No. 2020AP1032

In the Wisconsin Court of Appeals

DISTRICT IV

JOHN DOE 1, JANE DOE 1, JANE DOE 3,
JANE DOE 4, JOHN DOE 5, and JANE DOE 5,
PLAINTIFFS-APPELLANTS,

JOHN DOE 6, JANE DOE 6,
JOHN DOE 8, and JANE DOE 8,
PLAINTIFFS,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
DEFENDANT-RESPONDENT,

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

MEMORANDUM IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL AND/OR TEMPORARY INJUNCTION

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* Pro hac vice motion granted. R. 31.

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INTRODUCTION

The Madison Metropolitan School District ("the District") has a policy allowing children of *any age* to transition to a different gender identity at school, by adopting a new name and pronouns and having all staff treat them as though they were the opposite sex, without parental notice or consent. The policy then prohibits staff from communicating with parents about this major change without the child's consent and even directs staff to actively deceive parents, including by violating state records laws.

Transitioning to a different gender identity during childhood is a major and controversial decision, the long-term effects of which are still unknown and debated. Many psychiatric professionals experienced in these issues believe that transitioning at a young age may have long-lasting effects and even do serious harm. Whether transitioning is helpful or harmful is debated, but it does not matter who is right for purposes of this case or injunction. The important and undisputed point is that there is a debate among

professionals and that much is still unknown about the ramifications, which is exactly why parents must be involved.

Plaintiffs (all parents of children in the Madison public schools) have sought an injunction requiring deference to parents with respect to this serious mental-health issue while this case is pending. Plaintiffs filed a temporary injunction motion back in February but still have yet to be heard on that motion. They filed a second motion for an injunction pending this appeal, and while the Circuit Court granted a limited injunction, it denied the majority of their request without evaluating Plaintiffs' likelihood of success on the merits or addressing the harms Plaintiffs raised in their motion, instead brushing them aside on the ground that Plaintiffs cannot show harm "as to themselves" as an "inescapable effect of being anonymous." App. 102–03. But the harms Plaintiffs raised are based on the serious implications of transitioning at a young age and the indisputable fact that their children, like all children, might begin to deal with this while this case is pending.

An injunction is especially necessary here because the District's policy requires secrecy. Parents cannot wait until this becomes an issue for their children since the District will hide it from them. That is why Plaintiffs' motion for an injunction requests notice to the parents. The injunction Plaintiffs seek is also conditional, and therefore perfectly tailored to the harm they seek to avoid. *If*, while this case is pending, a child seeks to transition at school, the injunction would merely require parental notice and consent before the District could facilitate this major life change. If this never comes up, then the injunction will not require anything of the District. But the Intervenors have submitted affidavits showing that gender identity transitions *are* being facilitated in the District without parents' knowledge or consent.

To draw a simple analogy, if a school district adopted a policy of secretly offering children with COVID-19 symptoms an experimental and controversial drug, without parental notice or consent, there is no question such a policy would be swiftly enjoined, both to protect parents' right to make important

treatment decisions for their minor children and to prevent the potential harms the drug might do. That is the posture of this case. This Court should reverse the partial denial and direct the Circuit Court to enter an injunction requiring the District to defer to parents on this serious issue while this case is pending.

BACKGROUND

A. The Controversy over Child Gender-Identity Transitions

The sole legal question in this case and injunction motion is whether parents have a constitutional right to make major health-related decisions on behalf of their minor children; in particular, whether their children will socially transition to a different gender identity at school, such that all teachers and staff formally treat them as if they are the opposite sex. Answering that question does not require resolving any factual disputes. What matters is that transitions during childhood are "controversial" among professionals, and that they are experimental in that "the current evidence base is insufficient to predict the long-term outcomes." R. 7:24. Those facts are both indisputable and undisputed here; the

quotes in the prior sentence come from a document that *Defendants*' expert invokes. App. 247 (Dkt. 141[2] ¶ 14). The following information is intended simply to provide a lay of the land to better understand the controversy in this area.

"Transgender" individuals believe they have a "gender identity" that does not match their biological sex. R. 28 ¶ 13. "Gender dysphoria" refers to the psychological distress often associated with a mismatch between a person's biological sex and self-perceived or desired gender identity. R. 28 ¶ 13; R. 77 ¶ 17.

Gender dysphoria can be a serious condition that requires treatment and support from mental health professionals. R. 28 ¶¶ 54–59, 71–82; R. 77 ¶ 17. The American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders contains an official diagnosis for gender dysphoria that is *defined* by "significant distress" associated with the mismatch.

[2] Items cited as "Dkt. __" are not part of the record in this appeal, as they occurred subsequent to Plaintiffs' notice of appeal. However, this Court may take judicial notice of subsequent filings in the circuit court. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 6 n.2, 262 Wis. 2d 720, 665 N.W.2d 155.

See What Is Gender Dysphoria?, American Psychiatric Association[3]; R. 28 ¶ 13. It is also well recognized that children with gender dysphoria often present other psychiatric issues, including depression, anxiety, suicidal ideation and attempts, and self-harm. R. 28 ¶¶ 57, 78–79, 114. Thus, a child who expresses a desire to change gender identity should, "[a]t the very least," be "evaluated for psychiatric co-morbidities." R. 28 ¶ 79. Defendants agree that "an individual experiencing gender dysphoria may benefit from professional mental health treatment." R. 77 ¶ 17.

The origins and causes of transgenderism and gender dysphoria are still largely unknown; some professionals believe they are driven primarily by social and environmental factors, while others believe that "gender identity" has a biological basis. R. 28 ¶¶ 10, 22–28; R. 77 ¶¶ 18–20. Regardless of who is correct, multiples studies have found that the vast majority of children (roughly 80–90%) who experience gender dysphoria ultimately

[3] https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria

"desist," that is, they revert to an identity consistent with their biological sex (unless they transition, as discussed further below). R. 28 ¶ 60 (listing studies); R. 7:18 (same).

Given this evidence, and the uncertainty surrounding the underlying causes, there is significant disagreement within the professional community over how to treat gender dysphoria in children. R. 28 ¶¶ 22–44; *see generally* Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016)[4] (R 8:2–29). Many mental health professionals believe that children experiencing gender dysphoria can learn to find comfort with their biological sex and therefore support psychotherapy to help identify and address the underlying causes of the dysphoria. R. 28 ¶¶ 32–37. Plaintiffs' expert, Dr. Stephen B. Levine, has over forty years of experience working with transgender individuals, R. 28 ¶ 4, and has "seen children desist even before puberty in response to thoughtful parental

[4] https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html

interactions and a few meetings of the child with a therapist." R. 28 ¶ 37. Another prominent example is Dr. Kenneth Zucker, a clinical psychologist who for over three decades operated "one of the most well-known clinics in the world for children and adolescents with gender dysphoria" and treated numerous children, with many positive testimonies from parents. Singal, *supra*.

A different group of health professionals believe that the best response is to "affirm" a child's perceived gender identity. R. 28 ¶¶ 38–44. In between is a "watchful waiting" approach that allows the child's gender identity to evolve on its own without any intervention in either direction (while possibly treating any associated psychological distress). R. 28 ¶¶ 30–31.

One particularly controversial issue is whether children should socially transition to living under a different gender identity (i.e. adopt a new name and pronouns). R. 28 ¶ 68. Many professionals believe transitioning may become "self-reinforcing," causing children to solidify and retain a transgender identity when

the gender-identity issues might otherwise have resolved. R. 28 ¶¶ 63–69; Singal, *supra*.

Dr. Levine, for example, Plaintiffs' expert, argues that "therapy for young children that encourages transition … is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy." R. 28 ¶ 69. Dr. Zucker too has publicly written that "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence." Kenneth J. Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, 19:2 Int'l J. of Transgenderism 231 (2018).[5]

The debate has also been covered extensively in the media, *see* Singal, *supra*, and multiple recent books make similar

[5] https://www.researchgate.net/publication/325443416

arguments. *See* Heather Brunskell-Evans and Michele Moore, *Inventing Transgender Children and Young People* (2019) (a collection of essays from clinicians, psychologists, sociologists, educators, parents, and de-transitioners); Abigail Shrier, *Irreversible Damage: The Transgender Craze Seducing Our Daughters* (2020).

Defendants do not dispute that there is disagreement about this. *Defendants'* expert cites the World Professional Association for Transgender Health (WPATH) as the go-to source in this area, App. 247, but even WPATH acknowledges that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views," that "[f]amilies vary in the extent to which they allow their young children to make a social transition to another gender role," and that there is insufficient evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." R. 7:24. WPATH therefore encourages health professionals to *defer to parents* "as they work

through the options and implications," *even* "[i]f parents do not allow their young child to make a gender-role transition." R. 7:24.

Whether transitioning will be helpful or harmful may depend on the individual child's circumstances. As Dr. Levine explains, "[t]here is no single pathway of development and outcomes governing transgender identity," so it is "not possible to make a single, categorical statement about the proper treatment." R. 28 ¶¶ 54–59. Parents must be involved for "accurate and thorough diagnosis," R. 28 ¶¶ 71–79, for "effective psychotherapeutic treatment and support," R. 28 ¶¶ 80–82, and to provide informed consent, R. 28 ¶ 83–84. *Defendants*' expert agrees that an assessment of the "entire life experience of the child, adolescent, and family" is necessary when "assisting in decision-making relating to gender issues." App. 248–49.

School staff "are not trained and capable to undertake th[is] kind of diagnostic process," App. 314 (Dkt. 142 ¶ 21), as Defendants have conceded, R. 42:11. Defendants have also conceded that MMSD officials "have no way to know whether a

student has gender dysphoria" and cannot lawfully provide treatment to children who may need it. R. 42:11.

To reiterate, this Court does not need to (and cannot, in any event) resolve the debates in this area. The important point is that, when a child begins to wrestle with his or her gender identity, there is a critical fork in road: Should the child immediately transition? Or could therapy help the child identify the origins of the dysphoria and learn to embrace his or her biological sex? There are no easy answers, but the fact that there is a debate and competing alternatives is why parents must be involved. No one else can provide the child with the professional help the child may need and no one else has the authority under the law to make such a decision on behalf of the child.

B. The District's Policy to Exclude Parents

In April 2018, the Madison School District adopted a document entitled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students." App. 161–95 (R. 6, Ex. 1) (cited hereafter as "Policy"). The Policy repeatedly emphasizes that the District is committed to "affirm[ing]" each student's self-

perceived gender identity, Policy at 1, 13, effectively choosing a side in the debate described above. The District's policy further declares that Madison schools "will strive to … disrupt[ ] the gender binary," and will pursue this "disruption" through "books and lessons," "limit[ing] gendered and binary language," and interrupting and correcting "misconceptions about gender or language that reinforces the gender binary." Policy at 24.

Consistent with federal law, the Policy requires parental consent before students may change their name or gender in the District's *official* records. Policy at 18; 34 CFR §§ 99.3; 99.4; 99.20(a). Nevertheless, the Policy enables children, of *any age*, to change to a different gender identity at school by selecting a new "affirmed name and pronouns" to be used at school "regardless of parent/guardian permission to change their name and gender in [the District's] systems." Policy at 18.

While the Policy requires this change to be carefully kept out of the District's systems (see below), it is a formal change—the Policy requires all teachers and district staff to "refer to students

by their affirmed names and pronouns" (as opposed to their actual legal names), and failure to do so is considered "a violation of the [District's] non-discrimination policy." Policy at 18. The Policy then prohibits teachers and other staff from "reveal[ing] a student's gender identity"—including the student's new "affirmed name and pronouns" being used at school—"to … parents or guardians … unless legally required to do so or unless the student has authorized such disclosure." Policy at 9; *see also* Policy at 11. The Policy even directs staff to actively deceive parents, by "us[ing] the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family." Policy at 16.

The District provides teachers with a form, entitled "Gender Support Plan," to use if a student expresses a desire to change gender identity at school. R. 6:39–40. The form notes that parental consent is required to change name or gender in the *official* records and directs teachers to a different form for that purpose, but states that "[s]tudents can still use their affirmed name and pronouns in MMSD without parent/legal guardian permission." R. 6:39. In a

section entitled "family support," the form asks, "Will the family be included in developing a gender support plan?" with a blank space for teachers to fill in after making this critical decision. R. 6:39. The only guidance for teachers in deciding whether to include parents in developing the "gender support plan" is the question, "Does this student have family support around their gender identity?" R. 6:39. The form does not contain any definition of what qualifies as "support," but leaves to teachers, District administrators, or the child to decide whether families are sufficiently "supportive" to be consulted. Then, in blatant violation of state law giving parents access to their children's education records, Wis. Stat. § 118.125, the form directs teachers to keep this paperwork "in your confidential files, not in student records." R. 6:39.

The District has also trained all of its teachers regarding the Policy, R. 6:41–42, and the training repeatedly emphasizes that children in Madison schools "ha[ve] the right to use their affirmed name and pronouns in school, even without … *family permission*,"

R. 6:64, and that teachers must "[m]ake sure not to disclose information about [students'] gender identity without their permission," R. 6:54.

Finally, the District has promoted on posters throughout District schools that students have a "right" to change gender identity at school and a right to "privacy" about their transition (which can only mean privacy *from those not at school*, like their parents). *See* "Know Your Rights" Poster, MMSD.[6]

C. Procedural Background

Plaintiffs filed their complaint, along with a motion for a temporary injunction (with a brief and affidavits) and a motion to proceed anonymously (same), on February 18–19, 2020. R. 1–2, 4–5, 26–27. The Circuit Court issued a briefing schedule for both motions shortly thereafter. R. 33.

On March 11, the District filed a short motion to dismiss (without any supporting memorandum) and asked the Circuit

[6] https://drive.google.com/file/d/0BxQaX4hYfVJaajE3SjhvbWQ3T29yNi1XSkhMWXJjNWR6OUdv/view

Court to postpone Plaintiffs' temporary injunction motion until after resolution of its yet-to-be-briefed motion to dismiss. R. 36. Plaintiffs objected, R. 38, and the Circuit Court set a hearing for March 23. R. 41; 92.

During that hearing, the Circuit Court asked whether it lacked authority to hear Plaintiffs' temporary injunction motion until the motion to dismiss was resolved in light of the recent adoption of Wis. Stat. § 802.06(1)(b), which provides that, "[u]pon the filing of a motion to dismiss … all discovery and other proceedings shall be stayed … until the ruling of the court on the motion … unless the court finds good cause upon the motion of any party that particularized discovery is necessary." R. 92:5–22.

Plaintiffs responded that this interpretation "can't be what the legislature had intended" because it would "essentially eliminate the remedy of a temporary injunction," and offered multiple ways to interpret the provision, including that "other proceedings" means discovery-related proceedings, or that temporary injunctions are exempted under the specific-trumps-

the-general canon of statutory interpretation. R. 92:8–18. Plaintiffs also noted that the Circuit Court could retain a concurrent briefing schedule and *decide* the motion to dismiss first, as both the Circuit Court itself and another Dane County judge had recently done in cases with a similar posture. R. 92:5, 9, 18; R. 38:2.

Nevertheless, the Circuit Court concluded that Wis. Stat. § 802.06(1)(b) prevented it from hearing Plaintiffs' temporary injunction motion. The Circuit Court indicated that, if it denied the motion to dismiss, it would hear and resolve Plaintiffs' injunction motion in an "expedited fashion," before the fall school year. R. 92:23.

In early May, three high school student groups intervened in support of the District's policy and joined the District's motion to dismiss (hereafter referred to collectively as "Defendants"). R. 50–52, 66. Importantly for purposes of this motion, Intervenors submitted affidavits validating Plaintiffs' concern that transitions

are being facilitated in District schools, in secret from parents. R. 53 ¶¶ 13–14; R. 54 ¶¶ 11–12; R. 55 ¶¶ 8, 11.

The Circuit Court denied Plaintiffs' motion to proceed anonymously on May 26 and ultimately ordered Plaintiffs to disclose their identities to the lawyers representing the District and the Intervenors (including all lawyers at those law firms and all of their staff) subject to a protective order. R. 74. The Plaintiffs appealed the disclosure order and moved for a stay of that order, which the Circuit Court granted. R. 83, 84, 91. The appeal of that Order is the appeal currently pending before this Court.

Importantly, the Circuit Court also denied Defendants' motion to dismiss. R. 71. The Plaintiffs then argued that the Circuit Court should proceed to consider their outstanding temporary injunction motion notwithstanding their appeal of the anonymity issue. R. 87:2–4; 95:15–18. Plaintiffs cited Wisconsin Statute §§ 808.07 and 808.075, which provide that "a trial court … may … grant an injunction" "whether or not an appeal is pending." R. 87:2; 95:18. Plaintiffs emphasized that the "purpose of a

temporary injunction … is to prevent harm" while a case is pending, so Plaintiffs "should at least be heard" on their arguments that an injunction is needed to prevent harm to their children and to their constitutional rights. R. 95:17–18.

Plaintiffs pointed out that the pending anonymity appeal was irrelevant to their temporary injunction motion because their motion (like their entire case), depends on only one fact about them—that their "children might begin to deal with [gender dysphoria]" while this case is pending. R. 95:16–17, 22. This fact is indisputable, Plaintiffs emphasized, in the same way "that plaintiffs' children might get injured on the playground or might get stung by a bee or might get COVID-19," so Defendants do not need to know their identities to respond to the motion. R. 95:17. Nevertheless, the Circuit Court would not hear the Plaintiffs' outstanding temporary injunction motion until after this appeal is resolved. R. 95:26–30.

The Plaintiffs then filed a motion for an injunction pending appeal, identical in all meaningful respects to their temporary

injunction motion, R. 89–90, and the Court set a briefing schedule, Dkt. 130. On August 6, Defendants filed a 35-page response, App. 196–240 (Dkt. 140), along with their own expert affidavit to rebut Plaintiffs' expert, App. 241–85 (Dkt. 141), proving Plaintiffs' point that Defendants could fully and adequately defend the injunction motion without knowing Plaintiffs' identities. On August 14, Plaintiffs filed a reply, App. 286–306 (Dkt. 143), and rebuttal expert affidavit, App. 307–19 (Dkt. 142).

The Circuit Court heard arguments on September 21, and issued an oral decision partially granting Plaintiffs' injunction motion, App. 104–60 (Dkt. 153), to the extent that the District's Policy "allows or requires District staff to conceal information or to answer untruthfully in response to any question that parents ask about their child at school, including information about the name and pronouns being used to address their child at school." App. 102 (Dkt. 157).[7] The Circuit Court agreed that the standard for an

[7] Per Wis. Stat. § 809.12's requirement to provide this Court with "the reasons given by the trial court for its action," Plaintiffs have included the

injunction pending appeal is the same as for a preliminary injunction, App. 135–36, and, applying that standard, found that Plaintiffs had a likelihood of success on the merits (i.e, that this aspect of the Policy violates parents' constitutional rights), and that it causes irreparable harm for which they would have no adequate remedy. App. 137–38.

The Circuit Court did not, however, enjoin the Policy to the full extent Plaintiffs requested. Plaintiffs' motion had asked for an injunction prohibiting the District from: "(1) enabling children to socially transition to a different gender identity at school … without parental notice or consent; (2) preventing teachers and other staff from communicating with parents that their child may be dealing with gender dysphoria, or that their child has or wants to change gender identity, without the child's consent; and (3) deceiving parents by using different names and pronouns around parents than at school." R. 89:1–2. The Circuit Court's limited

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circuit court's written order and the transcript of the injunction hearing in an appendix to this motion.

injunction only prevents teachers from lying to or deceiving parents if they ask a *direct* question about their children at school—it does not prevent the District from facilitating gender-identity transitions at school, in secret, without parental notice or consent, and it allows the District to continue to bar staff from *volunteering* information to parents and to continue requiring deception by using different names at school and around parents and violating state record-keeping laws, at least until parents ask directly about this issue. *See* Dkt. 155:2–3.

Moreover, Plaintiffs explained that a limited injunction, while a step in the right direction, is not sufficient to prevent the serious harms they raised in their motion. Those harms include the "self-reinforcing" effect of "[h]aving every single teacher and staff member, people in positions of authority[,] treating the child as if they are the opposite sex," which experts believe can do lasting harm. App. 131; *infra* pp. 58–61. And while concerned parents can now ask about this issue and expect not to be lied to, their child "might start dealing with this tomorrow or next week or [in] the

following months, and parents should not have to interrogate their teachers on a periodic basis just to ensure that something secret is not happening in school." App. 130–31.

The Circuit Court acknowledged that Plaintiffs had sought an injunction requiring parental notice and consent for gender-identity transitions at school while this case proceeds, App. 115–16, but the Circuit Court simply declined to reach those issues, App. 134 ("I'm not talking about those today."); App. 138 ("I'm not making a decision on" those issues); App. 158 ("Again, that's going to wait for another day").

After the hearing, Plaintiffs filed a short motion for clarification, Dkt. 155, asking the court to give its reasons for the partial denial, and the Circuit Court provided a short explanation in its written injunction order. App. 102–03. Yet the Circuit Court did not address Plaintiffs' arguments or properly apply the injunction factors. As to the likelihood of success, the Circuit Court did not consider Plaintiffs' argument that, as a matter of parents' constitutional rights, schools must defer to parents on decisions as

significant and controversial as whether their child will transition to a different gender identity. Instead, the Circuit Court simply concluded that Plaintiffs are unlikely to succeed on their appeal *of the anonymity issue* and moved on—even though, with respect to the part the Circuit Court did enjoin, the Circuit Court properly considered Plaintiffs' likelihood of success on the underlying merits, as it should have.

Similarly, with respect to irreparable harm, the Circuit Court held that Plaintiffs could not show harm as an "inescapable effect of being anonymous." App. 102–03. Yet the Circuit Court did not discuss or assess any of Plaintiffs' actual arguments, none of which depend in any way on facts that are unique to them: that gender-identity transitions are experimental and controversial, that many experts believe they can do lifelong harm, that Plaintiffs, like all parents, have no way to know in advance when or if their children will begin to deal with this issue, and, given the policy of secrecy from parents, an injunction is necessary to protect

their children and their rights if this issue arises while the case proceeds. *See* R. 90:30–38; *infra* pp. 62–65.

Thus, despite having filed this case and a temporary injunction motion almost eight months ago, Plaintiffs have yet to have a court entertain their arguments that the District's Policy of secretly facilitating transitions at school, without parental notice and consent, is both harmful and unconstitutional, and should be enjoined while this case proceeds.

ARGUMENT

Wisconsin Statute § 808.07(2) provides that "[d]uring the pendency of an appeal, … an appellate court may … grant an injunction." *See Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 14, 237 Wis. 2d 498, 614 N.W.2d 565. Parties must first seek such relief from the circuit court, but if denied, they may file a motion directly in the court of appeals. Wis. Stat. § 809.12.

Although no Wisconsin appellate court to date (that undersigned counsel is aware of) has determined the standard for an injunction pursuant to Wis. Stat. §§ 808.07 and 809.12, the

Seventh Circuit has held that a request for an injunction under Federal Rule of Civil Procedure 62—the "federal counterpart" to Section 808.07, *see Scullion*, 2000 WI App 120, ¶ 14—is governed by the same standard as a request for a preliminary injunction. *See Grote v. Sebelius*, 708 F.3d 850, 853 n.2 (7th Cir. 2013).[8]

Therefore, to obtain an injunction under Wis. Stat. §§ 808.07 and 809.12, Plaintiffs must show "a likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy at law." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d 828; *Spheeris Sporting Goods, Inc. v. Spheeris on Capitol*, 157 Wis. 2d 298, 306, 459 N.W.2d 581 (Ct. App. 1990).[9] The purpose of any temporary

[8] In light of this, Plaintiffs' position is that there is no meaningful difference between a temporary injunction under Wis. Stat. § 813.02 and an injunction under Wis. Stat. § 808.07. There may technically be a durational difference, but a party entitled to one would necessarily be entitled to the other, given that the standard is the same. However, to the extent Defendants or this Court disagree and believe there is some other meaningful difference, Plaintiffs respectfully move for both.

[9] Some cases state a fourth factor—that an injunction must be "necessary to preserve the status quo." *E.g.*, *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. This Court should not consider this a requirement, for reasons explained in detail below, but even if this is a requirement, Plaintiffs meet it. *Infra* Part III.

injunction is to "mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits," *see In re A & F Enterprises, Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). Thus, "when the granting of [an] injunction will be of little or no injury to the defendant, and the refusal to grant it will be of great and irreparable damage to the plaintiff, courts usually grant the injunction pending the litigation." *Pioneer Wood Pulp Co. v. Bensley*, 70 Wis. 476, 36 N.W. 321, 323 (1888).

This Court reviews a trial court's denial of an injunction for an abuse of discretion. *Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 429, 293 N.W.2d 540 (1980). "[A] court erroneously exercises its discretion by: (1) failing to consider and make a record of the factors relevant to its determination; (2) considering clearly irrelevant or improper factors; or (3) clearly giving too much weight to one factor." *Carlin Lake Ass'n, Inc. v. Carlin Club Properties, LLC*, 2019 WI App 24, ¶ 43, 387 Wis. 2d 640, 929 N.W.2d 228. Especially relevant here, a court abuses its discretion when it "fail[s] … to consider a matter relevant to the

determination of the probability of the petitioners' success." *Wis. Ass'n of Food Dealers*, 97 Wis. 2d at 428.

I. Plaintiffs Are Highly Likely to Succeed on the Merits

A. The Policy Violates Parents' Rights

1. Parents Have a Constitutional Right to Direct the Upbringing of Their Minor Children

Article 1, § 1 of the Wisconsin Constitution provides that "all people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness." One of the most fundamental and longest recognized "inherent rights" protected by Article 1, § 1 (as well as the Fourteenth Amendment to the United States Constitution[10]) is the right of parents to "direct the upbringing and education of children

[10] To be clear, Plaintiffs only bring claims under the Wisconsin Constitution. Federal cases are nevertheless directly relevant given the Wisconsin Supreme Court's holding that Article 1, § 1 provides "the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *Mayo v. Wis. Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678. Moreover, two Justices recently noted that, as an original matter, Article 1, Section 1 provides an even stronger basis for parents' rights than the Fourteenth Amendment. *See Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 60–61 and n. 16, 387 Wis. 2d 1, 927 N.W.2d 486 (Justice R.G. Bradley, concurring, joined by Justice Kelly).

under their control." *See, e.g.*, *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.); *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998); *Wis. Indus. Sch. for Girls v. Clark Cty.*, 103 Wis. 651, 79 N.W. 422 (1899). This right is "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972), and the Wisconsin Supreme Court recently unanimously reaffirmed it, holding that any government action that "directly and substantially implicates a fit parent's fundamental liberty interest in the care and upbringing of his or her child" is "subject to strict scrutiny review." *A.A.L.*, 2019 WI 57, ¶ 22.

Parents also have a right under Article 1, Section 18, to raise their children in accordance with their religious beliefs. *See*, *e.g.*, *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971); *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 42–43, 426 N.W.2d 329 (1988); *State v. Kasuboski*, 87 Wis. 2d 407, 416, 275 N.W.2d 101 (Ct. App.

1978); *see also Yoder*, 406 U.S. at 213–14, 230–34[11]; *Prince v. Massachusetts*, 321 U.S. 158, 165–66 (1944); *Pierce*, 268 U.S. 510. This right is similar to, but distinct from, parents' right under Article 1, Section 1, in that it protects parental decision-making authority over significant decisions that implicate religious beliefs. *E.g.*, *Pierce*, 268 U.S. 510 (where children go to school); *Yoder*, 406 U.S. 205 (whether children attend school past eighth grade). In *Yoder,* the Supreme Court emphasized that the parental role is especially important "when the interests of parenthood are combined with a free exercise claim." *Yoder*, 406 U.S. at 233; *see also Bellotti v. Baird*, 443 U.S. 622, 640 (1979) (noting that "[parental] consultation is particularly desirable" for issues "rais[ing] profound moral and religious concerns."). As with an infringement of parents' rights under Article 1, Section 1, any "interference with" religious freedom rights protected by Article 1,

[11] Again, while Plaintiffs bring only state constitutional claims, federal cases are relevant given the Wisconsin Supreme Court's holding that Article I, Section 18 provides even "broader protections for religious liberty than the First Amendment." *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 66, 320 Wis. 2d 275, 768 N.W.2d 868.

Section 18 is subject to strict scrutiny. *Coulee Catholic Sch. v. Labor & Indus. Review Comm'n, Dep't of Workforce Dev.*, 2009 WI 88, ¶ 61, 320 Wis. 2d 275, 768 N.W.2d 868.

This line of cases establishes four important principles with respect to parents' rights.

First, parents are the primary decision-makers with respect to their minor children—not their school, or even the children themselves. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Jackson*, 218 Wis. 2d at 879; *Yoder*, 406 U.S. at 232. Parental decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602, and that parents are "in the best position and under the strongest obligations to give [their] children proper nurture, education, and training" because parents "hav[e] the most effective motives and inclinations" towards their children, *Jackson*, 218 Wis. 2d 835,

¶ 57 (quoting *Wis. Indus. Sch. for Girls*, 103 Wis. 651); *Parham*, 442 U.S. at 602.

Second, parental rights reach their peak, and thus receive the greatest constitutional protection, on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (calling this "the heart of parental decision-making authority"); *Yoder*, 406 U.S. at 233–34. One such area traditionally reserved for parents is medical care, as the United States Supreme Court recognized long ago: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603; R. 28 ¶¶ 134–38. Indeed, the "general rule" in Wisconsin "requir[es] parents to give consent to medical treatment for their children." *See In re Sheila W.*, 2013 WI 63, ¶¶ 16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). Another category of decisions at "the heart of parental decision-making authority" are those "rais[ing] profound moral

and religious concerns." *Bellotti*, 443 U.S. at 640; *C.N.*, 430 F.3d at 184.

Third, a child's disagreement with a parent's decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 603–04. *Parham* illustrates how far this principle goes. That case involved a Georgia statute that allowed parents to voluntarily commit their minor children to a mental hospital (subject to review by medical professionals). *Id.* at 591–92. A committed minor argued that the statute violated his due process rights by failing to provide him with an adversarial hearing, instead giving his parents substantial authority over the commitment decision. *Id.* at 587. The Court rejected the minor's argument, confirming that parents "retain a substantial, if not the dominant, role in the [commitment] decision" because "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 603–04. Thus, "[t]he fact that a child may balk at hospitalization

or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority." *Id.*

Fourth, the fact that "the decision of a parent is not agreeable to a child or … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603. Likewise, the unfortunate reality that some parents "act[ ] against the interests of their children" does not justify "discard[ing] wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602–03. The "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is "statist" and "repugnant to American tradition." *Id.* at 603 (emphasis in original). Thus, as long as a parent is fit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69 (plurality op.).

This constitutional commitment to parental authority is reflected in many state and federal laws. For example, state and federal law require schools to provide parents with access to all records about their children. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A). Under the federal Family Education Rights and Privacy Act (FERPA), only parents can request to amend education records. 34 CFR §§ 99.3; 99.4; 99.20(a). State law "prohibits a name change for a minor under fourteen unless both parents consent." *Jocius v. Jocius*, 218 Wis. 2d 103, 119, 580 N.W.2d 708 (Ct. App. 1998); Wis. Stat. § 786.36. And, as already noted, parental consent is required for most medical procedures in Wisconsin. *See*, *e.g.*, *Sheila W.*, 2013 WI 63, ¶¶ 16–24 (Prosser, J., concurring).

In accordance with these principles, courts have recognized that a school violates parents' constitutional rights if it attempts to usurp their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), for example, a high school swim coach suspected that a team member was pregnant, and, rather than

notifying her parents, discussed the matter with other coaches, guidance counselors, and teammates, and eventually pressured her into taking a pregnancy test. *Id*. at 295–97, 306. The mother sued the coach for a violation of parental rights, explaining that, had she been notified, she would have "quietly withdrawn [her daughter] from school" and sent her to live with her sister until the baby was born. *Id*. at 306. "[M]anagement of this teenage pregnancy was a family crisis," she argued, and the coach's "failure to notify her" "obstruct[ed] the parental right to choose the proper method of resolution." *Id*. at 306.

The court found that the mother had "sufficiently alleged a constitutional violation" against the coach and condemned his "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Id.* at 306–07. The court also suggested that the guidance counselors may have violated the mother's parental rights, even though she had not sued them: "We need not consider

the potential liability of school counselors here, although we have considerable doubt about their right to withhold information of this nature from the parents." *Id*. at 307.

2. The Policy Directly and Substantially Infringes Parents' Rights and is Subject to Strict Scrutiny

The District's Policy infringes parents' constitutional rights in at least three ways.

First, the Policy violates parents' right to make important decisions for their minor children by allowing and requiring District staff to facilitate a social transition to a different gender identity at school without parental consent. Policy at 18. Whether a child wrestling with his or her gender identity should socially transition is a significant and controversial healthcare decision that falls squarely within "the heart of parental decision-making authority," *C.N.*, 430 F.3d at 184; *Parham*, 442 U.S. at 603.

As described in more detail above, there is an ongoing debate among mental health professionals over how to respond when a child experiences gender dysphoria, and, in particular, whether children should socially transition by being addressed as though

they were the opposite sex. R. 28 ¶¶ 22–44, 60–69; *supra* pp. 7–11. Many experts believe that *enabling a transition* can be harmful, and Defendants do not dispute that this view is held by professionals in the field. *See* R. 28 ¶¶ 60–69, 98–120; Zucker, *supra* ("[P]arents who support, implement, or encourage a gender social transition … are implementing a psychosocial treatment."); Brunskill-Evans, *supra*; Shrier, *supra*.

Even WPATH, which Defendants' expert endorses, acknowledges that "[s]ocial transitions in early childhood" are "controversial" and that that "health professionals" have "divergent views." R. 7:24. Notably, Defendants have failed to cite *even a single source* or professional association endorsing childhood social transitions without parental involvement or a careful assessment by a medical professional, or suggesting that transition is right for *every* minor or adolescent, or advocating that schools should conceal this from parents. *See* App. 316. Instead, the sources Defendants do invoke (WPATH) recommend *the opposite*—deferring to parents. R. 7:24.

The District's Policy disregards these professionals and instead takes this potentially life-altering decision out of parents' hands and places it with educators, who Defendants concede have no expertise whatsoever in these matters, R. 42:11, and with young children, who lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602. By enabling children to transition without parental involvement, the District is effectively making a treatment decision without the legal authority to do so and without informed consent from the parents. *See Sheila W.*, 2013 WI 63, ¶¶ 16–24 (Prosser, J., concurring); R. 28 ¶¶ 83, 121–39. Given the significance of changing gender identity, especially at a young age, parents "can and must" make this decision. *Parham*, 442 U.S. at 603; R. 28 ¶¶ 134–39. The Policy therefore "directly and substantially" interferes with parents' right to make this critical decision. *A.A.L.*, 2019 WI 57, ¶ 22.[12]

[12] For many parents, including Plaintiffs-Appellants John Doe 1, Jane Doe 1, Jane Doe 4, John Doe 5, and Jane Doe 5, gender identity issues also "raise[ ] profound moral and religious concerns." *Bellotti*, 443 U.S. at 640; R. 10 ¶¶ 14–

Second, the Policy violates parental rights by prohibiting staff from communicating with parents about a subject directly involving their children, Policy at 9, 11, and even requiring teachers to actively deceive parents by using different names at school and around parents, Policy at 16. If a child expresses a desire to transition at school, these policies prohibit District staff from even *notifying* parents, without the child's consent, since doing so would "reveal a student's gender identity to … parents." Policy at 9; *see also* Policy at 11.

These policies violate parents' rights by circumventing parental involvement altogether on this sensitive issue. *See H. L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "presumptively include[ ] counseling [their children] on important

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21; R. 12 ¶¶ 14–21; R. 16 ¶¶ 14–21; R. 19 ¶¶ 14–21; R. 20 ¶¶ 14–21. Multiple religious leaders and organizations have issued statements on this topic expressing similar beliefs. *See* Congregation for Catholic Education, *Male and Female He Created Them,* ¶¶ 32, 35, *available at* http://www.educatio.va/content/dam/cec/Documenti/19_0997_INGLESE.pdf; The Council on Biblical Manhood and Womanhood, *Nashville Statement,* Articles 4, 7, available at https://cbmw.org/nashville-statement/. By facilitating a transition without their consent, the Policy directly interferes with religious parents' right to choose a treatment approach that, consistent with their beliefs, does not involve an immediate social transition. *E.g.*, R. 10 ¶ 19.

decisions"). Parents cannot guide their children through difficult decisions without knowing what their children are facing. That is why state and federal law give parents access to their children's education records. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A). By prohibiting staff from communicating with parents about this issue, the District's Policy cuts off an important channel of information—teachers and school staff—and effectively substitutes them for parents as the primary source of input for children navigating these difficult waters. *See Gruenke*, 225 F.3d at 306–07.[13]

Third, the Policy interferes with parents' ability to provide professional assistance their children may urgently need. Gender dysphoria can be a serious psychological issue that requires support from mental health professionals, R. 28 ¶¶ 54–59, 71–82, as even Defendants concede, R. 77 ¶ 17. And children experiencing gender dysphoria often face other issues, including depression,

[13] The portions of the Policy designed to hide this from parents also violate religious parents' right under Article 1, § 18 to guide their children through issues in accordance with their religious beliefs. *H. L.*, 450 U.S. at 410.

anxiety, suicidal ideation and attempts, and self-harm, R. 28 ¶¶ 57; 78–79, 114, and so should be evaluated, R. 28 ¶ 79.

Defendants concede that teachers and staff do not have the training and experience necessary to properly diagnose children with gender dysphoria or to opine and advise on the treatment options, and that they lack legal authority to provide children with treatment. R. 42:11. Gender dysphoria may first manifest at school and may surprise parents, R. 28 ¶ 78; App. 312, as a parent who has experienced this describes, R. 29 ¶¶ 3–7. And it should go without saying that parents cannot help their children through an issue that is concealed from them.

Thus, parents must be notified and involved not only to decide which treatment approach to pursue, but also to select the best mental health professional for their child. For this reason, the District's Policy prohibiting teachers from "revealing a child's gender identity … to parents," Policy at 9, violates parents' rights whether or not a child transitions, or even wants to transition. If a teacher observes behavior indicating that a child may be dealing

with gender dysphoria, the teacher must be free to openly discuss this with parents so that they can assess whether their child needs professional help.[14]

The District's implementation of its policy also reveals a blatant violation of state and federal laws giving parents access to their children's education records. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A). Parents generally have access to "all records relating to [their child] maintained by a school," Wis. Stat. § 118.125(1)(d), (2), where "record" is broadly defined, *id.* § 118.125(1)(e). There is a narrow exception for "[n]otes or records maintained for *personal use* by a teacher … if such records and notes are not available to others." *Id.* § 118.125(1)(d)1. The District's "gender support plan" form directs staff to "keep this

[14] To be clear, Plaintiffs do not argue that teachers and District staff have an *affirmative duty* to notify parents about any indication that a child may be wrestling with their gender identity. Plaintiffs do argue that parental notice and consent are required before the District may facilitate a transition at school, which is well recognized to be an important and controversial psychotherapeutic intervention in the lives and minds of their children. But as to any indications of gender dysphoria short of seeking to transition, Plaintiffs argue just that the District may not *prohibit* staff from openly communicating with parents about what they observe at school, as for all other issues.

interview in your confidential file, not in student records," R. 6:39—a clear attempt to use the narrow personal-notes exception to prevent parents from accessing this form. But this is an abuse of the exception; the form obviously is *not* solely for a teacher's "personal use," it is designed to record how *all teachers and staff* will refer to the student going forward, enforced by the non-discrimination policy. Policy at 18.

The Policy is also a striking aberration from the District's normal practices. District schools require parental consent for athletics,[15] field trips,[16] medication at school,[17] school dances,[18] internship programs,[19] special education programs,[20] music

[15] https://west.madison.k12.wi.us/athleticparticipation

[16] https://lafollette.madison.k12.wi.us/files/lafollette/uploads/parentalpermissionform_11.04.19.pdf; https://sennett.madison.k12.wi.us/files/sennett/FieldTripBackUpPermissionForm2012English.pdf

[17] https://studentservices.madison.k12.wi.us/Medication

[18] https://west.madison.k12.wi.us/prom-2020

[19] https://science.madison.k12.wi.us/internship

[20] https://govprograms.madison.k12.wi.us/files/govprograms/2017-18_permission_slip.pdf

classes,[21] photographing or recording students,[22] publicly displaying a student's artwork,[23] and allowing students to leave school during study halls.[24] Yet the Policy does not even require parental *notice* for gender identity transitions.

The Circuit Court's limited injunction of the Policy, preventing teachers and staff from lying to parents in response to a direct question about their children at school, App. 101–02, does not sufficiently remedy these infringements of parents' rights. It allows the District to continue to facilitate transitions at school without parental notice or consent, it allows the District to continue prohibiting staff from *volunteering* information about what is happening at school, and it allows the District to require staff to deceive parents, until they ask directly, by using different names at school and around parents and by violating state record-

[21] https://finearts.madison.k12.wi.us/files/finearts/String%20Parents%20Permission%20Slip.English.2015.pdf

[22] https://accountability.madison.k12.wi.us/ercguidelines

[23] https://finearts.madison.k12.wi.us/files/finearts/Art%20Work%20Display%20Permission%20slip%20ENGLISH_1.docx

[24] https://lafollette.madison.k12.wi.us/welcome-back-family-letter-2019

keeping laws. Nor is it sufficient to remedy the harms these infringements cause, as explained further below. *Infra* Part II.B.

Because the District's Policy directly and substantially interferes with the rights of parents, it is subject to strict scrutiny.

3. The Policy Fails Strict Scrutiny

The District's Policy fails both halves of strict scrutiny: it does not serve a compelling government interest, and even if it does serve a compelling interest in certain rare situations, it is not narrowly tailored to those situations. *A.A.L.*, 2019 WI 57, ¶ 18.

The Policy's stated justification is protecting children's privacy, *see* Policy at 9, but this is not a compelling interest, at least with respect to parents, because children do not have privacy rights vis-à-vis their parents. In *Bellotti v. Baird*, 443 U.S. 622, the Supreme Court recognized that "parental notice and consent are qualifications that typically may be imposed by the State on a minor's right to make important decisions," because the "parental role implies a substantial measure of authority over one's children." *Id.* at 638–40. "[T]he constitutional rights of children cannot be equated with those of adults," the Court explained, due

to the "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing." 443 U.S. at 634.

Thus, multiple lower federal courts have rejected minors' claims to privacy against their parents. The Fifth Circuit, for example, recently rejected a student's constitutional claim against her school for revealing her sexual orientation to her mother, holding that "there is no clearly established law holding that a student in a public secondary school has a privacy right under the Fourteenth Amendment that precludes school officials from discussing *with a parent* the student's private matters, including matters relating to sexual activity of the student." *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013) (emphasis in original).

Likewise, the Eastern District of New York rejected a privacy-based challenge to a school policy requiring parental notification of student pregnancies because "[n]o Court has created such a right to privacy for minors." *Port Washington Teachers' Ass'n v. Bd. of Educ. of Port Washington Union Free Sch. Dist.*, No.

04-CV1357TCPWDW, 2006 WL 47447, at *6 (E.D.N.Y. Jan. 4, 2006), *aff'd in part*, 478 F.3d 494 (2d Cir. 2007). That parents have full access to their children's records provide further evidence that children do not generally have privacy rights against their parents. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A).

The Policy also suggests, and Defendants argued below, that the Policy is necessary to keep students safe, Policy at 16, App. 226–27, but this does not provide a compelling justification for a number of reasons. First, the state "has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1019 (7th Cir. 2000). In other words, the District cannot *assume* that parents will do harm. Doing so directly violates the "presumption that fit parents act in their children's best interest." *Troxel*, 530 U.S. at 58 (plurality op.); *see also Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (finding a violation of parents' rights where state actors "not only failed to

presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite."). Nebulous, subjective conclusions that a family may not be "supportive" do not rise to this stringent standard.

Second, there is already a system in place to address those rare situations involving "imminent safety risks" from parents, namely Wisconsin's Child Protective Services program. *See generally* Wisconsin Department of Children and Families, *Wisconsin Child Protective Services (CPS) Process*.[25] Indeed, teachers and other school staff are mandated CPS reporters, Wis. Stat. § 48.981(2)(a)(14)–(16). Unlike the District's policy, the CPS process sets a high standard for displacing parents ("abuse or neglect"), *id.* § 48.981(2), and provides robust procedural protections, such as notice and a hearing and, ultimately, court review. *E.g.*, Wis. Stat. §§ 48.981(3)(c); 48.13; 48.27; 48.30.

Furthermore, the Policy is a far cry from one that would be narrowly tailored to protecting children from "imminent safety

[25] https://dcf.wisconsin.gov/cps/process

risks"; it enables gender identity transitions at school without parental consent, and prohibits staff from notifying parents about this, without requiring *any* evidence of an "imminent safety risk" to the child. Instead, the District has trained its staff that the criteria they should use for deciding whether to involve parents is whether the parents "support"—as determined by the District or the child—a gender identity transition. R. 6:39, 54; *supra* pp. 14–16. In other words, unless the parents agree with the approach the District believes is best, critical facts about their child's mental health and the school's interaction with their child will be concealed from them. The Supreme Court has made clear that is not a sufficient basis for excluding parents from a decision of this magnitude: "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to … the state." *Parham*, 442 U.S. at 603.

And even if the District's Policy to exclude parents *were* limited to situations involving "imminent safety risks," the Policy

does not contain any of the procedural protections that are typically required to displace a parent. In *A.A.L.*, for example, the Wisconsin Supreme Court addressed the "standard of proof required for a grandparent to overcome the presumption that a fit parent's visitation decision is in the child's best interest," and held that the parents' decision may be supplanted only with "clear and convincing evidence that the [parents'] decision is not in the child's best interest." 2019 WI 57, ¶¶ 2, 37. The Court explained that this "elevated standard of proof is necessary to protect the rights of parents" and to prevent lower courts from "substitut[ing] its judgment for the judgment of a fit parent." *Id.* ¶¶ 35, 37; *see also Troxel*, 530 U.S. at 69 (plurality op.). In the visitation context, parents receive "notice" and a "hearing." *See A.A.L.*, 2019 WI 57, ¶ 13 (quoting Wis. Stat. § 767.43(3)). Likewise, the CPS process described above requires notice, a hearing, and court review. *Supra* pp. 49–50. The District's Policy, by contrast, does not give parents any opportunity to weigh in or defer in any way to their judgment about what is best for their child.

Defendants have also attempted to justify the policy as simply "defer[ring] to the judgment of the students." App. 226–27. But schools do not "defer to students" on related decisions (e.g., name changes in school records, medication at school) or even much less significant ones (e.g. athletics, prom, field trips), they defer to *parents*. And the reason, the Supreme Court has explained, is that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions … Parents can and must make those judgments." *Parham*, 442 U.S. at 603. That rationale has scientific support: "[I]t is well established from many studies that adolescents chronically fail to appropriately balance short term desires against their longer term interests as they make decisions … [thus] the consent of parents or legal guardians is almost invariably required for even minor medical or psychiatric interventions." App. 316.

Astonishingly, the Policy also does not contain any age limit of any kind. So, if a six year old begins to question his or her sex—perhaps due to what he or she is hearing at school, *see supra* pp.

13, 16—and is persuaded to adopt a different gender identity but fears what his or her parents might think, teachers are required to keep parents in the dark as their child processes this sensitive issue, even if the *teachers believe* it would be in the child's best interest to communicate with parents. Such a policy is not "narrowly tailored" in any sense.

B. The Circuit Court Did Not Properly Assess Plaintiffs' Likelihood of Success on the Merits

The Circuit Court erred by failing to "consider a matter relevant to the determination of the probability of the petitioners' success." *Wis. Ass'n of Food Dealers*, 97 Wis. 2d at 428. In fact, the Circuit Court did not consider the underlying merits of Plaintiffs' claims *at all*. Instead, the Circuit Court considered only Plaintiffs' likelihood of success on the ancillary, procedural question of whether Plaintiffs may proceed anonymously. App. 102. That was error for multiple reasons.

First, the standard for an injunction pending appeal is the same as for a preliminary injunction, *see Grote*, 708 F.3d at 853 n.2, and thus the court must weigh whether the moving party "will

ultimately prevail," *id*. That certainly includes an assessment of the issues raised in the appeal, but it must also include the underlying merits to determine the overall likelihood of success. Both Defendants and the Circuit Court agreed that the likelihood-of-success factor includes the underlying merits, *see* App. 135–36; App. 206, and the court considered the underlying merits with respect to the portion of the Policy it enjoined, App. 137–38, but then simply disregarded them as to the remainder, App. 102.

Second, the underlying merits should be the primary, if not only, consideration, where, like here, the issue on appeal is a preliminary procedural issue which does not affect the merits and the merits will ultimately need to be decided regardless of the outcome of the appeal.

Moreover, as explained further below, the Circuit Court also erred by postponing consideration of Plaintiffs' initial temporary injunction motion (filed back in February) until after resolution of the Defendants' motion to dismiss, and then, after that was denied,

erred again by declining to consider the outstanding injunction motion until after this appeal is resolved. *Infra* Part IV.

The Plaintiffs were and are entitled to their day in court on their request for an injunction. In February they showed how an injunction is necessary to prevent irreparable harmed and why they are likely to win on the merits. But the Circuit Court never provided them with an opportunity to have that motion heard.

If the Circuit Court had promptly heard Plaintiffs' temporary injunction motion as it should have, a separate motion for an injunction pending appeal would not have been necessary, and Plaintiffs would have either the temporary injunction they requested or an order denying a temporary injunction from which they could appeal, which is the ordinary posture of cases like this.

So, even if this Court concludes that the likelihood-of-success analysis is different for an injunction pending appeal than for a temporary injunction, contra *Grote*, 708 F.3d at 853 n.2, Plaintiffs move for both, given that they were effectively denied temporary injunctive relief by the repeated postponements.

The whole purpose of an injunction is to "mitigate the damage that can be done during the interim period before a legal issue is finally resolved on its merits." *See A & F Enterprises*, 742 F.3d at 766. Plaintiffs have powerful arguments that the District's Policy is both unconstitutional and harmful to them and to their children. They made those arguments eight months ago. Plaintiffs are entitled to at least have those arguments *considered* in a timely manner.[26]

Lastly, even putting aside the Circuit Court's failure to consider the underlying merits of Plaintiffs' claims, the Circuit Court was also wrong to conclude that Plaintiffs are unlikely to succeed on their appeal. As Plaintiffs' brief on appeal shows, both

[26] While this Court could remand for the Circuit Court to consider the underlying merits first, it should not do so. When a trial court erroneously denies an injunction, Wisconsin appellate courts "usual[ly]" "direct the entry of an injunction." *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966). Additionally, the likelihood-of-success factor presents a pure legal question—whether a school may constitutionally exclude parents from a significant and controversial treatment decision involving their minor children—which this Court would review de novo. Finally, judicial economy and fairness to the Plaintiffs militate in favor of resolving their injunction motion now, since they filed it eight months ago. *Jackson*, 218 Wis. 2d 835, ¶ 104; *infra* Part IV.

the law and the facts strongly support their request to proceed anonymously.

II. An Injunction Is Necessary to Prevent Irreparable Harm

"[W]hen the granting of the injunction will be of little or no injury to the defendant, and the refusal to grant it will be of great and irreparable damage to the plaintiff, courts usually grant the injunction pending the litigation." *Pioneer Wood Pulp Co.*, 36 N.W. at 323. An injunction is warranted here because the District's Policy risks significant harm to Plaintiffs or their children without an injunction, Plaintiffs have no way to prevent these harms without an injunction given the District's policy of secrecy, and an injunction will not harm the District in any way.

A. The Policy May Do Lasting Harm to Plaintiffs or Their Children and an Injunction Is Perfectly Tailored to Preventing Those Harms

The District's Policy causes four different types of irreparable harm that warrant an injunction.

First, a social transition during childhood could have lifelong consequences for the child involved. As described above, many

professionals in the field believe that "affirming" a gender-identity transition during childhood can be self-reinforcing, causing gender dysphoria to persist when it otherwise might have resolved itself. *Supra*, pp. 8–10. A robust body of research has shown that the vast majority of children who experience gender dysphoria (roughly 80–90%) ultimately resolve it in favor of their biological sex—that is, if they do *not* transition. R. 28 ¶ 60; R. 7:18. But if children *do* transition at a young age, the desistance rate drops off a cliff; some recent studies suggest that fewer than 20% of boys who transitioned prior to puberty ultimately reverted to their biological sex. R. 28 ¶¶ 63–64.

There are many potential lifelong consequences if a child's transgender identity persists as a result of changing gender identity at school. First, and most obvious, is the inherent difficulty of life feeling trapped in the wrong body, which is often associated with psychological distress. R. 28 ¶¶ 16, 78, 91, 95, 99. While the causes are debated, it is well known that transgender

individuals experience significantly worse mental health outcomes than the general population. R. 28 ¶¶ 78, 95, 99, 114.

There are also many long-term physical challenges, given that it is not physically possible to change biological sex. R. 28 ¶ 12. Transitioning *socially* is the first step; later steps include puberty blockers, hormone treatment, sex reassignment surgery, and a variety of other cosmetic surgeries. R. 28 ¶ 12, 67, 102–104; *see* R. 7:25–26. The effects of these interventions are still unknown, R. 28 ¶¶ 88–90, 104–05, but some side effects are well known: surgery is sterilizing, and puberty blockers and cross-sex hormones also affect fertility and sexual response. R. 28 ¶¶ 102–04. Not all transgender individuals pursue a full transition, but many do, and an early social transition sets a child on a path toward that end. R. 28 ¶¶ 64–67, 102.

Other risks include social isolation from peers, R. 28 ¶ 111, and a greatly diminished pool of individuals interested in sexual and romantic relationships, R. 28 ¶ 110. There is also a growing number of "detransitioners" who come to deeply regret

transitioning. R. 28 ¶¶ 115–20. And there are likely other risks that are not yet known. Even WPATH, which Defendants' expert endorses, openly admits that there is little evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." R. 7:24.

The fact that the science is unsettled does not diminish the potential harms, but instead *magnifies* them. No one would argue that there is no harm in secretly administering an experimental drug to young children merely because the effects are unknown. Experimental treatments typically require *more* rigorous informed consent procedures, R. 28 ¶¶ 131–39, precisely because of the unknown risks.

Second, the District's Policy directly interferes with parents' ability to choose a course of treatment that does not involve an immediate transition. As already explained, an affirmed social transition is just one of multiple alternative treatment paths; other approaches include "watchful waiting" or psychotherapy to help a child identify and address the underlying causes of the dysphoria

and so return to comfortable identification with his or her biological sex. *Supra* pp. 7–8; R. 28 ¶¶ 29–44. The choice over which treatment path to pursue is a significant fork in the road given that these approaches are directly at odds with one another.

Third, children experiencing gender dysphoria often need mental health support, regardless of whether they transition, and the District's policy of secrecy prevents parents from providing their children with assistance they may urgently need. R. 28 ¶¶ 54–59, 78–82, 114. The District concedes that it cannot provide professional assistance to help a child cope with the psychological distress and other mental health issues often associated with gender dysphoria. R. 42:11; R. 28 ¶¶ 83, 121–139. And if, due to the District's Policy, parents are delayed in learning that their child is dealing with this issue, the child's needs may go unmet, with possibly devastating consequences. R. 28 ¶¶ 57, 91–95, 114. Enabling children to lead a "double life" is also "psychologically unhealthy in itself" and harmful to the integrity of the family. R. 28 ¶ 82.

Fourth, and finally, the violation of Plaintiffs' constitutional rights is itself an irreparable harm. Indeed, "[w]hen an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. § 2948.1 (3d. ed.).

Plaintiffs, like all parents, have no way to know in advance when or if this will become an issue for their children, and the first manifestation of it may come at school. R 28 ¶ 78; App. 312; *see* R. 29 ¶¶ 3–7. To give just one real-world example, Jay Keck's daughter, during childhood, "showed no discomfort whatsoever with being a girl or any interest in being a boy." R. 29 ¶ 3. But she met a girl during high school who came out as transgender and "[w]ithin 24 hours decided that she was also a boy trapped in a girl's body and wanted to pick out a new male name." R. 29 ¶ 7. When she told her school this, the school promptly "affirmed" her new identity and began using her new male name and pronouns, all without notifying her parents (and even attempting to hide this from them). R. 29 ¶¶ 8–9. When they eventually learned about

this, they consulted "over 12 mental health professionals," and the consensus was that their daughter's "sudden beliefs about being transgender were driven by her underlying mental health conditions." R. 29 ¶ 14. Some professionals even told them that "affirming" her beliefs "would be against [their] daughter's long-term best interest." R. 29 ¶ 15. Even after sharing this with the school, the school continued to refer to their daughter using a male name and pronouns. R. 29 ¶¶ 16–17. Keck believes that this "did significant harm to [his] daughter." R. 29 ¶¶ 18–19.

Plaintiffs must seek an injunction now because the District's Policy requires staff to hide this from them and even actively deceive them, preventing them from learning when these harms are imminent, or worse, realized. Without an injunction, parents have no way to protect their decision-making role.

The injunction Plaintiffs seek is also perfectly tailored to the harm they seek to avoid—it only requires the District to notify and defer to parents *if* this issue arises while the case is pending. If it does not, then the injunction will not require the District to do

anything at all. The odds that children will seek to transition at school while this case is pending may be low,[27] but the consequences if they do could be enormous and life-long. To return to a simple analogy already mentioned, if the District's policy were to secretly administer an experimental drug to students reacting to a bee sting, a court would not deny an injunction simply because a parent's child has not yet been stung by a bee. The point of an injunction is to *avoid* harm; that is all Plaintiffs seek.

And there is no harm to Defendants from granting an injunction; it will simply require the District to defer to parents if their child seeks to transition. Any harm the District may assert *from parents* is directly at odds with the "traditional presumption that a fit parent will act in the best interest of his or her child,"

[27] That said, recent statistics have shown a dramatic increase in the number of children seeking help with gender identity issues in the past few years. R. 28 ¶ 26; *E.g.*, Gordon Rayner, *Minister orders inquiry into 4,000 per cent rise in children wanting to change sex*, The Telegraph (Sept. 16, 2018) (noting a "4,400 per cent increase in girls being referred for transitioning treatment in the past decade") https://www.telegraph.co.uk/politics/2018/09/16/minister-orders-inquiry-4000-per-cent-rise-children-wanting/. And schools have never, until recently, actively promoted the idea that children have a "right" to "choose their own gender." *Supra* pp. 12–13, 16.

Troxel, 530 U.S. at 69 (plurality op.), and will be far more zealous in doing so than anyone else, including teachers and government bureaucrats, *Jackson*, Wis. 2d 835, ¶ 57; *Gruenke*, 225 F.3d at 307 ("It is not educators, but parents who have primary rights in the upbringing of children."). The idea that the District can "supersede parental authority" because it believes it knows best is "statist" and "repugnant to American tradition." *Parham*, 442 U.S. at 603.

B. The Circuit Court Failed to Consider These Harms, and Its Limited Injunction is Insufficient to Prevent Them

The Circuit Court's limited injunction is insufficient to protect against these harms. While it prevents staff from lying to parents who ask directly about whether their child has *already* transitioned at school, it does not require the District to defer to parents or even notify them *before* their child transitions. App. 102. And the District may continue to: (1) require its staff to deceive parents by using different names around parents than at school and by withholding the "gender support plan" from student records; (2) prohibit staff from *volunteering* any information to parents; and (3) directing staff not to answer a question about this,

so long as they do not lie. App. 102; Dkt. 155:3. As already noted, parents cannot know in advance *when* their children might begin to deal with this issue. R 28 ¶ 78; App. 312. So while they can ask about it today and expect not to be lied to, their child might start to struggle with their gender identity tomorrow or next week or next month.

If the District facilitates a gender-identity transition at school while this case is pending, the harms Plaintiffs are concerned about will be immediately realized. Having all teachers and staff treat a child as if he or she were the opposite sex for any period of time could have a self-reinforcing effect with long-term implications. R. 28 ¶¶ 60–69. And, of course, enabling this major life change without parents will immediately violate their right to make this decision, to help their child navigate it, and to provide professional help their child may need.

The Circuit Court did not discuss, or show that it evaluated, the harms that Plaintiffs raised in their injunction motion. R. 90:30–38. Instead, the Circuit Court simply brushed them aside

on the ground that Plaintiffs cannot show harm "as to themselves" as an "inescapable effect of being anonymous." App. 102. But the harms Plaintiffs raised are based on the serious and potentially life-long implications of an "affirmed" transition at school, which obviously has nothing to do with who the Plaintiffs are, and the indisputable fact that Plaintiffs' children, like all children, might begin to deal with this issue while this lawsuit is pending, in the same way that children might get injured on the playground or might get stung by a bee or might get COVID-19. And, to reiterate: a preemptive injunction is the only way to prevent these harms given the District's secrecy policy; the injunction only requires something of the District *if* the issue arises; and all it requires is deference to parents on a controversial mental-health issue.

Finally, the Circuit Court's statement that Plaintiffs are attempting to "convert the case to a *de facto* class action" is a red herring, and further shows that the Circuit Court's analysis was improper. Plaintiffs seek only declaratory and injunctive relief and challenge the District's policy on its face as a clear violation of

parents' constitutional rights. Courts regularly enjoin unlawful and harmful policies and do not limit the injunction to the named plaintiffs. *See*, *e.g.*, Order Granting Temporary Injunction, *Wis. Council of Religious and Indep. Schools v. Heinrich*, No. 2020AP1420 (Sept. 10, 2020) (enjoining a Dane County order closing all schools)[28]; *Papa v. Wisconsin Dep't of Health Servs.*, 2020 WI 66, ¶ 12, 393 Wis. 2d 1, 946 N.W.2d 17 (noting that the circuit court "grant[ed] a temporary injunction enjoining [DHS] from applying or enforcing the Perfection Rule.").

III. An Injunction Is Necessary to Preserve the Status Quo

As noted above, some cases state a fourth requirement, that an injunction must be "necessary to preserve the status quo." *E.g.*, *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶ 20. This should not be considered a requirement for a temporary injunction,

[28] http://www.thewheelerreport.com/wheeler_docs/files/91120wsc.pdf

for multiple reasons,[29] but even if it is, an injunction would preserve the status quo in two important ways.

First, Plaintiffs seek to protect the names that they thoughtfully and lovingly gave to their children at birth and the sexual identities their children were born with. That "status quo" both predates the District's 2-year-old, anomalous Policy, and far exceeds in importance maintaining that new policy. Plaintiffs simply want to participate in the decision before the District facilitates a major change to their children's identities. Nothing could be more directly related to "preserving the status quo."

[29] First, such a requirement has no foundation in the text of either the temporary injunction statute, Wis. Stat. § 813.02, or the statute for injunctions pending appeal, Wis. Stat. § 808.07(2). Second, more recent decisions from the Wisconsin Supreme Court have not treated this as a requirement. Order Granting Temporary Injunction at 2, 5 n.4, *WCRIS v. Heinrich*, No. 2020AP1420 (Sept. 10 2020) (flagging that Wisconsin courts have "at times" mentioned the status quo, but not deciding whether this is a requirement); Order Granting Temporary Injunction, *Wis. Legislature v. Evers*, No. 2020AP608 (Wis. Apr. 6, 2020); *Kocken, 2007 WI 72,* ¶ 22. Finally, as the Seventh Circuit has explained, identifying the "status quo" is often a matter of characterization and is therefore not a useful construct for determining whether to grant an injunction, which should focus instead on preventing harm while a potentially meritorious lawsuit is pending. *E.g.*, *Am. Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583, 590 n.1 (7th Cir. 2012); *Praefke Auto Elec. & Battery Co. v. Tecumseh Prod. Co.*, 255 F.3d 460, 464 (7th Cir. 2001).

An injunction is also necessary to preserve parental decision-making authority over minor children, a "status quo" that preceded the District's policy by well over a century. *See Yoder*, 406 U.S. at 232 (an "enduring American tradition"); *Troxel*, 530 U.S. at 65 (plurality op.) ("the oldest of the fundamental liberty interests recognized by the [Supreme] Court").

IV. The Circuit Court Erred by Declining to Hear Plaintiffs' Temporary Injunction Motion in a Reasonable Time

In addition to the errors already identified, the Circuit Court also erred by repeatedly delaying consideration of Plaintiffs' temporary injunction motion (which still has yet to be heard). While these errors do not need to be corrected for purposes of this motion,[30] it would be helpful to the bench and bar to correct them to avoid similar situations in the future.

[30] That is, unless this Court disagrees with Plaintiffs that there is no meaningful difference between an injunction pending appeal and a temporary injunction. If this Court believes there is a meaningful difference, then these errors support this Court ordering the circuit court to enter a temporary injunction.

The Circuit Court first erred by concluding that Wis. Stat. § 802.06(1)(b) requires courts to postpone consideration of an earlier-filed temporary injunction motion until after a subsequent motion to dismiss has been resolved. R. 92:5–22; *supra* pp. 16–20. That cannot possibly be the effect of § 802.06(1)(b), because it would allow defendants to procedurally evade temporary relief for months, without any hearing, totally undermining that remedy. *See State v. Villamil*, 2017 WI 74, ¶ 19, 377 Wis. 2d 1, 898 N.W.2d 482 (statutes must be interpreted "to avoid absurd results.").

A better interpretation of the phrase "discovery and other proceedings" is that "other proceedings" refers only to *discovery-related* proceedings. That interpretation makes sense of the clause allowing an exception for "good cause," which only references discovery. Wis. Stat. § 802.06(1)(b). The Act adopting § 802.06(1)(b) also states that it "relat[es] to: discovery of information in court proceedings," without any suggestion that it also upends the temporary injunction procedure. 2017 Wis. Act 235.

Even if "other proceedings" encompasses all proceedings, discovery-related or not, this Court should read in an exception for temporary injunctions under the specific-trumps-the-general canon of statutory interpretation, as the Wisconsin Supreme Court has done repeatedly for the broadly worded notice-of-claim statute. *See*, *e.g.*, *E-Z Roll Off, LLC v. Cty. of Oneida*, 2011 WI 71, ¶¶ 20–24, 335 Wis. 2d 720, 800 N.W.2d 421; R. 92:13–14, 17–18.

Alternatively, this Court could hold that § 802.06(1)(b) allows courts to receive briefing and hear a temporary injunction motion at same time as a motion to dismiss, and simply must *decide* the motion to dismiss first, as another judge in Dane County recently concluded. R. 92:18; *see* Order Denying Motion to Dismiss and Granting Temporary Injunction, *League of Women Voters v. Knudson*, Case No. 2019-CV-84 (Mar. 21, 2019, Dane County Cir. Ct., Judge Niess presiding). Whichever way this Court interprets § 802.06(1)(b), it should resolve this issue because there is confusion even within Dane County.

After the motion to dismiss was denied, the Circuit Court erred again by declining to consider Plaintiffs' outstanding temporary injunction motion until after this appeal is resolved, R. 95:17–18, even though the statutes allow a circuit court to "*grant* an injunction" "whether or not an appeal is pending," Wis. Stat. §§ 808.07(2)(a), 808.075(1), which necessarily means parties are entitled to be *heard* if they have requested one.

CONCLUSION

For the reasons stated above, this Court should reverse the Circuit Court's partial denial of their injunction motion and grant the injunction set forth in Plaintiffs' motion.

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