required to do so, or if the student has authorized such disclosure" (R.230¶16)); Pl.Br., 10 (asserting the Circuit Court "*sua sponte*, floated dismissing the case" when in reality the District fully briefed justiciability issues that provided the basis for dismissal); *id.* at 14-17 (mischaracterizing the deposition testimony of Dr. Leibowitz by extracting excerpts out of context and replacing select words); *id.* at 30 (stating the Guidance "interferes with parents' ability to provide professional assistance their children may urgently need" when in reality, the Guidance permits parents to request a meeting to review their child's gender support plan at any time (R.230:¶12) and contains no provision that prevents parents from seeking professional medical help for their child).

Doe admits the Guidance has not prevented her from teaching her religious beliefs to her child. (*Id.*)[2]

Further, Doe agrees the District does not interfere with her right to raise her child or to make healthcare decisions for her child by teaching her child to call another student by the pronouns that student desires. (*See id.* at 181:16-182:1.) Doe has been satisfied with the District's communication with her and she has never gotten the impression that the District is pushing ideas of different gender identities upon her child. (*Id.* at 96:6-10,97:22-98:9, 98:24-99:1.) Doe understands she can ask her child's teacher if her child is using a different name or pronoun at school but admits she has never done so because she has no concerns that her child is using a different name or pronouns at school. (*See id.* at 41:22-24, 105:6-14, 109:2-110:12, 130:3-9, 196:20-197:25.)

[2] Doe has not brought a claim based on her religious beliefs. (R:87,¶87.) Doe moved to add that claim to her complaint but the court had not acted on that motion before the case was dismissed. (R.261.)

3. *Jane Doe's Child Is Not Affected by The Guidance.*

The Circuit Court determined that there is "[n]o evidence that the [Guidance] has applied, or does apply, to Jane Doe's child." (R.312:4.) Doe's child has never requested to go by a name or pronoun associated with the opposite sex. (R.231, Ex. A at 82:18-25, 84:14-15, 109:2-110:12.) Doe testified that she does not have "any reason to believe that [her child] has an interest in exploring [his/her] gender identity." (*Id.* at 84.) Jane Doe's child told her that "[redacted]." (*Id.* at 80:12-13.) Doe's child has never been seen by any medical or mental health professional related to gender identity or gender dysphoria. (*Id*. at 88:14-15.)

4. *Doe's Child Would Likely Face Abuse from His/Her Father If He Were Informed The Child Used Different Names or Pronouns at School.*

Jane Doe's ex-husband is the father of her child. (R.231, Ex. A at 28:24-29:1.) [redacted] (*Id.* at 169:2-

170:3; 220:13-23.) Doe's ex-husband is openly hostile toward the LGBTQ+ community and the concept of different gender identities. (*Id.* at 74:8-75:3.) [redacted] (*Id.* at 75:6-76:9, 154:23-155:5; R.231:¶6, Ex. D.) [redacted] (*Id.* at 10:1-11:4, 11:6-11:17,43:15-17, 45:7-22, 52:1-6, 52:7-10, 175:4-22, 177:9-178:5.) [redacted] (*Id.* at 167:16-20.)[3] [redacted] (*Id.* at 155:13-156:6.)

Doe testified that her child could rationally fear abuse from her ex-husband if her ex-husband learned their child was using a different pronoun. (*Id.* at 194:12-22.) Despite that, Doe does not

[3] [redacted] (*Id.* at 225:19-226:11.)

support an exception to telling a parent about their child's use of a different pronoun or name in cases where there is evidence or a likelihood of abuse. (*Id.* at 223:18-224:25.)[4]

5. *The Use of a Different Name or Pronoun Does Not Equate to Social Transition or Gender Dysphoria.*

When a student uses a name or pronouns at school that differ from those given at birth, it does not mean the student is socially transitioning or has gender dysphoria. (R.141:¶¶22-23,32.) Someone making a social transition goes through a multi-faceted process involving different "steps that one takes to present themselves as the gender with which they most identify." (*Id.*¶22.) Social transition can take many forms but is not defined by the use of different names or pronouns in one setting. (*Id.*)

Doctors do not define or diagnose gender dysphoria by the use of different names or pronouns either. Rather, they diagnose gender dysphoria based on "clinically-significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth." (*Id.*¶10.) There is no

[4] A fuller recitation of Doe's deposition testimony is contained in R.232.

scientific evidence demonstrating that a young person's use of a different name or pronoun at school will lead them to become transgender or have lifelong medical treatment needs. (*Id.*¶31.)

B. Procedural History

1. *Procedural History Prior To Remand.*

Doe is on her second appeal in this case, which was originally filed in February 2020. In her first appeal, Doe and her then fellow plaintiffs challenged the Circuit Court's ruling that permitted them to protect their identities from the public but required disclosure to opposing counsel. The Wisconsin Supreme Court held that the Circuit Court did not abuse its discretion by requiring plaintiffs to disclose their identities to the court and opposing counsel and remanded this case for further proceedings.

2. *Discovery Upon Remand.*

On August 9, 2022—even before remittitur from the Supreme Court—the Circuit Court held a scheduling conference pursuant to Plaintiffs' request for an expedited briefing schedule on their outstanding preliminary injunction motion. (R.195;

R.196.) Plaintiffs stated they wished to stand on their originally filed motion and brief. (R.226 at 10:19-20; *see also* R.195.) Defendants needed to take Plaintiffs' depositions and obtain written discovery. (R.198; R.226:15-17.) The Circuit Court set an expedited discovery, briefing, and hearing schedule, seeking to accommodate both the need for discovery and an expedited ruling. (R.223; R.226:17-18, 26-28; R.217.) Before discovery responses were due, all but one plaintiff, Jane Doe 4, voluntarily dismissed their claims. (R.201; R.219; R.222.)

In responding to Doe's injunction motion, the District argued that Doe did not have standing and sought dismissal. At a hearing on September 29, 2022, the Circuit Court raised the issue of whether the case could proceed if Doe did not have standing and in response, Doe sought and received the opportunity to file an overlength reply brief to address the District's dismissal request. (R:260:41-43.) At a hearing on October 19, 2022, the Circuit Court granted Doe's written request for the chance to submit additional

briefing on standing, and the Parties subsequently filed supplemental briefs. (R:288:23-31.)

3. *The Circuit Court's Dismissal of this Lawsuit.*

On November 23, 2022, the Circuit Court issued a Decision, holding that Doe presented "no evidence that she predicts, anticipates, or will actually suffer any individual harm," and accordingly, "Jane Doe has no standing and her Complaint must be dismissed." (R.312:1-2.) The court determined there was no evidence that the Guidance has applied, does apply, or will apply to Doe's child or that the Guidance, as applied to other persons, could harm Doe. (*Id.* at 4-5.)

The Circuit Court stated that Doe's lack of standing was integral to deciding her motion for a preliminary injunction. (R.312:8.) The court concluded Doe was not entitled to an injunction because her own deposition admissions established she did not have standing. (*Id.* at 1-2, 12-32.) And it dismissed the action because standing is required not only to receive a preliminary injunction, but also to proceed in court at all. (*Id.*) The

Circuit Court explained that "[p]roperly applied, the standing doctrine is a 'vital check on unbounded judicial power' which ensures judges do not take the law into our hands, but instead honor our 'limited and modest role in constitutional governance.'" (R.312:2 (quoting *Teigen v. Wis. Election Comm'n*, 2022 WI 64, ¶160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., op.)).) On November 28, 2022, Doe filed a Notice of Appeal of that Decision. (R.318.)

The same day that Doe filed a Notice of Appeal, she filed a three-paragraph motion for injunction pending appeal with the Circuit Court. (R.317.) On January 20, 2023, the Circuit Court denied that motion on the grounds that Doe admitted she had no "reason to believe that [her child] has an interest in exploring [his/her] gender identity." (R.383 at 6.) The court concluded this admission indicated Doe was unlikely to succeed on an appeal that was properly limited to whether she has standing (*id*. at 7), and unlikely to suffer irreparable harm pending that appeal (*id*. at 2).

4. *Defendants' Motion to Strike Dr. Levine's Affidavits.*

In response to the District's discovery requests, Doe refused to produce her counsel's communications with her expert, Dr. Levine, raising a blanket attorney work-product objection. (R.276.) She did not prepare a privilege log or identify any responsive documents.

The District moved to compel and the Circuit Court granted the motion, ordering production and fees to the District. (R.310:39.) Doe failed to comply and the District moved to enforce the order, asking the court to strike Dr. Levine as a witness—including his affidavits—if Doe continued not to comply. (R.302.) The court *again* ordered Doe to produce the documents. (R.311.) The following day, the court dismissed Doe's Complaint for lack of standing.

Subsequently, the District moved the Circuit Court to strike the two affidavits of Dr. Levine. (R.334.) At the hearing on this motion, Doe confirmed she would rely on Dr. Levine's affidavits to support both her motion for injunction pending appeal that was

pending in the Circuit Court and her appeal. (R.359:37-40,46.) The Circuit Court acknowledged it had jurisdiction over Doe's pending motion, had authority to compel discovery germane to that motion, and could impose sanctions for Doe's failure to comply. (*Id.* at 38-40.) Noting it ordered Doe to produce communications with Dr. Levine twice before, the court ruled that Dr. Levine's two affidavits (R.31; R.142) be struck from the record as a sanction. (R.359:45,48.) Doe orally moved for a stay pending appeal of that order, (*id.* at 54-55), which the court denied after briefing. (R.383.)

5. *Defendants' Motion to Seal Deposition Transcript of Dr. Leibowitz.*

After insisting no discovery was necessary to decide her preliminary injunction, Doe unilaterally subpoenaed the District's expert, Dr. Liebowitz, for a deposition. In response, the District filed an emergency motion for a protective order. (R.242.) The Circuit Court held a hearing on the motion, set a different date for that deposition, and ordered that Dr. Leibowitz's deposition transcript would be protected for 30 days after his deposition to

allow the District's counsel time to request more permanent protection, if needed. (R.260 at 40:13-20.)

Doe's counsel deposed Dr. Leibowitz for over seven hours, asking him about numerous issues unrelated to his expertise or this case. (*See, e.g.*, R.308 at 22:5-12 ([redacted]); *Id.* at 171:23-172:9 ([redacted]); *Id.* at 115:12-15 ([redacted]).) Doe marked 19 exhibits (that she failed to timely produce in response discovery), and asked Dr. Leibowitz only a handful of questions about his affidavit and/or the Guidance. (*See id.* at 11:20-12:1, 201:1-203:4.)

Despite the fact that the Circuit Court had told the parties that it did not consider the experts' statements relevant to justiciability, (*id.* at 50:19-25), Doe filed the unreviewed transcript of Dr. Leibowitz just 6 days after the deposition. (R.308, Ex. A). Doe purportedly did so in response to the Circuit Court's request in an earlier hearing that the parties submit statements identifying any disputed facts previously submitted relevant to

justiciability. (R.310:51.) This is the only reason that Dr. Leibowitz's transcript is in the record.

The District moved to strike all references in the record to Dr. Leibowitz's deposition transcript and to seal his transcript. (R.334, R.344.) The Circuit Court denied the motion to strike but granted the motion to seal the transcript. (R.359:35, 67.) The Circuit Court did not rely on or cite to Dr. Leibowitz's transcript.

ARGUMENT

The predominant question this appeal raises is a procedural one: did the Circuit Court abuse its discretion in denying Doe's preliminary injunction because Doe lacked standing to challenge the Guidance? Because Doe, by her own admissions, has no reason to believe that the Guidance will ever apply to her child, she lacks standing and her case was properly dismissed. To rule otherwise would open the floodgates to litigation from anyone, anywhere.

Consequently, the Circuit Court did not abuse its discretion in denying a preliminary injunction because Doe lacked standing; she could not show that she faced irreparable harm; the injunction

would disrupt the status quo; and she is not likely to succeed on the merits of her case.

Finally, the Circuit Court did not abuse its discretion in deciding the discovery disputes. Well-established Wisconsin case law explains that communications between Doe's attorneys and her testifying expert, Dr. Levine, are not protected by work-product privilege, and it was therefore sanctionable to refuse to produce the requested communications. And it was proper for the Circuit Court to seal the deposition transcript of Defendants' expert, Dr. Leibowitz.

I. DOE LACKS STANDING BECAUSE SHE DOES NOT ANTICIPATE AN INJURY.

The Circuit Court was correct that, even taking the most liberal view of standing principles in Wisconsin, Doe could not show she anticipated injury to even a trifling interest. Doe's child does not have gender dysphoria and there is no evidence to suggest her child will develop gender dysphoria in the foreseeable future. Nor can Doe create standing by raising concerns about gender dysphoria arising "out-of-the-blue" in some children. Even if this

Court were to accept her stricken expert's argument that correlation equals causation based on a non-scientific online survey, Doe cannot connect that concern to her child. (R:357; R:31,¶78; R:141,¶27 (noting that "rapid onset gender dysphoria" was coined in an article based on one online survey of recruited participants skeptical of their children's affirmed gender).)

As the Circuit Court found, Doe had no standing because she failed to show why she anticipates that the District's policies will cause her injury. (R:312 at 3.) This Court should affirm this holding. The opinions of Doe's expert have been properly struck but even if this Court had questions related to those opinions, the only fair remedy would be to remand this case to the Circuit Court for it to fully consider the evidence (some of which Doe has still refused to produce) and decide whether she has standing.

The existence of standing generally presents a question of law, which this Court reviews independently, benefiting from the Circuit Court's analysis. *Teigen,* 2022 WI 64, ¶10 (R.G. Bradley, concurrence). While standing issues generally reach the appellate

level after a motion to dismiss, the Wisconsin Supreme Court has indicated that circuit courts should not stop searching for standing at that point. As Justice R. Bradley stated in *Teigen,* because the "judiciary has 'inherent power to protect itself against any action that would . . . materially impair its efficiency' . . .[a]s a practical matter, courts should not devote time or resources to adjudicating disputes only to ultimately conclude a party is not entitled to relief." *Id.* ¶18 (*quoting State v. Holmes*, 106 Wis. 2d 31, 40, 315 N.W.2d 703 (1982)[5]). Here, the Circuit Court correctly followed that admonition.

A. The Circuit Court Correctly Relied on Doe's Testimony to Determine She Did Not Have Standing.

Doe would prefer this Court not focus on the Circuit Court's conclusions regarding her and her child, because they demonstrate

[5] In *State v. Holmes,* the Wisconsin Supreme Court held that circuit courts can *sua sponte* raise issues, as long as they "giv[e] the litigants notice of its consideration of the issue and an opportunity to argue the issue." 106 Wis. 2d at 40. As in *Holmes*, the Circuit Court gave both sides ample opportunity to highlight evidence and make legal arguments on standing, even granting Doe additional briefing on the issue.

she lacks standing. As the Circuit Court explained, relying on Doe's sworn testimony, there was:

1. "No evidence that the [Guidance] has applied, or does apply, to Jane Doe's child."

2. "No evidence that the [Guidance], applied to other persons, could harm Jane Doe."

3. "No evidence that Jane Doe anticipates the [Guidance] will apply to her child."

(R.312:4-5.) Doe has never talked to anyone at her child's school to explain her child's gender or the pronouns she chose for her child. (R.274 at 108:13-110:12, 106:12-14.) Doe repeatedly testified that she was confident her child would not explore his/her gender, and her child would talk to her if concerns about that arose.

As the Circuit Court found, Doe could not bridge the gap between harm that is "anticipatory" and harm that simply "could happen." (R:312:2-3.) Given her sworn testimony, Doe could not show she anticipates the Guidance would cause her injury. The Circuit Court correctly explained she could no more anticipate an injury from the Guidance than nearby parents whose children might transfer to the District, or expecting parents whose children

might someday enroll in the District, or everyone else, anywhere, who could move, adopt, or otherwise be in the District while the Guidance exists. (R:312 at 3.)

Doe inexplicably argues that this Court should accept the stricken affidavits of her expert (whose deposition was to be taken after she produced documents she has refused to produce, even in the face of an order compelling their production), which relied on non-scientific questionable data to argue that gender dysphoria can arise "out-of-the-blue." Setting aside that she fails to explain why this Court should accept her expert's stricken affidavits over the affidavit of the District's expert, it is of no import because, as the Circuit Court found, Doe's own testimony was more than enough to establish she did not have standing.

While Doe cannot dispute that children must have obvious symptoms of distress to have gender dysphoria, she argues that other unnamed, non-party, parents may not realize their children (who would be showing obvious signs of distress) have gender dysphoria. Even if these parents had standing, Doe does not

explain why she is competent to raise these concerns on their behalf.[6]

Doe urges this Court to go further and assume the studies on children who undergo social transition would apply to children who simply use different names or pronouns at school. But social transition is not defined by the use of different names or pronouns in one setting. (R.141,¶22.) And making the assumption Doe requests would require this Court to accept Doe's stricken expert's non-scientific unsupported opinion that referring to a student as they desire is medical treatment, rather than Dr. Leibowitz's opinion that it is not. (*See* R:141,¶27 (explaining claims regarding "rapid onset gender dysphoria" are dubious).) That would require this Court to find facts, which it may not do because it is not a factfinding court.

[6] Perhaps Doe would like to subtly argue that she is raising a facial challenge, so subtle that she only uses a variant of the word facial one-time in her opening brief. (Pl.Br., 7.) But even if she seeks to raise a facial challenge, she still must have standing. *See, e.g., State v. Stevenson,* 2000 WI 71, ¶ 12, 236 Wis. 2d 86, 613 N.W.2d 90 ("Litigants claiming that a statute suffers from a constitutional infirmary generally must have a personal and vested interest in the outcome of the litigation.").

Because Doe has no real support for her "out-of-the-blue" argument, her only remaining argument is that some very small number of students may seek to use a different name and pronouns at school, and an even smaller number of students (at best 2 out of 27,000 as of August 2020) may not want to involve their parents in this choice. Doe testified that her child would not be one of these children. Yet she wants this Court to conclude she has standing anyway.

B. The Circuit Court Correctly Applied Wisconsin Current Law on Standing, and Declined Doe's Broad Request for Expansion.

To find in her favor, Doe asks this Court to expand the judicial limit of standing to non-existence. While this Court has opened the courthouse doors to more individuals, there is still some limit to standing. *See, e.g., Teigen*, 2022 WI 64, ¶36 (concluding plaintiffs who did not vote in region where drop boxes were used had standing to challenge whether the law allowed voting drop boxes to be used). This Court should not accept Doe's invitation to

allow individuals who do not anticipate an injury to seek declaratory judgments.

Doe suggests the Circuit Court applied the wrong legal standard for determining standing by requiring actual harm. (Pl.Br., 33.) The Circuit Court did no such thing. The court carefully reviewed every case Doe cited in her Supplemental Brief on Standing and determined those cases did not support Doe's assertions here. (*See* R.312:25-30 (Circuit Court discussing and distinguishing Doe's cases).)

The Circuit Court concluded that *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866, did not support Doe's argument because the plaintiff there was found to have a "tangible interest" and an "anticipation of future harm" based on "concrete and particularized evidence of past harm" to several union members. (R.312:25-26.) Here, Doe has not shown she has a tangible interest or can anticipate future harm. By her own testimony, she does not believe her child would

ever explore his/her gender, much less not share that decision with her.

Doe argues that the court in *Norquist v. Zeuske* found standing based on threats of injury that were far more remote. Not so. In *Norquist*, the plaintiff established standing through an "actual injury" because the facts showed the plaintiff would "inevitably" suffer a direct financial harm. *Norquist*, 211 Wis. 2d 241, ¶11, 564 N.W.2d 748 (1997). Here, harm to Doe is far from inevitable. She does not even think her child will take advantage of the Guidance and not inform her. Further, Jane Doe's ex-husband has publicly stated that the child will not be attending a District school next year. (R.231, Ex. C.)

Nor can Doe genuinely argue that *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship.*, found standing in more remote circumstances. *Putnam* was a class action and this case is not. (R.312:28-29.) There, the court concluded class members anticipated harm that was "imminent and [a] practical certainty." *Putnam*, 2002 WI 108, ¶46, 255 Wis. 2d 447, 649 N.W.2d 626. Doe

has not brought a class action and does not think she will ever suffer a harm. She cannot even suggest that her anticipated harm is "imminent" or "[a] practical certainty."

Doe also "badly misrepresents the court's holding" in *State ex rel. Parker v. Fiedler* to argue that it supports her claim of standing. (R.312:29-30); *see Parker,* 180 Wis. 2d 438, 509 N.W.2d 440 (Ct. App. 1993), *rev'd on other grounds sub nom. State ex rel. Parker v. Sullivan*, 184 Wis. 2d 668, 517 N.W.2d 449 (1994). In *Parker*, the plaintiffs showed actual harm to themselves. 180 Wis. 2d at 447. In contrast, as the Circuit Court found, Doe merely asserts she might suffer "conjectural" harm. (R.312:29-30.)

Without saying so, Doe advocates for a radical departure from Wisconsin's law on standing removing any previous limits. She would have this Court find standing when she thinks the Court, "owe[s] the public an answer to the important questions of law," *Teigen*, 2022 WI 64, ¶31 (R.G. Bradley, J., first op.), an approach rejected by four justices in *Teigen*. As this Court has long held, "[j]udicial policy is not, and has not been, carte blanche for

the courts of Wisconsin to weigh in on issues whenever respective members of the bench find it desirable." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶131, 333 Wis. 2d 402, 797 N.W.2d 789 (Prosser, J., concurring).

Perhaps realizing the facts and case law are not in her favor, Doe returns to a poor analogy about bee stings. (Pl.Br., 24.) The Circuit Court did not erroneously exercise its discretion in rejecting this analogy. As the Circuit Court explained, even assuming for argument's sake there is a reason for parents to anticipate their child will be stung by a bee (and there is not), there is no evidence that Doe anticipates her school-attending child will ever be "stung" by gender exploration and ever utilize the Guidance. (R.312:24.) Hypothetical imaginable harms that *could* happen are not concrete cases sufficient to confer standing. That is especially true here where Doe testified that she has no reason to anticipate harm to her child. (*Id., citing* R.231 at 84.)

II. DENYING JANE DOE'S MOTION FOR A PRELIMINARY INJUNCTION WAS NOT AN ABUSE OF DISCRETION.

Even if this Court disagrees with the Circuit Court's finding that Doe does not have standing, Doe is not entitled to an injunction. This Court reviews the Circuit Court's decision to deny her injunction motion under an abuse of discretion standard. *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977)

Courts may issue a preliminary injunction if the movant shows: "(1) [she] is likely to suffer irreparable harm if a [preliminary] injunction is not issued; (2) [she] has no other adequate remedy at law; (3) a preliminary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Service Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35 (internal citations and quotations omitted.)[7] Because the harm

[7] When deciding whether to grant a preliminary injunction, this Court also allows the consideration of potential harm to the nonmoving party, third parties, and the public interest. *See Samco, Inc. v. Keystone Lighting*, 91 Wis. 2d 851, 284 N.W.2d 122 (Ct. App. 1979); *State v. Crute*, 2015 WI App. 15,

to Doe is entirely speculative, she cannot show that she faces irreparable harm without an injunction.

A. Doe Could Not Show That She Will Suffer Irreparable Harm Without a Preliminary Injunction.

Doe failed to show that she would have suffered irreparable harm without the preliminary injunction. To do so, she had to demonstrate a sufficient probability that the District's future conduct would have injured her. *Fromm & Sichel, Inc. v. Ray's*

¶39, 360 Wis. 2d 429, 860 N.W. 2d 284. Those factors also support the circuit court's denial of Doe's motion. The District, numerous parents and students, and the public interest would all have been harmed by the injunction that Doe sought to be applied to all minor students attending District schools, which could have exposed the District to liability for failure to comply with state and federal nondiscrimination and curriculum laws. *See* § 118.01(2)(d); Wis. Stat. §§ 118.13; 118.019. (R.230:¶6,11; *see also* R.3:9-11.) Additionally, the injunction would have contradicted the interests of parents who believe the Guidance *benefits* their children. It would not, as Doe asserts, have required deference to parents (Pl.Br., 35) when possibly thousands of parents want their children to be able to tell their family they are exploring their gender identity only when they feel ready. Further, the injunction would deprive transgender and nonbinary students of the ability to be recognized at school as how they identify when they otherwise would not seek that due to fear of their family being told. Finally, the injunction would have harmed the public interest by making public schools less safe to vulnerable students. *See Parents Defending Educ. v. Linn-Mar Comty. Sch. Dist.,* No. 22-CV-78 CJW-MAR, 2022 WL 4356109, at *13 (N.D. Iowa Sept. 20, 2022). Transgender students are especially vulnerable to abuse from family members, resulting in homelessness and suicide. (R.230:¶¶8-9; *see also* R.3:4-5.) By contrast, no public interest is served by granting the injunction, given that the Guidance does not violate protected parental rights.

Brookfield, Inc., 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966); *see also Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). She also had to demonstrate that such harm would have been irreparable, meaning that without a preliminary injunction to preserve the status quo, a permanent injunction would become futile. *Werner*, 80 Wis. 2d at 520.

Here, Doe could not show that she faced any harm—let alone irreparable harm—if the injunction was not granted. Doe alleges harm only by speculating about future hypothetical injuries. She alleges that the Guidance interferes with her rights, "*should* [her child] experience gender dysphoria" (R.30 at 31) (emphasis added) or that the Guidance "*may* cause [her] child to solidify and retain a transgender identity," and "*may* prevent [her] from providing professional mental health support." (*Id.*) (emphasis added). But Doe did not ground these conjectures in past, present, or even probable future harm.

First, Doe is wrong to suggest that the Guidance allows any student to immediately or permanently transition. Throughout the

case, Doe alleges that a student using a different name or pronouns at school qualifies as an "immediate" transition that could have significant lifelong consequences for the student involved. (*See* R.30 at 1, 4, 10, 17, 29, 31–32.) As discussed above, using a different name and/or pronoun set does ***not*** amount to a social transition. (R.141¶32.) The World Professional Association for Transgender Health explains that there are other parts to a social transition which a parent would see, including changing one's appearance. (R.231, Ex. E at 22.)

And there is no scientific evidence that the use of a different name or pronouns at school will lead a student to become transgender or cause medical problems. (*Id.*¶31.) Dr. Liebowitz explained that he has treated many young people, who tried using a different name or pronoun for a while, only to return to using their assigned name and/or pronouns. (*Id.*)

Second, Doe has no evidence that the Guidance has applied, or will apply, to her child. (R.312:4-5.) Doe testified that her child currently shows no signs of gender dysphoria, no signs of

questioning or exploring gender identity *in any way*, nor using a different name/pronoun at school. (R.231, Ex. A at 80:12-13, 82:18-25, 84:8-19, 87:19-21, 108:6-110:12, 207:9-25.) More significantly, Doe testified that she does not believe—and has no reason to believe—her child will *ever* do any of those things. (R.231, Ex. A at 108:13-110:12; *see also* R.312:1 ("She does not predict or anticipate she will be harmed…").) As the Circuit Court noted, "[s]uffice to say that Jane Doe does not claim the [Guidance] currently harms her." (R.312:5.)

Doe has no basis for speculating that the Guidance, which has been in place for over five years—threatens her rights now or in the future. In the three years since Doe filed this case, she has yet to suffer any injury. Although the Circuit Court issued a limited preliminary injunction that would have allowed her to find out whether her child had asked to use a different name or pronouns at school, she never once even ***asked*** the school.[8]

[8] In *Parents Defending Education*, the court recently denied a preliminary injunction in a case similar to this one, noting that the only harm asserted by the plaintiff organization and its parent members "is speculative, notational

Being unable to show an anticipated injury to herself, Doe argues about purported injuries to unidentified "parents" (seven times in her introduction alone (Pl.Br., 8)), and argues the Guidance violates unnamed *parents'* rights rather than showing how it purportedly violates ***her*** rights.[9] Those "parents," if they exist, are not parties and Doe has no legal basis seeking relief for their alleged injuries.

Finally, the Circuit Court determined there was no evidence that the Guidance's application *to others* could harm Doe or her child. (R.312:5.) Doe admitted:

- the District does not interfere with her right to raise her child by teaching her child to call another student by the pronouns requested (R.231, Ex. A at 181:16-182:1);
- if the District tries to prevent bullying by requiring students to call other students by pronouns each student requests, this would not violate her beliefs, interfere with her right to raise her child, or interfere with her right to make healthcare decisions for her child (*Id.* at 205:3-206:16);

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harm that may never occur. Plaintiff must show 'more than a mere possibility that irreparable harm will occur.'" 2020 WL 5356109, at *5 (citation omitted).

[9] Doe even incorrectly frames the issue presented as "Whether *parents* have standing to challenge a policy that facially violates *their* rights…" (Pl.Br., 7 (emphasis added)), rather than a violation of *her* rights.

- her child should follow the Guidance to respect and honor the pronouns and names her child's classmates may request (*Id.* at 205:3-206:16);
- there is value in her child learning about topics like gender identity, and she has never thought that District is pushing ideas of different gender identities upon her child (*Id.* at 97:22-98:9, 98:24-99:1.)

Even if Doe could show that she would be harmed by the Guidance, she could not—and did not—show that such harm would be irreparable. As Dr. Leibowitz explained, "there is no scientific evidence to demonstrate the use of a different name or pronoun in a school setting will lead a young person to become transgender or have lifelong medical needs" (R.141:¶31), contrary to what Doe argues. (Pl.Br., 34.)

Doe misinterprets federal precedent to argue that this Court should presume irreparable harm whenever a movant asserts a constitutional claim. (Pl.Br., 33.) But that is not the law. In fact, even when constitutional rights are at stake, the Seventh Circuit requires a party seeking preliminary injunctive relief to show irreparable harm. *See Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012). Courts across forums agree that

issuing a preliminary injunction based on a mere possibility of harm belies the principle that injunctive relief is an *extraordinary* remedy to be awarded only upon a *clear showing* that the movant is entitled to relief. *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020); *Fromm & Sichel, Inc*., 33 Wis. 2d at 103; *Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983).

Doe is also wrong to argue that, if this Court reverses the Circuit Court' s decision that she lacks standing, the "usual" result is to "direct the entry of an injunction," citing *Fromm & Sichel, Inc.*, 33 Wis. 2d at 102. (Pl.Br., 25.) *Fromm* contradicts her assertion:

> Under usual circumstances, where the plaintiff has asked for an injunction and the trial court *has determined that his complaint states no cause of action*, we would, upon reversing, if the facts made such action appropriate, direct the entry of an injunction, *or if further fact finding were necessary, we would refer the matter to the trial court to determine whether present conditions of fact permit or require the court to issue the requested injunction*."

33 Wis. 2d at 102-03 (emphasis added). As this Court has explained, "an order requiring the issuance of a temporary injunction would practically require an examination of the merits

and a determination of the issues," which this Court "cannot" do when the facts remain in dispute. *Bartell Broadcasters, Inc. v. Milwaukee Broadcasting Co.,* 13 Wis. 2d 165, 172, 108 N.W.2d 129 (1961).

B. Doe Had Other Adequate Remedies at Law.

Doe had adequate remedies, other than a preliminary injunction, available to her. She could have waited to file her request for a preliminary injunction until her child showed any sign whatsoever of gender dysphoria. If her child ever seeks to explore his/her gender or shows signs of gender dysphoria, she can bring suit again, as the dismissal was without prejudice. A remedy that allows an *injured* party to seek redress is more than adequate—it is what our court systems were designed to provide.

C. The Requested Preliminary Injunction Would Improperly Disrupt the Status Quo.

Jane Doe sought an injunction that would have disrupted, not preserved, the status quo. Preliminary injunctions aim to preserve the status quo by preventing harm so imminent that there is a present need for equitable relief. *See Slinger v. Wis.*

Interscholastic Athletic Ass'n, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997); *Pure Milk Prods. Co-op,* 90 Wis. 2d 781, 800. In other words, "the function of a preliminary injunction is to maintain the *status quo,* not to change the position of the parties or compel the doing of acts which constitute all or part of the ultimate relief sought." *Codept, Inc. v. More-Way North Corp*., 23 Wis. 2d 165, 173, 127 N.W.2d 29 (1964).

The "status quo" is defined simply as "the situation that currently exists." *Status Quo*, Black's Law Dictionary (11th ed. 2019). Doe suggests the status quo is "the names parents lovingly gave their children and the sexual identities they were born with." (Pl.Br., 35-36.) But the status quo is the *current* state of affairs with *the District* and *Doe*, not "parents" and not at the time "their children" were born.

Instead of maintaining the status quo, the injunction would have impermissibly given Doe the relief she ultimately sought in the litigation. In *Slinger*, this Court concluded that an order for preliminary injunction was a misuse of discretion because it

caused the school district to be placed in a different athletic conference, impermissibly giving the district the relief it ultimately sought, "instead of maintaining the status quo as the law requires." *Slinger*, 210 Wis. 2d at 367, 373-74. Similar to *Slinger*, the current state of affairs since Doe filed her case has been—and continues to be——that the Guidance is in effect. Requiring the District to implement different standards would have impermissibly compelled the District to take new actions that effectively would grant Doe the ultimate relief she seeks: an injunction requiring parental notice and consent. Giving Doe a newfound right to radically alter the District's position at a preliminary stage in the litigation would have done the opposite of preserving the status quo.

D. The Requested Injunction is Overly Broad, Vague, and Unworkable.

Beyond the above, rather than being perfectly tailored, as Doe asserts (Pl.Br., 35), the injunction she requested is overly broad by applying to students other than her child, when she admitted she is not affected by how other students are treated.

Injunctions must be as narrowly tailored as possible. *See State v. Seigel*, 163 Wis. 2d 871, 890, 472 N.W.2d 584 (Ct. App. 1991); *City of Milwaukee v. Burnette*, 2001 WI App 258, ¶10, 248 Wis. 2d 820, 637 N.W.2d 447 (citation omitted).

The injunction Doe sought was also so vague, it was unworkable. It sought to prohibit the District from (among other things) "enabling children to socially transition to a different gender identity at school by selecting a [sic] new 'affirmed name and pronouns,' without parental notice or consent." (R.28:1.) If Christine asked to go by "Chris" or to use "they/them" pronouns, would the District have to determine whether that was for the purpose of a gender transition? How would the District know if agreeing would enable that? Would this injunction cover a student who does not necessarily want to "socially transition" but rather simply wishes to use a different name or pronoun?

Respondents have consistently disputed the premise that a student using a different name and/or pronoun set at school means that student is "socially transition[ing] to a different gender

identity." A proper, narrowly tailored injunction should not depend on such vague terms.

E. Jane Doe Lacks a Reasonable Probability of Success on the Merits.

Doe's lack of standing means she has no reasonable probability of success. For that reason alone, the Circuit Court was right to deny the preliminary injunction.

But even if Doe had standing, she is still unlikely to succeed on her claim that the Guidance is unconstitutional. Doe asserts that the Guidance violates "parental rights" by citing to Wisconsin decisions that have nothing to do with how students are referred to at school.[10] While parents have constitutional rights, the scope of those rights depend on the context involved. *See Larson v. Burmaster*, 2006 WI App 142, ¶¶31-35, 295 Wis. 2d 333, 720

[10] *See* Pl.Br., 25, citing *Matter of Visitation of A.A.L.*, 2019 WI 57, 387 Wis. 2d 1, 917 N.W.2d 486 (addressing grandparent visitation); *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) (upholding school choice program); *Wis. Indus. Sch. For Girls v. Clark Cnty.*, 103 Wis. 651, 79 N.W.422, 428 (1899) (overturning demurrer to suit for indebtedness by corporation that provided care and maintenance to children committed to its custody); *see also* Pl.Br., 27, citing *In re Sheila W.*, 2013 WI 63, ¶¶16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring) (discussing "mature minor" doctrine in appeal held moot).

N.W.2d 134 (a parent's right "to make decisions concerning the care, custody, and control of their children," "is neither absolute nor unqualified.").

The U.S. Supreme Court has emphasized that, in considering substantive due process claims like those asserted by Doe, particular care and precision is required in articulating the liberty interest at stake. The Court warns against recognizing too broad or general a right that intrudes on policymaking domains reserved to other branches of government and "the liberty protected by the Due Process Clause be subtly transformed into [judges'] policy preferences." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Doe cannot just assert that parental rights in general are constitutionally protected. She must show that it is unconstitutional for a public school to agree to a student's request to have a particular name or pronouns used at school without parental notification and consent.

Nor can Doe avail herself of *Meyer v. Nebraska*, 262 U.S. 390 (1923), *Pierce v. Society of Sisters*, 268, U.S. 510 (1925), and cases

relying on them. Courts considering those cases have emphasized that the rights identified in them do ***not*** provide a reason for upending school policies like the Guidance. The Supreme Court has stated that *Pierce* "len[ds] 'no support to the contention that parents may replace state educational requirements with their own idiosyncratic views of what knowledge a child needs to be a productive and happy member of society.'" *Runyon v. McCrary*, 427 U.S. 160, 177 (1976) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 239 (1972) (White, J. concurring)). The Court has since stressed the "'limited scope of *Pierce*'" as "simply 'affirm[ing] the right of private schools to exist and to operate." *Runyon*, 427 U.S. at 177 (quoting *Norwood v. Harrison*, 413 U.S. 455 (1972)).

Parents do not have the right to override schools' broad authority to "do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils." *Larson*, 2006 WI App. 142 at ¶21 (quoting Wis. Stat. § 118.001); *see also id.* at ¶39 ("parents simply do not have a

constitutional right to control each and every aspect of their children's education."). Wisconsin law mirrors federal law on this point. *See*, *e.g.*, *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (courts have "long recognized that local school boards have broad discretion in the management of school affairs"); *Cal. Parents for the Equal. of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020) (parental rights are "substantially diminished" once they elect to send their children to public school; "parents have the right to choose the educational forum, but not what takes place inside the school"); *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204-07 (9th Cir. 2005) (parents do not have the right to prevent a school from "providing its students with whatever information it wishes to provide, sexual or otherwise, when and as the school determines that it is appropriate to do so").[11]

[11] Doe ignores decisions reviewed in *Larson*, 2006 WI App 142, concluding parents do not have the right to dictate to a public school how to create an optimal learning environment, even though *Larson* is the only published Wisconsin case addressing that issue. Instead, she relies almost entirely on *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), to argue "that a school violates parents' constitutional rights if it usurps their role in significant decisions." (Pl.Br., 44.) But *Gruenke* involved parents and a student who sued the school

Courts across the country have rejected claims of violation of parental rights based on how their students are treated at school. *See*, *e.g.*, *Thomas v. Evansville-Vanderburgh Sch. Corp.*, 258 F. App'x 50, 54 (7th Cir. 2007) (private conversation between school counselor and student regarding school performance did not violate parent's right to direct child's upbringing); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 185 (3d Cir. 2005) (parental rights not violated by child's participation in survey seeking information about drug and alcohol use, sexual activity, physical violence, and suicide attempts); *Parents United for Better Sch., Inc. v. Sch. Dist. of Phila. Bd. of Educ.*, 148 F.3d 260, 277 (3d Cir. 1998) (upholding school's consensual condom distribution program); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995) (upholding compulsory high school sex education assembly program), *abrogated on other grounds by Martinez v.*

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over a coach requiring the student to take a pregnancy test, which they argued amounted to an unconstitutional "search." 225 F.3d at 300. *Gruenke* acknowledged its ruling did not mean schools lack authority to "impose standards of conduct...that differ from those approved by some parents" to provide "a proper educational atmosphere." *Id.* at 304.

Cui, 608 F.3d 54 (1st Cir. 2010); *Fleischfresser v. Dirs. of Sch. Dist*. 200, 15 F.3d 680, 690 (7th Cir. 1994) (parents lacked constitutional right to exempt child from reading program).

Any other result would be unworkable. *See*, *e.g.*, *Parents for Privacy v. Barr*, 949 F.3d 1210, 1233 (9th Cir. 2020) ("accommodating the different personal, moral, or religious concerns of every parent would be impossible for public schools, because different parents would often likely, as in this case, prefer opposite and contradictory outcomes").

While Doe cites two federal district court decisions that issued preliminary rulings to the contrary (Pl.Br., 28), those decisions are outliers that fail to follow the U.S. Supreme Court and numerous other court decisions cited above regarding the limits of parental rights with respect to how public schools are run. The decisions Doe cites also conflict with other decisions rejecting their conclusions with regard to policies like the Guidance. *See, e.g.*, *Foote v. Town of Ludlow*, No. 22-30041-MGM, 2022 WL 18356421 (D. Mass. Dec. 14, 2022); *Parents Defending Educ. v.*

Linn-Mar Comty. Sch. Dist., 2022 WL 4356109 (N.D. Iowa Sept. 20, 2022).

Seeking to avoid well-established law about limits on parental rights once they choose to enroll their children in public school, Doe argues that parental rights are implicated by the Guidance because, according to Doe, using a different name or pronoun involves medical treatment. (Pl.Br., 30-31.) This argument deserves no credence.[12] Students like Doe's child regularly go by a variety of nicknames, middle names, and last names for reasons having nothing to do with gender identity or gender dysphoria. (*See, e.g.,* R.231, Ex. A at 119:19-120:13 (Doe admitting her child uses a nickname).)

Moreover, while social transition may be an option for students who are diagnosed with gender dysphoria (which Doe's child has shown no likelihood of developing), individuals who use

[12] The same is true for Doe's assertions regarding infringement of parent's religious beliefs. Setting aside that Doe did not plead a claim under Article 1, Section 18 of the Wisconsin Constitution (*see* R.2,¶¶87-90), Doe's claim fails because she testified that she is able to teach her child her religious beliefs notwithstanding the Guidance. (R.231, Ex. A at 200:13-23.)

gender-affirming names are not themselves prescribing or providing medical care, any more than when a teacher assists a hearing-impaired student adjust a hearing aid.[13] As explained in *Foote*, 2022 WL 18356421, at *5, "[a]ddressing a person using their preferred name and pronouns simply accords the person the basic level of respect expected in a civil society…." *See also id.* at *9 (school "did not provide mental healthcare to Plaintiffs' children when supporting their use of preferred names and pronoun.")

Even if the Guidance did affect parental rights constitutionally recognized in this context, and even if strict scrutiny applied in this case,[14] the Guidance would be justified by

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[13] *See Shanks v. Blue Cross & Blue Shield United of Wis.*, 979 F.2d 1232, 1233 (7th Cir. 1992) ("Treatment . . . occurs when *a health care provider* takes steps to remedy or improve a malady that caused the patient to seek [the provider's] help.") (emphasis added).

[14] As the Fourth Circuit noted, the U.S. Supreme Court has never expressly determined the appropriate standard of constitutional review for claims involving parental rights in the educational context, but has declared that, in that context, "reasonable regulation by the [government] is permissible" even when it conflicts with parental rights, which is "the language of rational basis scrutiny." *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.,* 89 F.3d 174, 179 (4th Cir. 1996) (emphasis in original) (finding that, under a rational basis test, school's requirement that students engage in public service did not violate parental rights). Wisconsin courts similarly have never determined that public school policies and practices that may be inconsistent with some parents' wishes are subject to strict scrutiny review.

the compelling government interest in fostering an environment conducive to learning and preventing discrimination. *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (parental rights are subject to regulation in the public interest"; "acting to guard the general interest in youth's wellbeing, the state as parens patriae may restrict the parent's control," including with respect to students' education). School administrators are charged with "provid[ing] a safe school environment conducive to learning," *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 572 (4th Cir. 2011).

The government's "compelling interest in protecting the physical and psychological well-being of minors" extends to "a compelling state interest in not discriminating against transgender students" and "in protecting transgender students from discrimination." *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 525, 528-29 (3d Cir. 2018); *see also Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 597 (4th Cir. 2020) ("transgender students have better mental health outcomes when their gender identity is affirmed.").

III. THE CIRCUIT COURT'S DISCOVERY ORDERS AND SANCTIONS AGAINST DOE WERE PROPER.

The Circuit Court's discovery orders are reviewable for abuse of discretion. *Lane v. Sharp Packaging Sys., Inc.,* 2002 WI 28, ¶19, 251 Wis. 2d 68, 88, 640 N.W.2d 788, 797. In reviewing such orders, this Court asks whether the Circuit Court "examined the relevant facts, applied a proper standard of law, and using a demonstrative rational process, reached a conclusion that a reasonable judge could reach." *Id.*

Doe cannot succeed on any of her three challenges to the Circuit Court's discovery orders. First, the Circuit Court was correct in determining that she had not shown that her counsel's communications with her testifying expert were work product. Second, the Circuit Court had the discretion to strike her expert's affidavits after she repeatedly ignored orders compelling production related to her expert. Third, the Circuit Court correctly awarded attorneys' fees. Finally, the Circuit Court had discretion to seal a deposition, given the significant safety issues raised by

the witness and the unusual nature of questions asked at the deposition.

A. Doe Did Not Meet Her Burden of Establishing Entitlement to Work Product Protection.

The Circuit Court correctly determined that Doe could not claim work product protection over her communications with Dr. Levine. First, the Wisconsin Supreme Court has repeatedly required similar information to be *produced*. *See, e.g., State ex. rel. Dudek v. Cir. Ct. for Milwaukee Cnty.,* 34 Wis. 2d 559, 597, 150 N.W.2d 387, 408 (1967). And, while the Wisconsin Supreme Court has left open the possibility of protecting a narrow scope of testifying expert communications, Doe cannot show that the responsive documents fall into that narrow category.

In *Dudek*, the Wisconsin Supreme Court noted that "most materials, information, mental impressions and strategies collected and adopted by a lawyer after retainer in preparation of litigation and relevant to the possible issues be initially classified as work product of the lawyer and not subject to inspection or discovery unless good cause for discovery is shown." *Dudek*, 34

Wis. 2d at 589. But for ***testifying*** experts, the work product protection was more limited, applying only to information "designed only to assist the attorney in preparation of pleadings, in the manner of the presentation of his proof, and cross examination of opposing expert witnesses." *Id.* at 597. The Court allowed discovery of "[t]he findings and opinions of the expert that go to the establishment or denial of a principal fact in issue." *Id.* at 598.

Doe strays far afield from *Dudek* when she argues that *any* communication between counsel and a disclosed expert qualifies as work product. For decades, Wisconsin courts have approved the disclosure of information on which a testifying expert relies in formulating and reaching their opinions. *Id.* In fact, in *Blakely v. Waukesha Foundry Company, Inc.,* this Court upheld an order requiring production of written communications with an expert and a written resume of all oral communications with the expert. 65 Wis. 2d 468, 479, 222 N.W.2d 920 (1974); *compare State ex rel. Shelby Mutual Ins. Co. v. Circuit Court for Milwaukee Cnty.,* 67

Wis. 2d 469, 475, 228 N.W.2d 161 (1975) (concluding that a party can invoke the "extraordinary" protection of the work product rule to protect an expert's files from discovery if the expert is ***not*** going to testify).

Here, the communications that Doe is withholding do not fall within the narrow exclusion of work-product applicable to a testifying expert. Doe cannot claim otherwise as she did not even review the documents at issue until after the Circuit Court ordered them produced. As her counsel told the Circuit Court: "part of what we did after this Court issued its oral decision is begin reviewing carefully all of the emails between us and Dr. Levine." (R.359:50.) Two days after the Circuit Court granted the motion to compel, counsel explained: "[i]t is neither surprising nor inappropriate that it will take several days for Plaintiff to extract and review communications between counsel and Dr. Levine." (R.297.)

Doe has yet to provide any evidence to even suggest that these documents fall into the potentially protected category of communications with a testifying expert. Without such evidence,

there is no question that the Circuit Court reasonably exercised its discretion to conclude that the District should receive the communications.

Even if this Court applied the *de novo* review that Doe incorrectly seeks, the Circuit Court applied the correct legal standard articulated in Wis. Stat. § 804.01 and *Dudek*. Doe's arguments about the Federal Rules of Civil Procedure and amendments thereto are not compelling. The Circuit Court appropriately declined to adopt Doe's proposal to "abide by the federal rule and the federal practice," and in turn reverse the several decades of law and practice in Wisconsin. (R.359 at 79:12-80:6). *Dudek*, which has allowed parties to seek discovery into a party's communications with testifying experts for decades, "is a matter of state law and supersedes the federal courts' interpretation" of any federal analogue to Section 804.01. *Weber v. Weber,* 176 Wis. 2d 1085, 1093 n.7, 501 N.W.2d 413 (1993). Doe's attempts to tie Wisconsin's work product rules to the federal standard therefore fall flat. The Wisconsin Supreme Court has

been clear that the work product doctrine protects only a narrow area of materials with respect to a testifying expert.

Nor can Doe explain how her position aligns with Wisconsin's long-running presumption in favor of open discovery. It does not. Discovery into counsel's communications is appropriate since "experts who confer with parties and their attorneys provide relevant information that is as valuable as traditional matters of factual discovery." MELINDA A. BIALZIK, ET. AL., WISCONSIN DISCOVERY LAW AND PRACTICE § 1.34 (5th ed. 2021-22). As the Circuit Court recognized, Doe's theory would represent an "unheard of" sea change from this established practice without any substantial justification. (R.359 at 78:18-25).

B. The Circuit Court Properly Exercised its Discretion by Striking Dr. Levine's Affidavits.

The Circuit Court had the discretion to strike Dr. Levine's affidavits, given Doe's repeated refusal to comply with its order compelling production. Under Wis. Stat. § 804.12(2), the Circuit Court has the discretion to grant an order "striking out pleadings or parts thereof" if a party "fails to obey an order to provide or

permit discovery." *See also Selmer Co. v. Rinn*, 2010 WI App 106, ¶35, 328 Wis. 2d 263, 789 N.W.2d 621 (circuit court has broad discretion to impose discovery sanctions). The Circuit Court did just that. (R.359 at 47:9-15 ("As a sanction under 804.12(2), I can do no other than to simply say that until such time as […] the plaintiff turns over the discovery ordered by this court, as a sanction for disobedience, the affidavit to which the discovery is germane may not be used for any other purposes.")) Doe takes issue with the Circuit Court issuing this order after dismissal. But she cannot deny that she sought to (and erroneously did) rely on these affidavits in support of her motion for post-dismissal relief.

C. The Circuit Court Properly Exercised Its Discretion in Granting the District Attorneys' Fees.

Wisconsin Stat. § 804.12(1)(c) allows the Circuit Court to award a moving party's expenses if it grants a motion to compel and the non-moving party's position was not "substantially justified" in its opposition to the motion. Doe's attempt to reverse decades of law and practice was never substantially justified. The Circuit Court correctly determined that Doe set forth an argument

that was not Wisconsin law and had not been the practice in Wisconsin "for the last century." (R.359 at 78:18-80:6). Its fee award was therefore proper and should be upheld.

D. The Circuit Court Properly Exercised its Discretion in Continuing to Seal Dr. Leibowitz's Deposition.

Doe also wrongly argues that the sealing of Dr. Leibowitz's deposition transcript was improper and "deeply unfair." (Pl.Br., 44-45.) This Court has no reason to find that the Circuit Court abused its discretion in continuing to seal this transcript. *State v. Beloit Concrete*, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981). The Circuit Court applied the appropriate legal standard. Section 804.01(3)(a) authorizes a circuit court to make "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." The Circuit Court considered the legally relevant factors of expense, annoyance, embarrassment, and undue burden. (R:359 at 34:20-35:19.) The court considered the District redacting some of the transcript, but concluded that requiring it "to excise only those provisions that were objected to would certainly subject the

[District] to significant expense." (*Id*. at 34:22-24.) And making a public record of questions to Dr. Leibowitz unrelated to this case and "unrelated to his field of practice and area of practice" would cause annoyance and embarrassment. (*Id.* at 35:1-6.) The additional fact that Dr. Leibowitz did not have the opportunity to review and sign the transcript further weighed in favor of sealing it – especially "in consideration of...the sensitive nature of this case." (*Id.* at 35:7-15.)

Doe urges this Court to take the extraordinary step of unsealing Dr. Leibowitz's deposition transcript because Defendants "did not point to a single threat to his participation or to any sensitive information in the transcript" and "Defendants have and will publicly quote and rely on Dr. Leibowitz's affidavit." (Pl.Br., 45.) Doe is wrong. Dr. Liebowitz submitted an affidavit explaining the sensitive information. (R.347.) And, as the District explained in its motion, Doe spent only four of 281 pages in Dr. Liebowitz's deposition asking him about his affidavit. Had Doe simply questioned Dr. Liebowitz about the Guidance and his

affidavit, then the District would not have needed to move to seal the transcript. (*See* R.345-47.)

Therefore, the Circuit Court properly exercised its discretion in sealing Dr. Leibowitz's deposition transcript.

CONCLUSION

For the reasons discussed above, this Court should affirm the Circuit Court's rulings and dismiss this appeal.

Dated this 7th day of April, 2023.

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CERTIFICATION AS TO FORM AND LENGTH

In accordance with Wis. Stat. § 809.19, I certify that this Joint Response Brief of Defendants-Respondents conforms to the rules specified in Wis. Stat. § 809.19(8)(b) and (c), as to form and length for a brief and appendix produced with a proportional serif font. The length of this submission is 10,752 words.

DATE: April 7, 2023.

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