STATE OF WISCONSIN
IN SUPREME COURT
APPEAL NO. 2020AP1032

JOHN DOE 1, JANE DOE 1, JANE DOE 3, AND 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.

On Appeal from the Circuit Court for Dane County
Case No. 20-CV-454
The Honorable Frank D. Remington, Presiding

JOINT BRIEF OF DEFENDANTS-RESPONDENTS

QUARLES & BRADY LLP
Emily M. Feinstein
Adam R. Prinsen

BOARDMAN & CLARK LLP
Sarah A. Zylstra
Sarah J. Horner

33 East Main Street, Suite 900
Madison WI 53703
(608) 251-5000
emily.feinstein@quarles.com
adam.prinsen@quarles.com

Attorneys for 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

AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION
Laurence J. Dupuis
Christine A. Donahoe
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53158
(414) 207- 4032
ldupuis@aclu-wi.org
cdonahoe@aclu-wi.org

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Jon W. Davidson (*pro hac vice forthcoming*)
(admitted only in California)
125 Broad Street
New York, NY 10004
(323) 536-9880

Attorneys for 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

1 S. Pinckney St., Suite 410
Madison, WI 53703
(608) 257-9521
szylstra@boardmanclark.com
shorner@boardmanclark.com

Attorneys for Defendant-Respondent Madison Metropolitan School District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitution and Statutes

Other Authorities

ISSUES PRESENTED

1. Did the Circuit Court abuse its discretion in ordering Petitioners to disclose their identities to the Court and counsel for Defendants-Respondents and Intervenors-Defendants-Respondents (collectively, "Respondents") in an amended complaint under seal?

Circuit Court Answer: No

Court of Appeals Answer: No

2. Did Petitioners forfeit any argument that the Circuit Court abused its discretion in staying the schedule for a preliminary injunction hearing after Petitioners sought a stay of the prior order requiring them to disclose their identities to the court and Respondents' counsel when Petitioners never appealed that stay or raised this issue with the Court of Appeals?

Not answered by the Circuit Court or the Court of Appeals.

3. Did the Circuit Court abuse its discretion in enjoining Defendant Madison Metropolitan School District ("MMSD") pending this appeal from applying or enforcing its "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" ("Guidance") in any manner that allows or requires staff to conceal information or answer untruthfully in response to any question parents ask about their

child, including the name and pronouns being used to address their child at school, and not granting a broader injunction requiring MMSD to disclose to a parent without a student's consent that the student is using a different name and/or pronouns at school than those assigned at birth?

Circuit Court Answer: No

Court of Appeals Answer: No

STATEMENT OF THE CASE

I. Facts

MMSD adopted its Guidance in April 2018. (R.1:¶32; R.77:¶32.) In February 2020, Petitioners filed a complaint seeking a declaratory judgment that MMSD's Guidance violates their rights as parents under the Wisconsin Constitution and interferes with their Christian beliefs.[1] (R.1:¶¶84,95.) The complaint failed to include Petitioners' names or addresses, alleging only that they are parents with children enrolled at MMSD public schools. (R.1:¶¶2-9.)[2]

On the same day they filed their complaint, Petitioners also filed a motion "for an order allowing them to file and litigate this case anonymously, using pseudonyms." (R.4:1.) Petitioners argued that their challenge to the Guidance puts them or their children at risk of harassment and retaliation. (*Id.*) Petitioners filed a motion for a preliminary injunction the following day. (R.26.)

MMSD's Guidance states that MMSD is committed "to providing all students access to an inclusive education that affirms all identities" and that "[f]amilies are essential in supporting [MMSD's] LGBTQ+

---

[1] Jane Doe 3 does not appear to join the religious belief allegations. (R.18.)

[2] Several Petitioners voluntarily dismissed their claims; four Petitioners remain. (*See* R.47; R.85; Supp.Appx.39-41(Dkt.152; Dkt.176); R.10; R.11; R.18; R.19.)

students." (R.2:3,18.) But it recognizes that students who identify as transgender, non-binary, or gender-expansive may not have come out to their families, and that disclosing their gender identity or sexual orientation could pose imminent safety risks. (R.2:3.) Therefore, the Guidance provides that MMSD "will strive to include families...to support their LGBTQ+ youth" with a student's consent and permission. (R.2:18.) It allows families to request a meeting with staff to discuss their child's gender identity and encourages staff to give families resources and support. (*Id.*)

II. Procedural History[3]

MMSD moved to dismiss the complaint and opposed Petitioners' motion for complete anonymity. (R.42.) The Circuit Court granted Intervenors-Defendants-Respondents' motion to intervene (R.66.) and heard Petitioners' anonymity motion prior to their preliminary injunction motion, as it was filed first. At oral argument, the court denied Petitioners' request to shield their identity from *everyone*, including the court, and ordered that disclosure be limited to the court and Respondents under "attorneys' eyes only." (R.74.) The court held that,

[3] Given the complex procedural history, Respondents include a timeline of events in their Supplemental Appendix at 1-3.

under Wisconsin law and the longstanding practice, policy, and constitutional requirement of open court records, there is no authority to allow a party to proceed completely anonymously to the court and opposing counsel. (App.40:9-14.) It ordered Petitioners to file an amended complaint under seal disclosing their identities by June 12, 2020. (R.74,91.)

The Circuit Court then entered a scheduling order on Petitioners' motion for a preliminary injunction. (R.73.) It gave MMSD approximately 60 days from the filing of Petitioners' amended complaint to file a response and set oral argument for September 3, 2020. (R.73.)

On June 12, 2020, however, Petitioners filed a notice of appeal from the order requiring them to disclose their names in an amended complaint filed under seal. (R.84.) Petitioners then moved for a stay pending appeal of that order, which was granted. (R.83;R.91.) To prevent unfairness, the Circuit Court also stayed the schedule for the preliminary injunction, preventing the hearing from going forward before Respondents could obtain discovery and file a response. (R.26.)

On June 25, 2020, Petitioners filed a motion for an injunction pending appeal in the Circuit Court. (R.89.) The court granted that

motion in part. (App.53-55.)[4] Not satisfied, Petitioners filed a "Motion for an Injunction Pending Appeal and/or Temporary Injunction" with the Court of Appeals seeking to expand the injunction. (Supp.Appx.42-47.) When that was denied, Petitioners filed a petition for review, which this Court denied. (Supp.Appx.48-58.)

The parties then briefed to the Court of Appeals Petitioners' appeal of the Circuit Court's order to file under seal. Petitioners argued that the Circuit Court erred in requiring them to disclose their identities to the court and counsel under seal. The Court of Appeals ruled that Petitioners failed to show that the Circuit Court erroneously exercised its discretion. (App.2.)

Petitioners also ask this Court to decide the preliminary injunction, which was stayed—not denied—an issue they did not appeal, and the injunction pending appeal. The underlying motion for a preliminary injunction is not properly before this Court. If this Court

---

[4] Petitioners include in their appendix two documents that were docketed below after the Circuit Court's index of record had been transmitted to the Court of Appeals. These materials are outside "the record" pursuant to Wis. Stat. §809.19(1)(d), (e), and Petitioners have not supplemented the record on appeal to reflect these developments. The Court would be within its rights to disregard those materials and assume that they support the trial court's ruling. *See Fiumefreddo v. McLean*, 174 Wis. 2d 10, 26–27, 496 N.W.2d 226 (Ct. App. 1993) (citations omitted). That said, for completeness, Respondents include in their supplemental appendix post-index docket items related to the injunction pending appeal to the extent necessary to respond to Petitioners' arguments.

reaches that issue, it should remand the matter to the Circuit Court. The Court should not resolve factual disputes regarding issues on which the Circuit Court has not yet ruled. With respect to the injunction pending appeal, that issue will be moot once this Court issues its decision.

STANDARD OF REVIEW

This Court should review the Circuit Court's decision regarding the exercise of its inherent authority under the abuse of discretion standard that governs other discovery and protective orders. *See, e.g.*, *Konle v. Page*, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996) (reviewing discovery ruling under abuse of discretion standard); *Cf. Doe v. Village of Deerfield*, 819 F.3d 372, 376 (7th Cir. 2016) (reviewing denial of motion to use pseudonyms for abuse of discretion). When implementing the strong presumption of open and accessible court records in Wisconsin, courts exercise their discretion by balancing factors that favor access against factors that favor secrecy. *Krier v. EOG Env't, Inc.*, 2005 WI App 256, ¶23, 288 Wis. 2d 623, 707 N.W.2d 915; *see also Matter of Estates of Zimmer*, 151 Wis. 2d 122, 134, 442 N.W.2d 578 (Ct. App. 1989).

Indeed, despite proffering a *de novo* standard, Petitioners acknowledge that the abuse of discretion standard is appropriate here.

(Br.15 n.3 ("In any event, the Circuit Court never 'ma[de] a record of factors relevant to' Petitioners' request, a well-recognized abuse of discretion.").) And while there is no authority for the standard of review of an injunction pending appeal, it follows that it would be the same as the well-established standard that the Circuit Court's decision on injunctive relief may only be reversed for an abuse of discretion. *See Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. This Court gives deference to circuit courts' discretionary decisions and affirms them unless the record demonstrates the court applied an incorrect legal standard. *See Nat'l Auto Truckstops, Inc. v. Wis. Dep't. of Transp.*, 2003 WI 95, ¶¶12-13, 263 Wis. 2d 649, 665 N.W.2d 198.

ARGUMENT

I. WISCONSIN LAW DOES NOT PERMIT ANONYMOUS LITIGATION.

As the lower courts correctly observed, Wisconsin law does not allow a plaintiff to sue anonymously in the manner Petitioners attempt here. (App.17; App.39:6-10.) Petitioners argue that anonymous litigation is authorized by (1) Wis. Stat. §801.21 and (2) *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983). (Br.19.) In fact, the Wisconsin legislature and this Court have only allowed for the

use of *pseudonyms* in *some* public filings, not for a party to proceed entirely *anonymously* to opposing counsel. Neither the legislature nor this Court have interpreted Wisconsin law to contradict the statutory requirement that a complaint include the names of all parties. *See* Wis. Stat. §802.04(1) ("Every pleading shall contain...the names and addresses of all the parties").

A. Wisconsin Stat. §801.21 Does Not Authorize Anonymous Litigation.

Wisconsin Stat. §801.21 does not give courts discretion to allow parties to proceed anonymously to all but the court. (*See* Br.29.) Rather, §801.21 is a rule of procedure—not substance—and does not provide a legal basis for a party to sue anonymously. Wisconsin statutes deem some information (e.g., social security and drivers' license numbers) automatically protected. *See, e.g.*, Wis. Stat. §801.19. And courts treat certain documents or case types as confidential without the need for a motion to seal.[5] If a party seeks to protect information in a court record that is not statutorily listed as confidential, the party must file a motion and specify the authority for restricting public access. Wis. Stat. §801.21(2). The moving party is only entitled to a temporary seal of that

[5] *See* https://www.wicourts.gov/services/attorney/docs/conf_flyer.pdf.

information until the court rules on the motion. *Id.* If the court finds grounds to seal or redact information in public filings, it must use "the least restrictive means that will achieve the purposes of this rule and the needs of the requester." Wis. Stat. §801.21(4). Critically, this statutory scheme allows for protection from ***public*** disclosure only. In all circumstances, a party must submit the unredacted material for filing with the court under seal, and parties to the litigation may access the material subject to a protective order.

Further, §801.21 deals with limiting public access to court records only where sufficient grounds in constitutional, statutory, or common law exist. *See* Wis. Stat. §801.21(4). Wisconsin Stat. §801.21 "is *not intended to expand...the confidentiality concerns* that might justify special treatment" of information. Sup. Ct. Order No. 14-04 (emphasis added). This procedure does not exempt Petitioners from the requirement in §802.04(1) that a complaint must name all parties to the litigation.

B. *Bilder* Does Not Authorize Anonymous Litigation.

Contrary to Petitioners' argument, the Court in *Bilder* never authorized fully anonymous filings. In *Bilder*, this Court emphasized "the denial of public examination [of court records] is contrary to public

policy and the public interest" and provided only three narrow exceptions to the rule that public access to judicial operations is a "basic tenet of the democratic system." *Bilder*, 112 Wis. 2d at 553. The public has an "absolute right" to examine court records unless: (1) a statute authorizes sealing court records; (2) disclosure would infringe on a constitutional right; or (3) the circuit court determines that the administration of justice requires restricting public access. *Id.* at 553-56.

Parties may invoke the third exception only if they set forth "actual, as opposed to hypothetical" factors demonstrating that the administration of justice requires denying the public the right to access court records. *Id.* at 559. Even then, a protective order preventing public access is appropriate only when there is no less restrictive alternative available. *Id.* at 557.

Petitioners argue that this Court should interpret *Bilder* as having decided an issue never discussed: that Wisconsin courts have inherent authority to allow plaintiffs to proceed anonymously to opposing counsel when "the administration of justice requires it." (Br.29.) Petitioners attempt to obscure that a complaint is a court record subject to public examination under Wisconsin law. *See* Wis. Stat. §59.20(3) (requiring

circuit court clerks to open to any person all books and papers required to be kept in that office); *Bilder*, 112 Wis. 2d at 556.

Bilder remains controlling precedent and courts have consistently applied it for decades. *See, e.g.*, *State v. Stanley*, 2012 WI App 42, ¶30 & n.9, 340 Wis. 2d 66, 814 N.W.2d 867; *Krier*, 2005 WI App 256, ¶9; *City of Madison v. Appeals Comm. of Madison Human Servs. Comm'n*, 122 Wis. 2d 488, 491, 496-97, 361 N.W.2d 734 (Ct. App. 1984); *see also Morgan v. Circuit Court of Dane Cty.*, Appeal No. 2018AP2313, 2019 WL 4620494, at ¶¶12-13 (June 9, 2019). Petitioners provide no reason to depart from this longstanding precedent.

C. This Court Should Not Use This Case to Set a New Policy Favoring Anonymous Litigation.

This Court should adhere to long-standing case law and public policy and reject fully anonymous litigation. Petitioners fail to demonstrate that withholding their identities from all but the Circuit Court advances the administration of justice, let alone *requires* it.

Because the law strongly favors public access to court records, a party faces a heavy burden when it tries to draw on the inherent power of the circuit court to limit such access. *See, e.g., Krier*, 2005 WI App 256, ¶23 (citing *Zimmer*, 151 Wis. 2d at 134-35). "[B]efore any question of inherent powers would even arise, the party seeking closure must

'overcome the legislatively mandated policy favoring open records.'" *Zimmer*, 151 Wis. 2d at 130 (quoting *Bilder*, 112 Wis. 2d at 556). A circuit court's inherent power is not so expansive as to allow it to disregard the unambiguous statutory requirement that a complaint must include the names of all parties. Even if courts had the power to do so, the administration of justice would never call for it; and the Circuit Court did not abuse its discretion in rejecting Petitioners' request to do so.

A fundamental aspect of democracy is that people have the right to know what is happening in their government—including the court system. *Bilder*, 112 Wis. 2d at 553. By bringing this lawsuit, Petitioners—voluntarily and with knowledge of its consequence—exposed themselves and their claims to some scrutiny, just like any litigant. Indeed, as this Court observed in *Bilder*, "[a]ny use of the judicial process opens information about a party's life to the public's scrutiny...." *Id.* at 557. While Wisconsin courts undoubtedly have inherent power to seal or redact court records (including party names) from disclosure to the public where justice requires, they do not have authority to allow totally anonymous litigation because it would not only undermine judicial transparency, but entirely frustrate the adversarial judicial process.

The public policy of open courts by definition results in private information becoming public when it is the subject of litigation. Every day in courts across the state, survivors of domestic violence and other crimes must testify in open courtrooms about some of the most harrowing and personal events of their lives. Not even then does the administration of justice require closing court records to the public, counsel, or the courts.

A party cannot show that the administration of justice requires even use of pseudonyms unless it demonstrates "with particularity" that "[a]ctual, as opposed to hypothetical" factors require court records to be closed. *Bilder*, 112 Wis. 2d at 556, 559. Petitioners have not done this. They contend that their counsel has received antagonistic calls, emails, and comments in the past. (Br.35.) But they have not shown that any such contact is related to this case specifically. Petitioners also contend that others, such as J.K. Rowling, had negative experiences after taking a similar position on LGBTQ+ issues, but that has no relevance here. (Br.37-38.) If courts could allow plaintiffs to sue anonymously every time a celebrity had a negative experience for taking a position similar to theirs, all litigation would be brought by "Does." Petitioners have not met their burden to show that the administration of justice requires hiding

their identities from Respondents' counsel. *See John Doe No. 1 v. Reed*, 561 U.S. 186, 198 (2010) (recognizing government's interest in "promoting transparency and accountability" in rejecting attempt to prevent disclosure of identities of those who signed controversial petition).

Even assuming for argument's sake that Petitioners set forth "actual, as opposed to hypothetical factors," the Circuit Court properly denied Petitioners' request to keep their identities secret from Respondents' counsel. Affording Petitioners such complete anonymity is far broader than "the least restrictive means" necessary to protect the public from learning their identities, as Wis. Stat. §801.21(4) requires. If Petitioners were given complete anonymity, Respondents would never be able to verify that these parents exist, that their children are students at MMSD, or whether they have been or likely will be impacted by the Guidance. It is unfair to require Respondents to defend against speculative harms that have no factual basis. The Court of Appeals agreed that Petitioners' proposal to omit their identities from all filings is not the least restrictive method to protect Petitioners' asserted interests. (App.22.)

The Circuit Court appropriately weighed Wisconsin's public policy of open court records against the risks resulting from public disclosure in holding that Petitioners could preserve their confidentiality with a motion to seal and protective order. (App.40:1-41:1.) Petitioners acknowledge that a protective order would "provide some protection" from their alleged harms but argue that "[t]he protective order contemplated by the circuit court exposes Petitioners' identities to an unreasonably large group of people" by allowing Respondents' counsel to know who they are. (Br.40-41.) Petitioners base this argument on the unsupported assertion that there is a risk that the information provided to counsel will be leaked. (Br.40-42.)

Petitioners have no basis in law or fact to assume that counsel, who are officers of the court subject to professional ethics rules, would violate the protective order.[6] As the lower courts observed, such a baseless accusatory assumption is insufficient to support Petitioners' extraordinary request for complete anonymity. (*See* App.6, 49:2-15); (*see also* App.22-23 (citing *Zimmer*, 151 Wis. 2d at 137) ("speculative

[6] Petitioners also suggest that Respondents' counsel should not be permitted to disclose Petitioners' identities to paralegals or assistants. (Br.41.) But the ethics rules require lawyers to ensure that non-lawyer assistants' conduct is compatible with the lawyer's professional obligations. SCR 20:5.3. And Petitioners have no basis to assume that any paralegal or assistant would "leak" any information.

reference" to fear that disclosure could occasion further contact with perpetrator 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 deny plaintiffs' request for broader sealing of court records when plaintiffs showed only "potential harm" and "no factual foundation.").)

Disclosure of party names is also necessary for counsel to follow the conflicts-of-interest provisions in the Wisconsin Rules of Professional Conduct. *See, e.g.*, SCR 20:1.7(a).[7] And Petitioners' refusal to disclose their real identities, even under seal, would interfere with fundamental due process rights, including Respondents' right to explore, for example, whether a justiciable dispute exists and particular facts surrounding Petitioners' claims. *See, e.g., Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶18, 312 Wis. 2d 1, 754 N.W.2d 439 ("The right to discovery is an essential element of our adversary system."); *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶13, 243 Wis. 2d 119, 625 N.W.2d 876 (broad discovery is essential "because the purpose of discovery is

[7] In fact, shortly after Respondents raised this argument in the circuit court, two Petitioners sought dismissal for exactly this reason. (R.44.)

identical to the purpose of our trial system—the ascertainment of truth.").

Hiding Petitioners' identities from opposing counsel also risks the court deciding moot issues or allowing Petitioners to relitigate issues and/or claims in violation of preclusion principles. *See State ex rel. McDonald v. Circuit Court for Douglas Cty., Branch II*, 100 Wis. 2d 569, 572, 302 N.W.2d 462 (1981) (case is moot when determination sought could have no practical effect on existing controversy); *Northern States Power Co. v. Bugher*, 189 Wis. 2d 541, 550, 525 N.W.2d 723 (1995) (describing claim and issue preclusion). Therefore, the Circuit Court correctly ruled that the administration of justice does not require allowing Petitioners to proceed anonymously.

D. No Special Justification Exists to Depart from Wisconsin Precedent.

Petitioners argue that the lower courts erred by failing to adopt or apply a purported federal standard to their anonymity request. (Br.8-10, 31.) The principle of stare decisis prohibits departure from existing law without special justification, and Petitioners have provided no valid reason to abandon Wisconsin law.[8]

---

[8] Petitioners cite *Krier*, 2005 WI App 256, ¶23 and *Democratic Party of Wis.*, 2016 WI 100, ¶11, 372 Wis. 2d 460, 888 N.W.2d 584, in contending that the federal test "is

As the Court of Appeals correctly noted, "[w]hen addressing Wisconsin law, Wisconsin courts are bound by the decisions of Wisconsin courts." (App.17.) Here, *Bilder* controls the standard for evaluating requests to close court records from public scrutiny. And this Court adheres to existing law unless a "special justification" exists to ignore stare decisis. *Hennessy v. Wells Fargo Bank, N.A.*, 2022 WI 2, ¶27, 400 Wis. 2d 50, 968 N.W.2d 684. A "special justification" may exist if developments in the law have undermined *Bilder*'s rationale, if there is a need to make *Bilder* correspond to newly ascertained facts, or if *Bilder* is unsound, unworkable, or has become detrimental to consistency in the law. *Id.* ¶28.

Petitioners have not shown that any such justification exists here.[9] Petitioners' only justification is that federal courts apply a seven-factor test to evaluate requests to use pseudonyms. (Br.29-30.) But decisions of other jurisdictions, not binding on this Court, reaching opposing

---

equivalent to the balancing test Wisconsin courts already apply to similar questions." (Br.29.) Incorrect. Neither case evaluated the factors Petitioners request this Court to adopt. And *Democratic Party of Wis.* is inapposite because it involved the Public Records Law (Wis. Stat. §19.31), which differs from Wis. Stat. §59.20(3)'s requirement of public access to court records. *See Bilder*, 112 Wis. 2d at 552 (explaining the two statutes govern different public offices and have been given different interpretations by this Court).

[9] On the contrary, as discussed in Section I.B., Wisconsin courts have adhered to *Bilder* for decades.

conclusions do not provide a sufficient reason to depart from precedent—especially when Wisconsin statutes govern the issue (here, Wis. Stat. §801.21 and §59.20(3)). *See Hennessy*, 2022 WI 2, ¶¶31, 34. The lower courts correctly held that no new procedure should be adopted "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." (App.18.) Adopting the standard that only *some* federal courts apply would require this Court to abandon *Bilder* simply because Petitioners disagree with it. That is far from the "special justification" required to ignore stare decisis.

Additionally, the Wisconsin Legislature's inaction in response to *Bilder*'s interpretation of Wis. Stat. §59.20(3) demonstrates legislative approval of that interpretation. *State v. Eichman*, 155 Wis. 2d 552, 566, 456 N.W.2d 143, 566 (1990) ("Legislative inaction following judicial construction of a statute ... evinces legislative approval of the interpretation.") In the nearly 39 years since *Bilder* was decided, the legislature has remained silent. If the legislature intended Wisconsin law to create a procedure by which plaintiffs could remain completely anonymous to opposing counsel, they would have enacted a statute

allowing for such a procedure. *See id.* at 566 n.3 (noting that if the court's prior decision was clearly contrary to the legislature's intent, the legislature would have responded by narrowing its construction).

II. NO UNIFORM FEDERAL STANDARD EXISTS ALLOWING PLAINTIFFS TO REMAIN ANONYMOUS TO OPPOSING COUNSEL.

Failing to find support in Wisconsin law,[10] Petitioners argue that a wealth of federal law permits parties to proceed anonymously not only to the public, but also to other litigants and the court. (Br.33-34.) Setting aside that federal cases are not binding authority on this Court, *see State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W.2d 662 (1993), Petitioners are simply wrong to suggest that there *is* a uniform federal standard allowing parties to litigate anonymously. Rather, Petitioners cite to a

[10] Petitioners assert that a Dane County Circuit Court judge allowed a plaintiff to remain anonymous to opposing counsel. (Br.34.) But the online public record from CCAP (Case No. 19CV3166) reveals otherwise. The court ordered the anonymous party to disclose its identity in a confidential filing. *See* https://wcca.wicourts.gov/caseDetail.html?caseNo=2019CV003166&countyNo=13 (February 17, 2020 entry). And after the anonymous party disclosed its identity through what appears to be an affidavit (*see id.* at February 21, 2020 entry), the judge was able to confirm that recusal was not necessary. (*See id.* at March 23, 2020 entry.) Here, the Circuit Court required Petitioners to similarly disclose their identities to the court by filing an amended complaint under seal. (App.36-37.)

number of cases where federal courts exercised their discretion to apply some level of protection only from *public* disclosure.

The Court of Appeals correctly noted that most of the cases on which Petitioners rely do not involve the court allowing a party to remain anonymous to opposing counsel. (App.16:n.6 (noting that the court in *Plyler v. Doe*, 457 U.S. 202 (1982) did not comment on the use of pseudonyms).) In addition, neither *Roe v. Wade* nor *Doe v. Bolton* support Petitioners' assertion that the United States Supreme Court has allowed plaintiffs to remain anonymous. (Br.34.) Rather, the Court in those cases simply acknowledged that "Roe" and "Doe" were pseudonyms. *See Roe*, 410 U.S. 113, 120 n.4 (1973); *Doe*, 410 U.S. 179, 184 n.6 (1973). Petitioners provide no support for their assumption that the mere use of "Doe" or "Roe" in a case caption means that the court and opposing counsel did not know who "Doe" or "Roe" were, or that these courts endorsed anonymous litigation. *See MBS-Certified Public Accountants, LLC v. Wis. Bell, Inc.*, 2012 WI 15, ¶34, 338 Wis. 2d 647, 809 N.W.2d 857 ("[Q]uestions 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.") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

Most of the federal cases that Petitioners cite allowed a party to use pseudonyms, not litigate anonymously to counsel or the court. For example, in *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 n.1 (2000), while the Supreme Court noted that the district court permitted respondents to litigate "anonymously," the underlying record shows the Court simply meant that the respondents used pseudonyms. (Supp.Appx.63-64.) The district court order states that the respondents were permitted to use pseudonyms "for the purpose of concealing their identities from the general public," but attorneys of record knew their identities. (*Id.*) And the court ordered counsel to keep their identities confidential (*id.*), as the Circuit Court ordered here. (App.41:18-22.)

Other cases similarly required disclosure to the parties and counsel through an order to seal like the Circuit Court ordered here. *See, e.g.*, *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1245 (D.D.C. 1981) (ordering plaintiff's name and address to be given to clerk and made available to defendants when necessary); *Doe v. Stegall*, 653 F.2d 180, 182 (5th Cir. 2011) (parties disclosed identities to other parties and merely, "sought to bar disclosure to the general public").

Other cases Petitioners cite allowed a party to proceed using pseudonyms without explanation sufficient to determine whether the

litigant remained anonymous to the other parties in the case. *See, e.g.*, *Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (*see* Supp.Appx.76-81); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n.7 (S.D.N.Y 1973); *Doe v. Shapiro*, 302 F. Supp. 761, 762 n.2 (D. Conn. 1969); *Doe v. Lavine*, 347 F. Supp. 357, 358 (S.D.N.Y. 1972); *Poe v. Ullman*, 367 U.S. 497, 498 n.1 (1961); *Buxton v. Ullman*, 156 A.2d 508, 514-15 (Conn. 1959).

Petitioners also cite *Doe ex rel. Doe v. Elmbrook School District*, 658 F. 3d 710, 721, 724 (7th Cir. 2011), *vacated on other grounds*, 687 F.3d 840 (7th Cir. 2012), which is not helpful to Petitioners for at least five reasons. First, the school district never challenged plaintiffs' request to remain anonymous. *Id.* at 724. Second, the court determined there was "no indication that litigating anonymously [would] have an adverse effect on the District or its ability to defend itself in [that] or future actions." *Id.* Third, the record does not clearly indicate whether plaintiffs' names were withheld from counsel and the court or simply the public. Fourth, the parties agreed to proceed to summary judgment without taking any discovery. *Id.* at 734. And fifth, detailed affidavits demonstrated that the particular plaintiffs suffered reprisals from the defendants, not just an abstract fear of harm. *Id.* at 722.

The same is not true here. Respondents challenged Petitioners' request and have repeatedly asserted that Respondents have a fundamental and automatic right to discovery, which is essential for them to be fully informed of the facts of the case and the evidence that may come out at trial.[11] (R:42 at 21; Supp.Appx.89:16-90:4, 101:5-9.) *See also Crawford*, 2001 WI 45, ¶¶13-14; Wis. Stat. ch. 804. Moreover, Petitioners themselves have suggested they intend to seek discovery from MMSD, unlike in *Elmbrook School District*.[12] (Supp.Appx.139:17-

[11] The Circuit Court correctly held that "anonymous plaintiffs effectively deny the Defendants and Intervenors the ability to take discovery or otherwise respond to the facts presented by the Plaintiffs in their motion as to the Plaintiffs themselves." (App.55.) Petitioners contend that they can respond to interrogatories and participate in depositions while remaining anonymous. (Br.39.) But Petitioners provide no explanation for how that would be possible or how it would result in full and fair discovery to which Respondents are entitled. *See* Wis. Stat. §804.01(2). Even if discovery of anonymous plaintiffs were possible, it would not allow Respondents to uncover the truth of Petitioners' claims regarding the context in which their children supposedly are impacted by the Guidance, the nature of communication between MMSD and their children, or whether any issues related to their children's gender identity ever arose at school.

[12] Petitioners' contention that their identities are irrelevant because they are no different from any other parents and are merely seeking declaratory and injunctive relief in a facial challenge to the constitutionality of the Guidance (Br.38-39) is a red herring. Evidence regarding Petitioners' facial challenge is relevant to the merits of the underlying lawsuit. Individualized factual development is necessary because Wisconsin law requires a party bringing a facial challenge to prove that the policy in question cannot be constitutionally enforced under *any* circumstances. *See Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶38-48, 393 Wis. 2d 38, 946 N.W.2d 35 (emphasis added). Respondents have the right to gather facts through discovery to show that constitutional applications of the Guidance exist and therefore Petitioners' facial challenge cannot succeed. *Id.* at ¶72 (concluding that a facial challenge cannot succeed where there are constitutional applications of the laws in question).

20.) And Petitioners have not alleged particularized harm to them from Respondents; only abstract harm.

Finally, the few federal cases Petitioners cite where a plaintiff was anonymous to opposing counsel are distinguishable for other reasons. *Moe v. Dinkins* involved intervenor plaintiffs proceeding with pseudonyms only after they alleged specific facts demonstrating they were specifically injured as a result of being precluded from petitioning for judicial approval to obtain a marriage license pursuant to a New York law that required parental consent. 533 F. Supp. 623, 626-27 (S.D.N.Y. 1973). The facts here are entirely different, especially because *Petitioners concede that they have not been injured* by the District's Guidance that they challenge. (App.38:1-10 (explaining that Petitioners are "not acknowledging that they have any special injury").) And in both *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832 (9th Cir. 1998), and *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667 (E.D. Ky. 2000), there was no question that the anonymous plaintiffs were actually impacted by the challenged practices and there was no harm to the defendants from being denied the plaintiffs' names.

Here, however, the challenged Guidance impacts only a small number of students. Petitioners have not shown their children are in this

small group or are likely to ever be. In fact, Petitioners "do not claim that their children are currently struggling with this, but that, like all students, they may begin to at any time." (Br.39.) They further admit that they "do not seek damages or any remedy that would apply only to them, but simply a declaration" that the Guidance violates parents' rights and an injunction against the District's enforcement of the Guidance. (Br.40.) But a party cannot obtain declaratory relief unless the facts are sufficiently developed to show a justiciable controversy exists. *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694-95, 470 N.W.2d 290 (1991). And no justiciable controversy exists unless the plaintiffs establish they have a legal interest in the controversy and the issue is ripe for judicial determination. *See id.* at 694 (citing *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982)); (*see also* R:42:6-7.) Without Petitioners' identities, it is impossible to know whether they have a legal interest in a ripe controversy here.[13]

Although Petitioners assert that federal courts "uniformly apply" a balancing test to evaluate requests for complete anonymity (Br.29), as

[13] Petitioners' citation to three Speech First cases equally misses the mark. (Br., 33-34, citing *Speech First, Inc. v. Killeen*, 968 F.3d 628 (7th Cir. 2020); *Speech First, Inc. v. Schlissel*, 939 F.3d 756 (6th Cir. 2019); *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020).) Those cases do not support Petitioners because plaintiff—Speech First, Inc.—*was* publicly identified; the cases did not involve a "Doe" at all.

the Court of Appeals observed (*see* App.17:n.7) and as the foregoing analysis demonstrates, federal law governing a party's attempt to sue anonymously is not uniform. The Seventh Circuit, for its part, criticizes the overuse of pseudonyms in federal litigation. *See Coe v. Cty. of Cook*, 162 F.3d 491, 498 (7th Cir. 1998); *Mueller v. Raemisch*, 740 F.3d 1128, 1135-36 (7th Cir. 2015) (changing caption to disclose plaintiffs' identities who used pseudonyms below without allowing plaintiffs to withdraw their appeal). Federal court practices vary with respect to the use of pseudonyms and almost none endorse the notion that a plaintiff may pursue federal litigation without ever disclosing their identity to opposing counsel.[14]

III. PETITIONERS FAILED TO APPEAL THE STAY OF THE PRELIMINARY INJUNCTION HEARING AND ARE NOT ENTITLED TO A BROADER INJUNCTION PENDING APPEAL.

Petitioners misstate the procedural history as it relates to their preliminary injunction motion. The Circuit Court did not deny their motion, but instead stayed proceedings because *Petitioners* sought a stay

[14] Regardless, Petitioners seem to argue that the Circuit Court failed to evaluate two of the seven factors in the purported federal balancing test they present: (1) whether Petitioners' identities are relevant to this case; and (2) whether Respondents are prejudiced by Petitioners' failure to identify themselves. (Br.40.) As discussed, Petitioners' identities are relevant to the underlying merits of their claims and Respondents are prejudiced by the inability to properly investigate those claims through discovery. *See supra*, notes 11-12.

while they appealed the Circuit Court's order requiring them to disclose their identities under seal. (R.83;R.91.) The Circuit Court had a schedule in place for deciding the preliminary injunction that included time for discovery and dispositive motions, as well as an evidentiary hearing. (R.73.) That schedule was tied to Petitioners filing an amended complaint under seal, which never occurred due to Petitioners' stay motion and appeal.

Petitioners then moved for an injunction pending appeal (R.89), which the Circuit Court partially granted and partially denied. The Circuit Court found that, because the Guidance was not binding on teachers, there was little or no risk of injury to Petitioners. (App.59:15-60:5.) But because Petitioners expressed concern that the Guidance could put some teachers in the position of "not providing accurate and truthful information to parents when addressed by the parents," the Circuit Court issued a limited injunction pending appeal, prohibiting school district employees from lying to parents. (App.61:7-13, 53-55.)

Petitioners then moved the Court of Appeals to review the Circuit Court's decision to grant only a limited injunction pending appeal. The Court of Appeals determined that the Circuit Court did not abuse its discretion because Petitioners did not establish a likelihood of

irreparable harm absent additional injunctive relief pending appeal. (App.33.) Petitioners sought review of that decision from this Court and this Court denied review. (Supp.Appx.57.)

Importantly, Petitioners *never* appealed the Circuit Court's discretionary decision to stay the preliminary injunction schedule. In fact, Petitioners filed their appeal, now before this Court, before Petitioners' requested stay of the anonymity order was granted. (R.84; R.91.) Thus, the Court of Appeals did not consider whether that decision was an abuse of discretion, as Petitioners did not raise that issue with it. (*See* App.2.)

A. This Court Has No Jurisdiction Over the Circuit Court's Stay of the Preliminary Injunction Motion Because Petitioners Did Not Appeal That Decision.

Petitioners did not appeal the Circuit Court's discretionary decision to stay the preliminary injunction schedule. Indeed, they filed their notice of appeal prior to the stay. (R.84;R.91.) Petitioners do not explain how this Court could have jurisdiction over an issue the Circuit Court decided after Petitioners filed their notice of appeal.

Further, Petitioners did not ask, nor did the Court of Appeals decide, whether the decision to postpone discovery and a hearing on the preliminary injunction was an abuse of discretion. (*See* App.9:n.4.) By

failing to raise this issue before the Court of Appeals, Petitioners have forfeited it. *Veritas Steel, LLC v. Lunda Construction Co.*, 2020 WI 13, ¶38, 389 Wis. 2d 722, 937 N.W.2d 19.

In addition, this Court should not consider whether the Circuit Court erred by not granting the preliminary injunction because the Circuit Court has not decided that issue yet. Appellate courts generally will not, "blindside trial courts with reversals based on theories which did not originate in their forum." *Gibson v. Overnite Transp. Co.*, 2003 WI App 210, ¶9, 267 Wis. 2d 429, 671 N.W.2d 388 (citation omitted).

B. There is No Reason for This Court to Address the Scope of the Injunction Pending Appeal.

To be clear, this Court has already weighed in on the scope of the injunction pending appeal and denied Petitioners' Petition for Review in March 2021, which encompassed the Court of Appeals' order upholding the Circuit Court's decision on the motion for injunction pending appeal. (Supp.Appx.57.)

It also makes no sense for this Court to consider the scope of the injunction pending appeal now because, should this Court grant a broader injunction pending appeal, that ruling would become moot as soon as this Court issues a decision, which would conclude the appeal. At that point, the case would be returned to the Circuit Court, which

presumably would re-establish a preliminary injunction hearing schedule.

Nor should this Court enter an injunction on its own. Petitioners erroneously assert that, if this Court reverses the Circuit Court's denial of a broader injunction pending appeal, the "usual" result is to "direct the entry of an injunction." (Br.17, citing *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966).) But *Fromm* contradicts Petitioners' assertion. "Under usual circumstances, where the plaintiff has asked for an injunction and the trial court *has determined that his complaint states no cause of action*, we would, upon reversing, if the facts made such action appropriate, direct the entry of an injunction, *or if further fact finding were necessary, we would refer the matter to the trial court to determine whether present conditions of fact permit or require the court to issue the requested injunction*." 33 Wis. 2d at 102-03 (emphasis added). Indeed, as this Court explained in *Bartell Broadcasters, Inc. v. Milwaukee Broadcasting Co.*, "an order requiring the issuance of a temporary injunction would practically require an examination of the merits and a determination of the issues," which this Court "cannot" do when the facts remain in dispute. 13 Wis. 2d 165, 172, 108 N.W.2d 129 (1961).

The Circuit Court here did not determine that the Complaint failed to state a cause of action; in fact, it denied MMSD's motion to dismiss. (R.71.) Further, additional fact finding is necessary here. Thus, the "usual" result would be for this Court to remand the matter to the Circuit Court to determine the facts and decide whether those facts permit or require the requested injunction.

C. The Lower Courts Correctly Found That Petitioners Failed to Demonstrate Essential Prerequisites for Broader Temporary Injunctive Relief.

Wisconsin courts have not articulated a separate standard for an injunction pending appeal. Outside of an appeal, a party seeking a temporary injunction must demonstrate that: (1) they are likely to suffer irreparable harm without a temporary injunction; (2) they have no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) they have a reasonable probability of success on the merits. *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App

56, ¶20.[15] Petitioners fail to address these elements, which they have the burden of demonstrating to obtain an injunction pending appeal.

"Injunctions, whether temporary or permanent, are not to be issued lightly." *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶24, 301 Wis. 2d 266, 732 N.W.2d 828. Moreover, "[t]he granting or denial of injunctive relief is a matter of discretion for the circuit court" and will not be overturned "absent a showing that the circuit court erroneously exercised such discretion." *Milwaukee Deputy Sheriffs' Ass'n*, 2016 WI App 56, ¶20; *see also McCleary v. State*, 49 Wis. 2d 263, 281, 182 N.W.2d 512 (1971) ("An appellate court should not supplant the predilections of a trial judge with its own.").

The Circuit Court correctly applied the test for the issuance of a temporary injunction pending appeal. In doing so, it enjoined MMSD from applying its Guidance in any manner that allows or requires MMSD staff to deceive parents who seek information about the name and pronouns being used to address their child at school. (App.54.) It simply

---

[15] Petitioners assert that the factors governing issuance of an injunction pending appeal are "not prerequisites but rather are interrelated considerations that must be balanced together," (Br.23, quoting from *State v. Gudenschwager*, 191 Wis. 2d 431, 440, 529 N.W.2d 225 (1995).) That is incorrect. *Gudenschwager* did not address the factors governing when a circuit court abuses its discretion in not granting an injunction pending appeal but rather, factors governing whether to stay a circuit court order pending appeal. *Id.*

declined to issue a *broader* injunction that would impose an affirmative obligation on MMSD staff to volunteer information to parents that the law does not require be disclosed or that is legally protected against disclosure. (App.54, 63.)

The Circuit Court explained that it declined to require MMSD to affirmatively disclose students' use of affirmed names and pronouns without the consent of the student to "preserv[e] the status quo" while Petitioners appealed the denial of their motion to proceed anonymously. (App.54–55.) That of course was correct. "The purpose of 'a temporary injunction is to *maintain the status quo,* not to change the position of the parties or *compel the doing of acts which constitute all or part of the ultimate relief sought.*'" *School Dist. of Slinger v. Wisc. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 373, 564 N.W. 2d 585 (1997) (quoting *Codept, Inc. v. More-Way North Corp.*, 423 Wis. 2d 165, 173, 127 N.W.2d 29 (1964)) (emphasis in original).

Here, the status quo since April 2018 was MMSD's Guidance allowing students to choose whether to consent to disclosure of their use of their affirmed name and pronouns. (R.1:¶32; R.2:18.) The Circuit Court did not abuse its discretion in declining to alter that status quo to grant Petitioners the ultimate relief they seek in this case. Indeed,

granting the "preliminary" relief Petitioners seek would improperly "constitute all ... of the ultimate relief sought." *Slinger*, 210 Wis. 2d at 373 (quotation omitted; emphasis deleted).[16]

As the Circuit Court explained in its September 28, 2020 Order, Petitioners' refusal to disclose their identities to opposing counsel "effectively den[ied] the Defendants and the Intervenors the ability to engage in discovery or to otherwise respond to the facts presented by the Plaintiffs in their motion as to the Plaintiffs themselves." (App.55.) And Petitioners were demanding "preliminary relief that would otherwise convert the case to a *de facto* class action, rather than a plea for relief by particular, albeit anonymous, parents." (*Id.*) The Circuit Court correctly found that "Plaintiffs have not adequately demonstrated irreparable harm to them" and that "Plaintiffs have not provided facts sufficient for this court to find irreparable harm or to find that they do not have an adequate remedy as to themselves." (App.54, 55 (emphasis in original).)

---

[16] Petitioners' argument that the status quo is the preservation of parental rights (Br.28) conflates their merits arguments with the prevailing situation (*i.e.*, the Guidance, which was in place for nearly two years before this lawsuit). Were Petitioners' reasoning adopted, it could be argued in every case in which government action is claimed to violate a constitutional right that the status quo was the existence of the constitutional right, regardless of how long the challenged government action was in place. Petitioners' alternative argument that the status quo is "protecting the names that they thoughtfully and lovingly gave to their children at birth and the sexual identities their children were born with" (*id.*) is a non sequitur because nothing in the Guidance threatens a change in any student's legal name or the sex they were identified with at birth.

This was especially true because the Circuit Court required that, if Petitioners inquired of school officials pending appeal, those officials could not answer untruthfully. (App.54.)

As the Court of Appeals rightly held, the Circuit Court did not abuse its discretion because, among other reasons, Petitioners failed to "establish a likelihood of irreparable harm absent additional injunctive relief pending appeal." (App.33.) That was so because "[t]he harms the parents assert are not likely harms but are instead potential harms that are uncertain and speculative." (*Id.*) Such harms depend on "a chain of events, each of which is uncertain to occur," including that:

> one of their children *might* now or in the future start to socially transition at school; the School District *might* apply its Guidance & Policies to withhold information about the child's social transition from that child's parent or parents; and the child's social transition *might* increase the child's risk for negative physical and psychological health outcomes before the parent or parents can intervene and exercise their constitutional rights to direct the child's treatment and other aspects of the child's upbringing.

(App.33-34 (emphasis added).)

Petitioners accordingly failed to meet the requirement of showing that "the movant"—rather than just anyone—"is *likely* to suffer irreparable harm if a temporary injunction is not issued." *Service Emps. Int'l. Union, Local 1*, 2020 WI 67, ¶93. Moreover, Petitioners can avoid

these speculative harms under the current injunction by simply asking their schools whether their children are using different names or pronouns than they are using at home. As the Court of Appeals explained, it therefore was unnecessary to decide "whether the parents also fail to satisfy the other requirements for temporary injunctive relief." (App.33.)

Petitioners contend that, under *Wis. Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 428–30, 293 N.W.2d 540 (1980), the lower courts abused their discretion in not deciding and making findings on Petitioners' likelihood of success on their underlying constitutional claims. (Br.16.) But that case did not hold that such findings are required whenever temporary injunctive relief is denied. To the contrary, that case reaffirmed that "'[t]emporary injunctions are to be issued *only* when necessary to preserve the status quo'" and that "'[i]njunctions are *not to be issued* without a showing of a lack of adequate remedy at law and irreparable harm.'" 97 Wis. 2d at 429 (quoting *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) (emphasis added)). This makes clear that those are essential elements, not elements simply to be balanced with probability of success on the merits.

Wisconsin Ass'n of Food Dealers stated only that an abuse of discretion can occur due to "'(1) [f]ailure of the trial judge to consider and make a record of factors *relevant to a discretionary determination in a particular case*; (2) consideration of clearly irrelevant or improper factors; and (3) clearly giving too much weight to one factor.'" 97 Wis. 2d at 430 (citation omitted) (emphasis added)). Probability of success on the merits is not relevant to a discretionary determination not to grant temporary injunctive relief, however, when a party fails to establish the other necessary prerequisites to temporary injunctive relief. Instead, all that the Court decided in *Wis. Ass'n of Food Dealers* was what it described as "the narrow issue" of "whether the circuit court abused its discretion by denying the petitioners' motion for a temporary injunction on the ground that the petitioners had not shown a reasonable probability of ultimate success on the merits." *Id.* at 430. That was essential in *Wis. Ass'n of Food Dealers*, unlike this case, because in that case the injunction would have preserved the status quo and the circuit court only denied injunctive relief based on a finding that the plaintiff had failed to establish a reasonable probability of success on the merits rather than a failure to show the likelihood of irreparable harm. *See id.*at 428.

There simply is no requirement that findings on probability of success be made if the other requirements for injunctive relief are not met. *See Werner*, 80 Wis. 2d at 524 (even if probability of success on merits were shown, no abuse of discretion could be found because of lack of an inadequate remedy at law and lack of irreparable injury were absent); *Codept*, 423 Wis. 2d at 172-73 (no abuse of discretion regardless of probability of success on the merits where moving party had adequate remedy at law). Where "the trial court clearly set out the factors which influenced its determination on the record, [an appellate] court may not find an abuse of discretion." *Joint School Dist. No. 1 v. Wisconsin Rapids Educ. Ass'n*, 70 Wis. 2d 292, 309, 234 N.W. 2d 289 (1975). Here, the Circuit Court explained how Petitioners failed to show a likelihood of irreparable harm as to them, that Petitioners sought to alter the status quo, and why the court was only granting a limited injunction pending appeal. There was no abuse of discretion.

D. Petitioners Also Have Failed to Demonstrate That They Have a Reasonable Probability of Success on Their Parental Rights Claim.

Even if the lower courts should have considered Petitioners' probability of success on the merits, Petitioners have failed to show they

have a reasonable probability of succeeding on their claim that the Guidance violates their parental rights or that they have a ripe claim.

1. Parents do not have a constitutional right to control the school environment or receive notice of names and pronouns a student uses.

Petitioners do not have a reasonable probability of succeeding on their claim that MMSD's Guidance infringes on their constitutionally protected parental rights because, while parents have a fundamental right "to make decisions concerning the care, custody, and control of their children," that "right is neither absolute nor unqualified." *Larson v. Burmaster*, 2006 WI App 142, ¶¶31–35, 295 Wis. 2d 333, 720 N.W. 134.

Where a parent has made the choice to have their child attend public school, the parental right to control the upbringing of their child gives way to a school's ability to control the curriculum and school environment. *Id.* ¶36. Schools, on the other hand, have broad authority to "do all things reasonable to promote the cause of education, including establishing, providing and improving school district programs, functions and activities for the benefit of pupils." *Id.* ¶21 (quoting Wis. Stat. §118.001); *see also California Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1020 (9th Cir. 2020) ("with respect to education, parents have the right to choose the educational

forum, but not what takes place inside the school"); *Thomas v. Evansville-Vanderburgh School Corp.*, 258 Fed. Appx. 50, 54 (7th Cir. 2007) (constitutional protections of parental rights do "not imply a parent's right to control every aspect of her child's education at a public school"); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 395–96 (6th Cir. 2005) ("While parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child.") (emphasis in original).

Numerous cases uphold this principle. *See, e.g., Parents for Privacy v. Barr*, 949 F.3d 1210, 1231-33 (9th Cir. 2020) (parents have no fundamental right to object to school policy allowing transgender students to use single-sex facilities consistent with their gender identity); *Thomas*, 258 Fed. Appx. at 54 (school counselor's private conversations with student regarding problems performing and functioning at school did not violate parent's right to direct upbringing child); *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 183–84 (3d Cir. 2005) (parental rights not violated by child's participation in involuntary survey seeking information about drug and alcohol use, sexual activity, physical violence, and suicide attempts); *Leebaert v. Harrington,* 332

F.3d 134 (2d Cir. 2003) (upholding school's mandatory health classes against father's claim of violation of fundamental rights); *Parents United for Better Sch., Inc. v. School Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir. 1998) (upholding school's consensual condom distribution program); *Curtis v. Sch. Comm. of Falmouth*, 652 N.E.2d 580, 584–87 (Mass. 1995) (same); *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525 (1st Cir. 1995) (upholding compulsory high school sex education assembly program), *abrogated on other grounds by Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680 (7th Cir. 1994) (parents did not have constitutional right to exempt child from reading program); *Reardon v. Midland Cmty. Sch.*, 814 F. Supp. 2d 754, 767–72 (E.D. Mich. 2011) (school counselors allegedly encouraging minor child to run away did not violate parental rights because counselors provided counseling upon minor's request and did not exert coercive influence).

Parents can always home school their children or enroll them in a private school if they do not want their children subject to guidance that a public school believes is most appropriate for students' educational well-being. Moreover, even outside of the school context, parental rights do not extend to requiring the government to interact with children only

according to a parent's wishes. For example, in *Doe v. Irwin*, the court rejected a constitutional challenge by parents to a state clinic's condom distribution program for minors that did not notify parents that their children were using its services. 615 F.2d 1162, 1169 (6th Cir. 1980). The court explained that the desire of the parents to know of such activities is understandable but not constitutionally required. *Id.* at 1166–69. The same is true here.[17]

Petitioners ignore these well-established legal principles. They do not address the long list of cases that undermine their argument, even though those cases are extensively reviewed in *Larson v. Burmaster*, the only published Wisconsin case addressing the issue. Instead, they rely almost entirely on *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), to support their argument "that a school violates parents' constitutional rights if it usurps their role in significant decisions." (Br.18.) But in that

[17] Petitioners slip into their Opening Brief arguments that the Guidance violates the conscience provisions of Article 1, §18, of the Wisconsin Constitution to raise their children in accordance with their religious beliefs and violates Wisconsin state records laws. (Br.18,20.) Those arguments were **not** included in Petitioners' Petition for Review. Their inclusion in Petitioners' Brief accordingly violates this Court's January 13, 2022 order granting the Petition for Review, which explicitly stated that Petitioners "may not raise or argue issues not set forth in the petition for review unless otherwise ordered by the court." Because the Court has not so ordered, Respondents will not rebut those unmeritorious arguments here. Should the Court so order or decide to consider those arguments notwithstanding Petitioners' violation of both the January 13th order and Wis. Stat. § (Rule) 809.62(6), Respondents respectfully request that they be granted an opportunity to brief those issues.

case, both the parents and student sued the school over a swim coach requiring the student to take a pregnancy test, which they argued amounted to an unconstitutional "search." *Gruenke*, 225 F.3d at 300. And the coach's conduct led to adverse publicity about the student that intruded upon a private family matter, *id.* at 306, circumstances very unlike a school agreeing to use the name and pronouns a student requests and not volunteering that it is doing so unless the student consents. In addition, the *Gruenke* court acknowledged that its ruling did not mean that schools lacked authority to "impose standards of conduct ... that differ from those approved by some parents" in order to provide "a proper educational atmosphere." *Id.* at 304.

2. A school's agreement to use the name and pronouns a student requests is not medical treatment.

Key to Petitioners' erroneous argument is their assertion that using the name and pronouns a student requests is a form of medical or psychotherapeutic treatment to which parents must give informed consent. (Br.11-12, 18-21, 23-26.) Those assertions are both wrong and, as shown in Section III.E., below, highly contested.

First, the Guidance does not interfere with parents' rights to make health care decisions for their children, as Petitioners falsely claim.

Students often seek to use a different name than their legal name, including shortened forms of their legal name, a nickname, a middle name, or simply some other name they prefer. Such a request is hardly an indication of illness, and acceding to it is not medical treatment, even if the name is gender-neutral or gender non-conforming. If Christine asks to be called "Chris," or if Michelle asks to be called "Michael," there is no reason to believe a medical condition exists or that using those names is medical care. Likewise, students may request to use different pronouns for numerous reasons, including generalized concerns about sex-stereotyping, solidarity with other students, or a desire not to conform.

As Respondents' expert Dr. Leibowitz explained, even when students are exploring their identity, allowing them to do so through the use of a different name or pronouns than those assigned at birth is not medical treatment and does not require a medical diagnosis. (Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶9, 13, 30.) In fact, the request to use a different name or pronouns is not even a diagnostic criterion for gender dysphoria. (*Id.* ¶13.) Gender exploration in general is a normal aspect of youth development and does not mean a child has gender dysphoria. (*See id.* ¶¶9, 30–32.)

"Treatment, as commonly understood, occurs when *a health care provider* takes steps to remedy or improve a malady that caused the patient to seek [the provider's] help." *Shanks v. Blue Cross & Blue Shield United of Wis.*, 979 F.2d 1232, 1233 (7th Cir. 1992) (emphasis added). Here, Petitioners take issue with the potential actions of District staff, not medical providers. MMSD is not providing medical treatment by creating a safe and accepting environment to further MMSD's educational mission.

Moreover, a teacher's knowledge that a student prefers a different name and/or pronouns will not prevent Petitioners or any other parent from getting their children medical treatment for gender dysphoria. As Dr. Liebowitz explained, a child experiencing gender dysphoria would show signs—obvious to a parent or caregiver—of gender-related concerns or clinical distress. (*See* Supp.Appx.140-184 (LiebowitzAff.Dkt.141), ¶¶39–41, 45, 56.) Those signs—*not* a request to use a different pronoun or name at school—would be the reason why a parent would know their child needs treatment. Petitioners allege that, if their children develop gender dysphoria, they should have a say in the appropriate treatment. (R.1, ¶95.) But the Guidance does not prevent them from asking a qualified provider to determine whether their child

has that condition nor, if so, deciding what medical treatment their child should receive.

No research exists to support that using a different name or pronouns at school will lead to a lifelong transgender identity. Dr. Levine may suggest otherwise,[18] but he improperly relies on research that defines social transition to be a far more comprehensive set of changes than just use of a different name and/or pronouns in one setting. (*See* Supp.Appx.140-184(LiebowitzAff.Dkt.141) ¶¶20–26, 31–32.) He cites no authority that supports his opinion that use of a different name and pronouns in one setting causes one to have gender dysphoria or increases the likelihood that the condition would endure. (*Id.* ¶¶22-26.)

Finally, even if use of affirmed names and pronouns were connected to medical treatment in a particular case (if, for example, a medical professional diagnosed a student with gender dysphoria and advised use of a different name and pronouns as part of the treatment, which parents necessarily would know about), Petitioners are wrong that the law requires disclosure to parents of all information that may relate to their children's medical conditions. For example, Wis. Stat. §118.126

[18] Petitioners rely on the affidavit of a psychiatrist who has little experience in treating children. (*See* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶19.)

requires that school employees who are engaged in alcohol or other drug treatment programs in schools maintain confidentiality of students' conditions.

3. Petitioners Also Have Failed to Show That Their Claims are Ripe.

As this Court recently explained, "[t]he purpose of ripeness is to avoid courts entangling themselves in abstract disagreements. Courts resolve concrete cases, not abstract or hypothetical cases." *Papa v. Wis. Dep't of Health Servs.*, 2020 WI 66, ¶30, 393 Wis. 2d 1, 946 N.W.2d 17 (citations and internal quotation omitted). Because declaratory judgments and injunctions are prospective remedies, a plaintiff need not prove an injury has already occurred, but the facts on which the court is asked to make a judgment nonetheless "must be sufficiently developed to allow a conclusive adjudication" and cannot be "contingent or uncertain." *Id.* (citations and internal quotation omitted).

Petitioners fail this requirement. As the Circuit Court explained, the facts on which Petitioners' parental rights claim rest are wholly undeveloped because Petitioners have refused to disclose their identities to opposing counsel and no discovery has occurred. (App.55.) Nothing is known about Petitioners other than their allegations about how many children they have and which schools they attend. (*See, e.g.*, R.10, ¶2;

R.22, ¶2.) As discussed in Section III.E. below, numerous factual disputes underlie Petitioners' claims, with myriad conflicts in the parties' expert testimony that the Circuit Court has not yet resolved.

Moreover, as the Court of Appeals noted, Petitioners' claims "depend on a chain of events, each of which is uncertain to occur," including whether any of Petitioners' children will ever request to use a different name or pronouns than they use at home; whether, if so, they will ever request that District staff keep that information confidential; whether they are exploring or are likely to explore their gender; whether they have or may develop any signs of gender dysphoria; and whether there is any risk in the use of a different name or pronouns that could occur before parents could intervene, if they wished. (App.33-34.) Because it remains purely hypothetical that Petitioners themselves will ever be affected by Guidance, Petitioners have not shown that their claims are ripe.

E. Factual Disputes Require an Evidentiary Hearing Before Any Broader Injunction Is Granted.

No injunction on the merits should issue before the facts are fully developed. Facts regarding Petitioners and their children are still entirely unknown and the Circuit Court has not yet had occasion to consider the conflicting expert testimony. It would be highly

inappropriate for this Court in the first instance to weigh that testimony and resolve the conflicts that include, among other things:

- The relative qualifications of the experts (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶3-8, 19, *with* R.28, Levine Aff., ¶¶1-7, and LevineRebuttalAff.(Dkt.142), ¶¶3, 5);
- Whether a minor's use of a different name or pronouns at school means they are transgender or engaging in social transition from one gender to another (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶9, 13, 30, 43-44, *with* R.28 ¶¶71-79, and LevineRebuttalAff.(Dkt.142), ¶11);
- Whether a minor's use of a different name or pronouns at school is a medical issue, calls for medical evaluation, or involves medical treatment (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶9, 13, 30, 43-44, *with* R.28, ¶¶10, 71-79, and LevineRebuttalAff.(Dkt.142), ¶11);
- Whether a minor's use of a different name or pronouns at school means they have gender dysphoria or, if they do, would increase the likelihood that gender dysphoria would

last longer or become permanent (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶23-26, 30-32, 34-35 *with* R.28 ¶¶58, 60-64, 121-139 and LevineRebuttalAff.(Dkt.142), ¶18);

- Whether use of a different name or pronouns for a student at school can cause any harm (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶9, 13, 30, 37, 43-44, 46-49, 53, *with* R.28 ¶¶60-65, 71-79, 82, 98-119, and R LevineRebuttalAff.(Dkt.142), ¶¶11 and 31);
- The impact of disclosing a student's use of a different name or pronouns without the student's consent (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141) ¶¶3, 48-52, *with* R.28 ¶¶70-84, and LevineRebuttalAff.(Dkt.142), ¶¶23 and 29); and
- Whether disclosing a student's use of a different name or pronouns at school interferes with the student obtaining treatment for gender dysphoria, in a student diagnosed with that condition (*compare* Supp.Appx.140-184(LiebowitzAff.Dkt.141), ¶¶41, 56, *with* R.28 ¶¶70-84).

Under these circumstances, this Court should not reverse the Circuit Court's decision to issue a limited injunction pending appeal, but if it does, this Court should remand this case to the Circuit Court for additional fact-finding and to determine in the first instance whether the facts permit or require issuance of a broader injunction.

CONCLUSION

This Court should reject Petitioners' request to reverse long-standing Wisconsin law that favors disclosure of party identities. The Circuit Court's order for Petitioners to disclose their identities to the court and opposing counsel under seal was an appropriate exercise of discretion.

Likewise, this Court should reject Petitioners' request for a broader injunction pending appeal. Petitioners have failed to show that the Circuit Court abused its discretion or that they meet the requirements for such an injunction. Further, even if the Court finds the Circuit Court erred, it should remand the matter given the factual disputes that the Circuit Court never ruled on due to Petitioners' requested stay.

Respondents respectfully urge this Court to affirm the court of appeals and remand for further proceedings.

Dated: March 16, 2022.

BOARDMAN & CLARK LLP

Sarah A. Zylstra, WI SBN 1033159
Sarah J. Horner, WI SBN 1113185
1 S. Pinckney St., Suite 410
P.O. Box 92
Madison, WI 53701-0927
(608) 257-9521
szylstra@boardmanclark.com
shorner@boardmanclark.com

Attorneys for Defendant-Respondent Madison Metropolitan School District

QUARLES & BRADY LLP

Emily M. Feinstein, WI SBN 1037924
Adam R. Prinsen, WI SBN 1090448
33 East Main Street, Suite 900
Madison, WI 53703
(608) 251-5000
emily.feinstein@quarles.com
adam.prinsen@quarles.com

AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION
Laurence J. Dupuis
Christine A. Donahoe
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53158
(414) 207- 4032
ldupuis@aclu-wi.org
cdonahoe@aclu-wi.org

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION, INC.
Jon W. Davidson (*pro hac vice forthcoming*)
(admitted only in California)
125 Broad Street
New York, NY 10004
(323) 536-9880
jondavidson@aclu.org

Attorneys for 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

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,978 words.

Dated: March 16, 2022.

BOARDMAN & CLARK LLP

Sarah A. Zylstra, WI SBN 1033159
Sarah J. Horner, WI SBN 1113185
1 S. Pinckney St., Suite 410
P.O. Box 927
Madison, WI 53701-0927

Attorneys for Defendant-Respondent Madison Metropolitan School District

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: March 16, 2022.

BOARDMAN & CLARK LLP

Sarah A. Zylstra, WI SBN 1033159
Sarah J. Horner, WI SBN 1113185
1 S. Pinckney St., Suite 410
P.O. Box 927
Madison, WI 53701-0927

Attorneys for Defendant-Respondent Madison Metropolitan School District