No. 2020AP1032

IN THE WISCONSIN SUPREME COURT

JOHN DOE 1, JANE DOE 1, JANE DOE 3, JANE DOE 4,
Plaintiffs-Appellants-Petitioners,

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. LAFOLLETTE HIGH SCHOOL,
Intervenors-Defendants-Respondents.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Defendant-Respondent Madison Metropolitan School District ("MMSD") and Intervenors-Defendants-Respondents Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School, and Gender Sexuality Alliance of Robert M. La Follette High School (collectively, "Respondents") oppose the Plaintiffs-Appellants-Petitioners' ("Petitioners") Petition for Review. Both the circuit court and court of appeals found that Wisconsin law does not allow Petitioners the relief of complete anonymity. Because both courts were correct on the law and the circuit court appropriately exercised its discretion to order use of pseudonyms in public filings while requiring disclosure of their identities to counsel and the court under an "attorneys' eyes only" protective order, this Court should deny Petitioners' petition with respect to anonymity.[1]

Further, this Court should reject Petitioners' attempt to resurrect their complaints about the scope of the circuit court's order partially granting their request for temporary injunctive relief pending appeal, the subject of an earlier Petition for Review this Court has already denied. There is currently a limited injunction pending appeal that forbids MMSD from concealing information or lying to parents who ask whether their children are using different names or pronouns in school. Petitioners appealed in an attempt to expand that injunction, lost at the court of appeals, and then had their Petition for Review to this Court denied.

Just as their last Petition for Review, rather than allow the litigation to unfold in the typical fashion before the circuit court and

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[1] Petitioners oscillate between arguing for complete anonymity from the court, Respondents' counsel, the parties, and the public (*see* Pet. 9, Section I), and claiming "they were ready and willing to disclose their identities to the court." (*Id.* at 14.) While Petitioners' actual motion was clear that they sought only complete anonymity (R.4), the circuit court nevertheless addressed and rejected both arguments. (R.74; R.93 at 18-26.)

court of appeals, Petitioners seek to sidestep the fact-finding process, limit Respondents' discovery, and shortcut their way to this Court. Petitioners did not file a petition to bypass or a petition for writ of supervision. Thus, Petitioners' request for this Court to develop new law is entirely inappropriate. They filed a petition for review, and there is no special or important reason why this Court should grant it. The only question appropriately subject to a petition for review is whether the circuit court erroneously exercised its discretion with respect to the anonymity issue. This Court has already rejected the unrelated question about the scope of the injunction pending appeal and such does not merit review now any more than it did six months ago.

STATEMENT OF ISSUES

1. Whether the circuit court erroneously exercised its discretion by allowing Petitioners to seal their identities from the public and parties, but requiring Petitioners to provide them to the court and counsel under an attorneys' eyes only protective order.

2. Whether the circuit court, the courts of appeals, and this Court erred in denying Petitioners' attempts to expand a limited injunction pending appeal.

STATEMENT OF FACTS

1. Procedural History.

Petitioners filed a complaint seeking a declaratory judgment against MMSD declaring that MMSD's Guidance & Policies to Support Transgender, Non-Binary, and Gender Expansive Students (the "Guidance") violates their fundamental rights as parents under the Wisconsin Constitution to the extent that the Guidance: allows their students to use a name and pronouns of their choice at school; keeps teachers and staff from communicating with parents about a student's gender identity without first obtaining the student's consent; and permits school staff, if the student wishes, to use

different names and pronouns in communications with parents than the ones they use in school. (R.1.) While Respondents dispute Petitioners' claims regarding the Guidance, Petitioners have failed to show that they have any grounds for challenging it, given that they have failed to show any likelihood at all that their children, who have exhibited no signs they are questioning their gender assigned at birth, will be affected by it.

Petitioners filed a motion to proceed anonymously, asking the circuit court to adopt a balancing test they argued was used by some federal courts and to proceed without sharing their names not only with the public, but also the court and Respondents. (R.4.) Petitioners submitted an affidavit of counsel attaching social media comments to support their desire to proceed anonymously. (R.8.) Additionally, shortly after filing their complaint and their motion to proceed anonymously, Petitioners also filed a motion for preliminary injunction. (R.26.)

MMSD opposed Petitioners' anonymity motion as Wisconsin law does not allow a party to proceed anonymously and MMSD would be prejudiced by not being able to obtain discovery if the court granted Petitioners' motion. (R.42.) The court took up the anonymity motion prior to the preliminary injunction motion as it was filed first. At oral argument, the circuit court denied the motion to allow Petitioners to proceed anonymously, but crafted a remedy allowing them to keep their identities sealed from the public and parties, only disclosing their identities to the court and Respondents' counsel within the restrictions of an attorneys' eyes only protective order. (R.74.) The court ordered Petitioners to file an amended complaint within fourteen days under seal. (R.93 at 24.)

The court then entered a scheduling order on Petitioners' motion for a preliminary injunction. (R.73.) It gave MMSD thirty days from the filing of the amended complaint to file any responsive materials, and fourteen days for Petitioners to reply, with oral argument set for September 3, 2020. (R.93 at 66, 76; R.73.) At the same

hearing, the circuit court granted Intervenors-Defendants-Respondents the right to intervene in the case to defend the Guidance. (R.66.)

On June 12, 2020, however, Petitioners appealed from the order to file under seal before MMSD's response to their motion for preliminary injunction was due. (R.84.) Petitioners also brought a motion for a stay pending appeal, which was granted. (R.83; R.91.) As the scheduling of Petitioners' motion for a preliminary injunction (R.26) was tied to the filing of the amended complaint, which did not occur due to the Petitioners' own request for a stay, the circuit court did not and has never ruled on the preliminary injunction motion.

Then, on June 25, 2020, Petitioners filed a motion for an injunction pending appeal. (R.89.) After briefing and oral argument, the circuit court granted it in part. (P-App. 53–55.) Petitioners then filed a "Motion for an Injunction Pending Appeal and/or Temporary Injunction" with the court of appeals to further expand the injunction pending appeal, which motion was, and a petition for review of that denial, which this Court denied. (P-App. 27-35; March 2, 2021 Ord. of Wis. Sup. Ct. denying Pet. for Rev.)

As to the appeal of the circuit court's "order to file under seal," as the court of appeals called it, Petitioners argued that the circuit court erred in requiring them to disclose their identities to the court and counsel. (R.84.) The court of appeals affirmed the circuit court's order, concluding that Petitioners failed to show that the circuit court erroneously exercised its discretion in issuing the order to file under seal. (P-App. at 1-26.)

2. The Circuit Court Applied The Appropriate Standard To Petitioners' Request To Proceed Completely Anonymously.

This Court should not confuse Petitioners' repetition of the arguments they made to both the circuit court and court of appeals as

the findings of those courts. The lower courts did not find, as Petitioners suggest, that Petitioners and their children had demonstrated a need for complete anonymity from the public, the court, parties, and counsel. (P-App. 5-7.) Rather, the circuit court found that Petitioners demonstrated that should *their names* be known by the public, Petitioners would likely be subject to threats and intimidation. (P-App. 39.)

The circuit court carefully considered Petitioners' evidence in support of their motion to proceed anonymously. That evidence included vague social media postings, snide remarks about Petitioners' counsel, and vehement support for transgender, non-binary, and gender expansive children who have traditionally been the subject of bullying and torment in schools. (R.8.) Petitioners provided no evidence suggesting that either they or their children have faced harassment or any negative feedback because of their status as individuals who object, based on their religious and other beliefs, to Guidance intended to protect the safety and well-being of transgender, non-binary, and gender expansive students at MMSD schools.

In contrast, when adopting its Guidance, MMSD reviewed data showing that transgender youth in Dane County are significantly more likely than cisgender youth to have experienced homelessness and violence in the home and relied on that and other data regarding the serious risks of harm that LGBTQ+ students face as bases for implementing the Guidance. (R-App. 6-7.) MMSD also noted that in response to a nationwide survey:

> three-quarters of transgender students felt unsafe at school;
>
> two-thirds of transgender and non-binary students reported being verbally harassed at school;
>
> one in four transgender and non-binary students reported being physically harassed at school; and
>
> one in ten transgender and non-binary students reported being physically assaulted at school.

(R-App. 7.)

The circuit court exercised its discretion to protect the Petitioners' identities, and determined that the best approach to do so while allowing Respondents' necessary discovery was to keep Petitioners' identities secret from the public and parties, not the court and counsel. (P-App. 42–43.) Contrary to Petitioners' repeated assertions, the circuit court found that Respondents could be prejudiced by Petitioners' request. The circuit court would not agree that the Petitioners' identities were "completely immaterial to everything that follows in this case" stating that "at this point in this juncture it's not for me to say as to how I would control what the lawyers do in defending the policy of the school district or in the discovery that may follow." (P-App. 41–42.)

Reviewing the circuit court's order to seal for an erroneous exercise of discretion, the court of appeals affirmed the order, finding that the circuit court applied the appropriate legal standard—considering both the "administration of justice" test and the "public interest" test under Wisconsin law—and that Petitioners did not assert that their request of anonymity was "subject to any blanket legal exception to Wisconsin's general rule of open court records." (P-App. 20.)

The court of appeals declined to adopt Petitioners' desired procedure "as a substitute for Wisconsin's clearly delineated statutory procedure, under which a party seeking to protect its identity may do so through a motion to seal, and may file the identifying complaint under temporary seal while awaiting the court's decision on the motion." (P-App. 18 (citing Wis. Stat. §801.21(2).) The court of appeals, like the circuit court, also "decline[d] to adopt the purported federal balancing test (assuming without deciding that there is a uniform federal test) because it is contrary to, not equivalent to, the Wisconsin balancing test." (P-App. 19.)

3. The Circuit Court Applied The Appropriate Standard To Petitioners' Request For An Injunction Pending Appeal.

Courts generally may grant injunctive relief only when the moving party shows that: (1) it is likely to suffer irreparable harm without the injunction; (2) no other adequate remedy at law exists; (3) a temporary injunction is necessary to preserve the status quo; and (4) it has a reasonable probability of success on the merits. *See Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 293 N.W.2d 540 (1980); *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. If a party fails to demonstrate any one of these factors, a court may deny injunctive relief at any stage of litigation. *See Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶20. The standard for granting relief under Wis. Stat. §808.07(2)(a) reveals that preservation of the status quo and the likelihood of irreparable harm are the most crucial factors to ensure effective resolution of the issues on appeal.

"In consideration of the applicable legal standard for obtaining an injunction pending appeal," the circuit court found that Petitioners could not demonstrate irreparable harm beyond the extent to which the Guidance could be interpreted to allow teachers to lie to parents. (P-App. 54-55; P-App. 56-65.) Because Petitioners remain anonymous, the circuit court determined that they had no evidence of further irreparable harm and denied Petitioners the remaining injunctive relief they requested. (*Id.* at 55.) Concluding Petitioners failed to show that any teacher was untruthful to them personally, the circuit court articulated that Petitioners "have not provided facts sufficient for this court to find irreparable harm or to find that they do not have an adequate remedy <u>as to themselves</u>." (*Id.* (emphasis in original).) The circuit court went on to clarify that "[b]y denying the motion in part, the court concludes that it is preserving the status quo whilst this case winds its way through the appellate court system." (*Id.*)

REASONS TO DENY THE PETITION FOR REVIEW

This Court should deny the Petition for Review because there is no need to disturb the circuit court's discretionary decisions on the anonymity issue or the injunction pending appeal. As shown below, Petitioners cannot meet their burden to identify applicable criteria or otherwise provide substantial and compelling reasons for review. *See* Wis. Stat. §809.62(1r)(a)–(e) (identifying criteria for review); Wis. Stat. §809.62(1r) (Supreme Court review will be granted only "when special and important reasons are presented."); *see also* Wis. Stat. §809.62(1r) Judicial Council Committee's Note 1981.

I. PETITIONERS CANNOT MEET ANY OF THE CRITERIA FOR REVIEW TO PROCEED ANONYMOUSLY.

Petitioners state as grounds for review of the anonymity issue that there is a is a need for this Court to "establish[ ] [or] implement[ ] … a policy within its authority," Wis. Stat. §809.62(1r)(b); review will "develop … the law" on a question that is "novel," legal rather than factual, and that "calls for application of a new doctrine," §809.62(1r)(c); and the Court of Appeals' decision "'conflict[s] with' the test federal courts apply," §809.62(1r)(d). (Pet. 2-3.) Petitioners ignore Wisconsin law on the issue and that the circuit court properly exercised its discretion to require disclosure with a protective order.

A. Petitioners Are Not Likely To Succeed On The Merits Of Their Petition.

1. Wisconsin law does not allow Petitioners to hide their identities from the court and Respondents.

Petitioners fail to cite to any Wisconsin precedent allowing a party to hide its identity from the court, opposing counsel, and the parties. They are right that in very limited circumstances a court can prevent *the public* from learning its identity—which is precisely what the circuit court did here. However, none of those circumstances allow a party to withhold its identity from the court and other parties.

Petitioners erroneously rely on a few Wisconsin cases in which a party identified as "Doe" in the caption was permitted to use a pseudonym in public filings. None of these cases address a party's ability to proceed anonymously with respect to the court, the parties, and counsel, and thus none can be said to be precedent on this point. *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents."). As the circuit court noted, the Wisconsin cases Petitioners cite as support in fact suggest that the lawyers knew the identities of the pseudonymous plaintiffs. (R-App. 36-38.)

The circuit court stated that "[t]here is no precedent for what the plaintiff is asking for in the current published appellate case law." (P-App. at 39.) The court of appeals agreed with the circuit court in holding that the court has the discretion to enter as restrictive a protective order as is warranted, taking into account the facts and circumstances of a particular case and whether there is an "overriding public interest" in secrecy or the administration of justice requires it, just as occurred here. (P-App. 18 n.8.) The court of appeals also highlighted the statutory motion to seal procedure under Wisconsin Statute §801.21(2) and (4). (*Id.*) The court of appeals agreed that Petitioners were seeking to substitute their own desired procedure for Wisconsin's clearly delineated statutory procedure. (P-App. 18.)

Both the circuit court and court of appeals were correct that no precedent exists in Wisconsin to allow a party to proceed anonymously. Instead, Wisconsin law only gives the circuit court the power to shield Petitioners' identities from the general public. *See State ex rel. Bilder v. Delavan Twp.,* 112 Wis. 2d 539, 334 N.W.2d 252 (1983). While there are a number of specific kinds of cases where one or more of the parties' names are statutorily kept from the public, *see, e.g.,* Wis. Stat. §809.86, Petitioners have not cited any Wisconsin statute or case precedent allowing a party to hide its identity from counsel and the court.

Failing to find support in Wisconsin law, Petitioners base their arguments on federal cases they claim allow parties to proceed anonymously, not only to the public but as to all other litigants and the court. (Pet. 5-6, 9-14.) However, Petitioners grossly overstate the support in those cases. The court of appeals correctly pointed out that "the majority of the federal cases cited by the parents do not evince the use of such a procedure." (P-App. 16 n.6.) The court of appeals also questioned whether the Petitioners' "purported federal test is in fact 'uniform.'" (P-App. 17 n.7.) Both lower courts declined to adopt the purported federal balancing test "because it is contrary to, not equivalent to, the Wisconsin balancing test." (P-App. 4, 19, 40.) The courts recognized Wisconsin's longstanding public policy in favor of open courts. (P-App. 5, 23-24.)

Petitioners suggest that Wis. Stat. §801.21(4) allows them to proceed anonymously as to the court, the parties, and counsel (Pet. 13–14.), but again, they rely on authority for keeping their identities secret from the *public*—not from the court and other parties. Petitioners provide no support for their erroneous assumption that sealing documents in the court file pursuant to §801.21(4) prevents the court and other parties from having access to those documents.

Further, the circuit court found that complete anonymity would cause Respondents substantial prejudice. The circuit court would not agree with Petitioners that their identities were "completely immaterial to everything that follows in this case" and stated, "at this point in this juncture it's not for me to say as to how I would control what the lawyers do in defending the policy of the school district or in the discovery that may follow." (P-App. 41–42.) The court of appeals also appropriately held that Petitioners' "lack of prejudice" argument lacks merit because it is not a factor "weighed in the balance in Wisconsin case law, under which only an 'overriding public interest in closure,' or the requirements of the 'administration of justice' can justify an exception to [Wisconsin courts'] general public policy of democratic openness." (P-App. 23.)

Petitioners think a decision on the merits of this case can be reached (in their favor) using only the limited set of facts about them they choose to provide. However, they have no support for why Respondents should be prohibited from testing the truth of the facts they assert or ascertain other facts that Respondents believe are relevant. Nor do they explain why Respondents must accept their version of legal framework in conducting discovery, on summary judgment, or at trial.

Finally, Petitioners incorrectly suggest that another Dane County judge has allowed a party to proceed anonymously. The CCAP notes in that case suggest otherwise. *See* Wis. CCAP Search for Dane County Circuit Court Case No. 19CV3166 (available at: https://wcca.wicourts.gov/caseDetail.html?caseNo=2019CV003166&countyNo=13 (last visited August 20, 2021)). That court ordered the "anonymous party" to disclose its identity in a confidential filing, just as the circuit court did here. *See id.* at Feb. 17, 2020 entry. Petitioners provide no evidence sufficient to conclude that the court in that case did anything other than allow the party to protect its identity from the public.

2. Even if Petitioners' purported federal "standard" were applied, the circuit court correctly concluded that Petitioners had not met their burden to proceed anonymously.

Petitioners do not critique the circuit court's assessment of the evidence. Rather, they erroneously argue that the circuit court erred as a matter of law by not adopting the purported federal balancing test. (Pet. 10–11.) What Petitioners ignore, however, is that the circuit court found that *even if* the purported federal balancing test applied, Petitioners would not be entitled to remain anonymous to the court and counsel "under the facts of this case." (P-App. 9.)

Further, the bulk of the federal cases cited by Petitioners only allow a party to proceed pseudonymously as to the public, not anonymously to counsel or the court. Many of the cases on which Petitioners rely actually allowed disclosure to the parties and counsel. For example, in *Stegall*, the pseudonymous parties disclosed their identities to the other parties and the court and merely, "sought to bar disclosure to the general public." *Doe v. Stegall*, 653 F.2d 180, 182 (5th Cir. 2011). In *Doe v. Village of Deerfield*, a case in which the pseudonymous party alleged two of the defendants made false statements about him that led to his arrest, plaintiff did not keep his name from the other parties. 819 F.3d 372, 374 (7th Cir. 2016). *See also Doe v. Porter,* 370 F.3d 558, 561 (6th Cir. 2004) (stating defendants and their counsel were permitted access to plaintiffs' names, residency status, and school enrollment status). Beyond just these examples, the court of appeals also emphasized that other federal cases that Petitioners relied upon do not evince the use of the procedure Petitioners ask for here. (P-App. 16 n.6.)

The few cases Petitioners cited where the plaintiffs were allowed to proceed anonymously are distinguishable from this case. In those cases, there was no question that the anonymous plaintiffs were actually impacted by the challenged policy or practices and there was no harm to the defendants from being denied the plaintiffs' names. *See, e.g.*, *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998); *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000). However, here, the challenged Guidance impacts only a small number of students who are transgender, non-binary, or gender expansive and therefore take advantage of the accommodations accorded under that Guidance. Petitioners here have not shown their children are in this small group or likely to ever be. In fact, Petitioners acknowledged below that they are "not acknowledging that they have any special injury" nor "even arguing that their children are presently dealing with gender dysphoria." (P-App. 38:1–10.)

The circuit court did not erroneously exercise its discretion in concluding that the federal factors did not weigh in favor of allowing

Petitioners to proceed anonymously as applied to the facts of this case. In its discretion, the circuit court fashioned an order to prevent public disclosure and, in turn, prevent whatever possible risk of retaliation Petitioners might face if their identities became public. (P-App. 39.) Petitioners' counsel admitted that with this protection, "the risk is small." (R-App. 46.) This Court must give deference to that discretionary decision. *See State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433 ("We review a circuit court's discretionary decisions under the deferential erroneous exercise of discretion standard.") (citations omitted).

B. Petitioners Do Not Need Greater Protection From Injury Than An Attorneys' Eyes Only Protective Order.

Petitioners are not facing public disclosure of their identity. They are facing disclosure to counsel and the court—not even the parties—subject to an attorneys' eyes only protective order. Petitioners have never provided any evidence or legal citation to support an argument that producing information pursuant to an attorneys' eyes only protective order will result in substantial or irreparable injury. And they do not do so in their Petition for Review.

Instead, Petitioners rely on the risk that information provided to counsel will be leaked, an unsupported assertion that the circuit court found insufficient to support their extraordinary request. (Pet. 7; P-App. 22.)[2] The court of appeals agreed that "[s]uch speculative harms are not enough to show that the parents' proposed terms for an order to seal are the 'least restrictive means' available, Wis. Stat. §801.21(4), to protect the parents from harassment." (P-App. at 22 (citing *Matter of Ests. of Zimmer*, 151 Wis. 2d 122, 137, 442 N.W.2d 578 (Ct. App. 1989) ("speculative reference" to relatives' fear that disclosure of court documents could occasion further contact with

[2] Although Petitioners continue to argue that the number of attorneys at the American Civil Liberties' Union and Quarles & Brady LLP increases the risk of disclosure (*see* Pet. 6.), they have no evidence to support that argument and neither the circuit court nor the court of appeals found this argument persuasive.

perpetrator of deceased relatives' murders did not justify closure); *C.L. v. Edson*, 140 Wis. 2d 168, 174, 184, 409 N.W.2d 417 (Ct. App. 1987) (affirming decision to redact references to minors and to deny plaintiffs' request for a more restrictive seal of court records when plaintiffs showed only "potential harm" for which there was "no factual foundation").)

Petitioners request that this Court assume that Respondents' counsel, officers of the court who are subject to professional ethics rules, will violate the proposed protective order and that said violation will result in the public disclosure of their identities. Petitioners provide no support for their argument that this Court should grant their Petition for Review based on such an outlandish hypothetical scenario.

C. Petitioners Cannot Use The Anonymity Issue To Obtain A Ruling On A Discovery Issue Not Yet Presented To The Circuit Court.

Petitioners are asking that this Court not only determine that the circuit court erroneously exercised its discretion in proposing a protective order, but are also insisting that this Court adopt their view that discovery specific to the individual Petitioners is completely irrelevant. They ask this Court to take such a radical step on an undeveloped record and without having an actual discovery request before it. The circuit court weighed Respondents' need for discovery as a factor in deciding whether to allow Petitioners to proceed anonymously. (P-App. 41–42.) The circuit court declined to limit discovery so early in the proceedings when it was not presented with a specific discovery request to consider the relevance or appropriateness. (*Id.*) Because this issue was not presented to the circuit court, this Court should not consider it for the first time on appeal. *Wirth v. Ehly,* 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980).

II. PETITIONERS CANNOT MEET ANY OF THE CRITERIA FOR REVIEW OF THE INJUNCTION PENDING APPEAL.

A. Only The Motion For An Injunction Pending Appeal Is At Issue, Not The Merits.

The second issue Petitioners present is whether the circuit court and court of appeals erred in applying the discretionary standard that governs injunctive relief pending appeal. (Pet. 1.) However, Petitioners' arguments conflate the motion for preliminary injunction and the motion for an injunction pending appeal, of which only the latter is even arguably before this Court.

The circuit court took up Petitioners' motion to proceed anonymously before the preliminary injunction motion. (R.93.) The court ordered Petitioners to file an amended complaint under seal, with Petitioners' identities to be classified attorneys' eyes only. (R.93 at 24.) The court then entered a scheduling order on Petitioners' motion for a preliminary injunction, giving MMSD thirty days from the filing of the amended complaint to file any responsive materials. (R.93 at 66, 76; R.73.)

However, Petitioners appealed and then filed a motion for a stay pending appeal, which was granted. (R.83; R.91.) As the scheduling of Petitioners' motion for a preliminary injunction (R.26) was tied to the filing of the amended complaint, which did not occur, the circuit court did not and has never ruled on that preliminary injunction motion.

Yet, Petitioners seemingly seek to challenge the lower courts' decisions with respect to their preliminary injunction motion in addition to their motion for an injunction pending appeal. (*See* Pet. 1, 7–9, 16-20.) As the circuit court did not decide the preliminary injunction motion, Petitioners are left to cite the circuit court's Order Granting and Denying Plaintiffs' *Motion For An Injunction Pending Appeal* and the court of appeals' interlocutory order on their *motion for injunction pending appeal*. (*See* Pet. 8–9, 21–23 (citing P-App. 27–33, 53–

55) (emphasis added).) Petitioners similarly argued the *merits* of their preliminary injunction motion to the court of appeals, who correctly noted that Petitioners did not explain why the court of appeals would have authority to grant temporary injunctive relief. (P-App. 31-32). The same is true here.

Thus, this Petition raises the exact same issue Petitioners asked this Court to review on December 9, 2020, which this Court properly denied; nothing has changed. (Orig. Pet. for Rev. 12-09-20 at 5 (identifying statement of issues); R.162.) There is no basis for Petitioners to seek review of the same issue before full factual development of the record in the circuit court. *See, e.g., S. Cross, Inc. v. John*, 193 Wis. 2d 644, 646, 533 N.W.2d 188 (1995) (denying petition for review presenting the same issue previously presented where trial did not yet occur and factual development of circuit court record was incomplete).

B. Petitioners' Arguments About The Injunction Pending Appeal Do Not Satisfy The Criteria For Review.

Petitioners state as grounds for review that review of the court's injunction decision "involves '[a] real and significant question of … state constitutional law,'" Wis. Stat. §809.62(1r)(a); the lower courts' decisions "are directly 'in conflict with' this Court's 'controlling' precedents as to proper application of the temporary injunction standards," §809.62(1r)(d); and "the underlying issue is 'a novel one" that "will have statewide impact,' *id.* §809.62(1r)(c)(2)." (Pet. 3.) Even setting aside the inappropriateness of Petitioners' repeated maneuvers to bring non-final decisions before this Court prior to any factual development, Petitioners never explain how these factors apply to the circuit court's exercise of its discretion on the injunction pending appeal. Instead, Petitioners bury within each ground a merits-based constitutional discussion that has no place here. As shown below, Petitioners do not meet any criteria for review.

1. The Petition does not raise a constitutional issue.

Petitioners contend that "the primary reason" this Court should review the appeal injunction "is to protect parents' constitutional rights and their children from lifelong harm." (Pet. 16.) Petitioners' arguments conflate the underlying merits of their lawsuit with the relief pending appeal of the anonymity issue. At its core, their injunction issue involves only evaluating whether the lower courts erred in applying the well-settled temporary injunction standard to their request for relief pending appeal. (Pet. 1.) Petitioners expressly acknowledge that "[t]he basic requirements for an injunction are well-established" and they are not raising any constitutional challenge to the standard for granting temporary injunctive relief under Wisconsin law. (*See* Pet. 20–21.) That procedural question does not require any constitutional analysis.

The fact that Petitioners' underlying complaint seeks relief related to constitutional issues does not give them a free pass to jump to the ultimate merits on a request for temporary relief. *See, e.g.*, *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997) (misuse of discretion where temporary injunctive relief gave movant the ultimate relief sought). Petitioners simply fail to explain how a discretionary ruling on a request for injunctive relief pending appeal presents a "real and significant question of federal or state constitutional law." Wis. Stat. §809.62(1r)(a).

2. The injunction issue will not help develop, clarify, or harmonize the law.

Petitioners fail to show that the law governing injunctive relief pending appeal requires development, clarification, or harmonization of any kind. Wis. Stat. §809.62(1r)(c). If this Court were to grant the Petition and conduct review, it would employ the same "erroneous exercise of discretion" standard that the court of appeals applied and that has existed for decades. *See Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519, 259 N.W.2d 310 (1977) ("The denial

of a temporary injunction ... is a matter within the discretion of the trial court, and the sole issue on appeal is whether the trial court abused its discretion.")

Wisconsin circuit courts have long enjoyed broad discretion to decide whether and in what form to grant injunctive relief. *See, e.g.*, *Forest Cty. v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998); *Hoffmann v. Wis. Elec. Power Co.*, 2003 WI 64, ¶23, 262 Wis. 2d 264, 664 N.W.2d 55. For over 40 years, both Wisconsin circuit courts and courts of appeals have followed the guidelines set forth in *Werner* when exercising that discretion. *See, e.g.*, *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370–74 563 N.W.2d 585 (Ct. App. 1997); *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶20.

There is no need to develop, clarify, or harmonize the law here. The lower courts' rulings on Petitioners' requests for temporary injunctive relief resulted from a discretionary application of the law to the particular facts, in line with binding precedent. (*See* P-App. 32) (court of appeals decision citing *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶20); (P-App. 54) (circuit court order partially granting temporary injunction pending appeal "in consideration of the applicable legal standard for obtaining an injunction pending appeal...."). And, regardless, subsection (1r)(c) of the criteria for review requires more than that a decision by this Court would "help develop, clarify, or harmonize the law; the issue **presented must also** (1) **not** merely call for application of **well-settled principles**; (2) present a **novel question** of statewide impact; or (3) **not be factual** in nature." Wis. Stat. §809.62(1r)(c) (emphasis added). Reviewing the circuit court's and court of appeals' discretionary decisions for relief pending appeal does not satisfy any of these three additional criteria.

To purportedly satisfy §809.62(1r)(c)(2), Petitioners erroneously claim that this Court's review "will have a statewide impact" because other school districts in Wisconsin have allegedly adopted guidance to support transgender, non-binary, and gender non-conforming students similar to MMSD's Guidance. (Pet. 24.) But

Petitioners were not seeking—and the circuit court did not rule on—a statewide injunction or an injunction on the merits. Petitioners asked for an injunction against MMSD alone, pending their appeal of the anonymity issue. A review of the lower courts' fact-specific inquiry into their request for temporary relief pending appeal before discovery or presentation of the merits of this case would not affect any other school district in this State.[3]

In an attempt to overcome the obvious hurdles of their premature Petition, Petitioners contend that "courts, including this Court, regularly hear appeals from orders granting or denying temporary injunctions" and that the "underlying issue in this case is the purely legal question of whether a school district may constitutionally exclude parents from important, health-related decisions involving their children." (Pet. 25.) Petitioners are misguided.

First, Petitioners again conflate the merits with temporary relief pending appeal. The issue on this Petition is not "whether a school district may constitutionally exclude parents from important, health-related decisions involving their children" as they posit, but rather whether the circuit court appropriately exercised its discretion regarding temporary relief pending appeal. The circuit court has not

[3] A request to interpret MMSD's Guidance would also amount to a request for this Court to exercise original jurisdiction because neither of the lower courts have interpreted the Guidance or ruled on its enforceability or constitutionality. *See, e.g.*, *Gottsacker v. Monier*, 2005 WI 69, ¶35, 281 Wis. 2d 361, 697 N.W.2d 436 (power to make factual determinations is reserved to trial courts or Supreme Court in exercise of its original jurisdiction). Petitioners have not filed a petition for an original action pursuant to Wis. Stat. §809.70, nor filed a petition for a supervisory writ alleging that the circuit court violated a duty. *See State ex rel. CityDeck Landing LLC v. Circuit Court for Brown County*, 2019 WI 15, ¶¶29–30, 385 Wis. 2d 516, 922 N.W.2d 832 (party seeking to invoke Supreme Court's supervisory authority must establish that circuit court had plain duty and either acted or intends to act in violation of that duty). Therefore, this Court should disregard Petitioners' substantive arguments related to the Guidance, which have nothing to do with the lower courts' decisions on their requests for injunctive relief pending appeal.

ruled on the merits of Petitioners' motion for preliminary injunction and for good reason. Respondents have not yet even had the opportunity to respond to it.

Second, the cases they cite to support this contention are distinguishable because the Court was examining other legal issues, not determining whether lower courts erred in denying temporary relief pending appeal. *See, e.g., Tavern League of Wis., Inc. v. Palm*, 2021 WI 33, ¶12, 396 Wis. 2d 434, 957 N.W.2d 261 (granting petition to determine whether order Department of Health Services issued met the definition of a rule, not whether the lower courts erred in denying temporary injunctive relief); *Woznicki v. Erickson*, 202 Wis. 2d 178, 183, 549 N.W.2d 699 (1996) (Court's review focused on release of records, not temporary injunctions).

The relief pending appeal Petitioners sought was governed by longstanding principles underlying temporary injunctions and has not sprouted any novel questions since. Both lower courts properly exercised their discretion. Any review scrutinizing those decisions would contradict the Wis. Stat. §809.62(1r)(c) criterion.

3. The lower courts' decisions do not conflict with other controlling opinions.

Petitioners contend that the rulings below "are directly 'in conflict with' this Court's 'controlling' precedents as to temporary injunctions." (Pet. 20.) But Petitioners identify no controlling precedent that the lower courts neglected to follow. To the contrary, Petitioners cite *Werner* when referencing the requirements for obtaining a temporary injunction. (*Id.* at 21.) The circuit court employed the *Werner* four-factor test, as even Petitioners admit. (*See* Pet. 21) ("The Circuit Court *did* consider Petitioners' likelihood of success on the merits with respect to the portion of the Policy it enjoined...."); (*see also* P-App. 53–55, 59.) And the court of appeals cited *Milwaukee Deputy Sheriffs' Ass'n*—another ruling that followed *Werner*—to support its conclusion that the circuit court did not

erroneously exercise its discretion in evaluating the factors a party must demonstrate to obtain a temporary injunction. (P-App. 32.)

Petitioners cannot satisfy the criterion set forth under Wis. Stat. §809.62(1r)(d) without showing that the court of appeals' decision in this case "is in conflict with controlling opinions of the United States Supreme Court or the supreme court or other court of appeals' decisions." Petitioners surmise an apparent conflict from the court of appeals' conclusion that once Petitioners failed to show irreparable harm, they were not entitled to temporary injunctive relief. (Pet. 21.) But *Werner* mandates that "[i]njunctions are not to be issued without a showing of ... irreparable harm." 80 Wis. 2d at 520. The court of appeals' decision directly aligns with that mandate. Petitioners' disagreement with binding precedent cannot convert alignment into conflict.

Nor can Petitioners' misstatement of the law on this point create conflict. Petitioners cite *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995), to argue that "the factors for temporary relief are 'not prerequisites but rather are interrelated considerations that must be balanced together.'" (Pet. 22.) But *Gudenschwager* governs the standard on a motion for stay pending appeal—not a temporary injunction. *See Gudenschwager*, 191 Wis. 2d at 440. A motion for stay pending appeal requires a different analysis than a motion for temporary injunctive relief pending appeal. *Compare id.* (courts should consider harm to interested parties and the public interest for stay motions); *with Serv. Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis.2d 38, 946 N.W.2d 35 (court considers *Werner* factors for temporary injunction motions, which does not include harm to interested parties or public interest). Because the court of appeals followed *Werner* and applied the same factors other Wisconsin courts have applied, it did not err and its decision is not in conflict with anything.

4. This Court's function is to develop the law, not error-correction.

Error-correction is not this Court's primary responsibility. *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶¶47–48, 326 Wis. 2d 729, 768 N.W.2d 78. Rather, this Court's role is to develop and clarify the law. *See State v. Mosley*, 102 Wis. 2d 636, 656 n.18, 307 N.W.2d 200 (1981) (Wis. Stat. §809.62(1r) guides Supreme Court review to advance its function of developing the law, not correcting errors); *State v. Gajewski*, 2009 WI 22, ¶11, 316 Wis. 2d 1, 762 N.W.2d 104 (dismissing review as improvidently granted because it was "more about error correction than law development and more about the significance of undisputed facts than about a need to clarify the law").

Yet Petitioners nonetheless ask this Court to decide "[w]hether the lower courts erred" in applying the well-settled temporary injunction standard. Reviewing the rulings on interim relief pending appeal would merely determine whether the courts ruled correctly, not develop the law—the precise circumstance that the criteria are designed to weed out.

Further, the Petition is full of concessions that Petitioners simply disagree with the result, not that those courts erred in applying existing law. (*See* Pet. 21) (conceding that the circuit court *did* consider Petitioners' likelihood of success but disagreeing with its decision to not address every discrete argument Petitioners raised); (Pet. 9) (acknowledging that the circuit court considered the irreparable harm element but disagreeing with the fact that its rationale did not go further); (*Id.*) (recognizing that the court of appeals considered irreparable harm but disagreeing with its conclusion that those harms were too speculative). Wisconsin law prohibits parties from seeking review of decisions with which they merely disagree. *See* Wis. Stat. §§809.62(1m)(a), (1g)(c) (permitting parties to file a petition for review only of an "adverse decision," which does not include a party's disagreement with the court of

appeals' language or rationale). Disagreement does not amount to error.

5. The lower courts properly applied the temporary injunction standard.

Petitioners' argument ultimately hinges on the inaccurate notion that the lower courts did not properly apply the temporary injunction standard. They did. The circuit court concluded that "[t]o obtain an injunction pending appeal, the Plaintiff must show 'a likelihood of success on the merits, a likelihood of irreparable harm, and an inadequate remedy [at] law.'" (*See* P-App. 59:16–19.) It then issued an order denying part of Petitioners' injunction request that would have required MMSD to affirmatively disclose students' affirmed pronouns during this litigation, in order to "preserv[e] the status quo" while Petitioners appealed. (P-App. 54–55.)

Petitioners contend that the circuit court erred because it "only assessed Petitioners' likelihood of success on the unrelated anonymity issue." (Pet. 9.) But the anonymity issue is entirely related. It is *the* issue on appeal and this temporary injunction was granted pending that appeal—not the *merits* of Petitioners' preliminary injunction motion, on which the circuit court has not yet ruled. In their court of appeals brief, Petitioners expressly asked the court to determine whether "Plaintiffs [are] entitled to proceed anonymously in this matter." (*See* Ct. App. Br. of App. at 8.) It can hardly be said that a court should not consider the exact issue on appeal when assessing whether a party has a likelihood of success on appeal.

Further disagreeing with the court of appeals' decision, Petitioners make the broad-sweeping assertion that "[a] violation of constitutional rights is itself sufficient harm to warrant an injunction." (Pet. 19.) They cite one Sixth Circuit Court of Appeals' opinion as support, suggesting that courts should presume irreparable harm when constitutional rights are impaired. (*Id.* at 19, 22.) Petitioners erroneously suggest that this Court should accept review to follow an

inapposite federal case that would require the Court to make multiple presumptive leaps about anonymous litigants: (1) that they are protected by certain constitutional rights; (2) that they have standing to allege those rights have been violated; and (3) that they will suffer irreparable harm by virtue of simply possessing those rights.

The fatal flaw in Petitioners' argument is that they cannot show harm without showing that they are directly affected by the ways in which MMSD applies its Guidance. *See Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶¶15, 23, 259 Wis. 2d 107, 655 N.W.2d 189 (plaintiff lacked standing to bring declaratory judgment because it did not show that it was directly affected by issue in controversy). And they cannot show that they are directly affected by anything without revealing who they are. *See Joint School Dist. No. 1, City of Wis. Rapids v. Wis. Rapids Educ. Ass'n*, 70 Wis. 2d 292, 309, 234 N.W.2d 289 (1975) (courts should not enjoin actions unless injury sought to be avoided is actually threatened or has occurred). Because Petitioners refuse to do that, they wound up in a self-fulfilling prophecy of failure to satisfy the standard for temporary injunctive relief pending appeal. They even admit that they are "not acknowledging that they have any special injury" nor "even arguing that their children are presently dealing with gender dysphoria." (P-App. 38:1–10.)

Due to the Petitioners' own refusal to disclose their identities and their own request for a stay pending appeal, neither party has conducted any discovery. As such, Respondents cannot develop facts sufficient to respond to Petitioners' motion for a preliminary injunction or demonstrate that the Guidance does not violate any of Petitioners' individual constitutional rights. This Court should not permit Petitioners to use this Petition for Review as a vehicle to the merits that the circuit court have not yet considered.

CONCLUSION

For these reasons, Respondents respectfully request that this Court deny Petitioners' Petition for Review.

Dated this 27th day of August, 2021.

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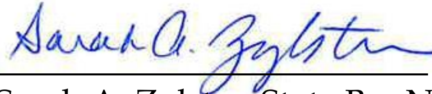

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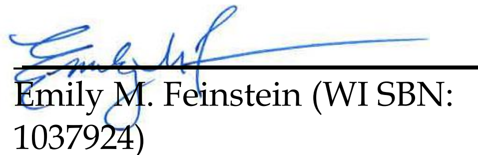

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Response to Petition for Review conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a response to petition for review with a proportional serif font. The length of this response is 7,621 words.

DATED: August 27, 2021.

BOARDMAN & CLARK LLP

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ELECTRONIC CERTIFICATION

I hereby certify that I have submitted an electronic copy of this Response to Petition for Review, which complies with the requirements of Wis. Stat. §§809.62(4) and 809.19(12). I further certify that the text of the electronic copy of this Response to Petition is identical to the text of the paper copy of this Response to Petition for Review filed on this date. A copy of this certificate has been served with the paper copies of this Response to Petition for Review filed with the court and served on all opposing parties.

DATED: August 27, 2021.

BOARDMAN & CLARK LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused 10 true and correct copies of this Response to Petition for Review to be filed with the Court via messenger. I further certify that on this date I caused one true and correct copy of this Response to Petition for Review to be served upon counsel of record via U.S. mail at the following address:

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