In the Wisconsin Court of Appeals

DISTRICT IV

JANE DOE 4,
PLAINTIFF-APPELLANT,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
DEFENDANT-RESPONDENT,

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

On Appeal from the Dane County Circuit Court,
The Honorable Frank D. Remington, Presiding,
Case No. 2020-CV-454

OPENING BRIEF OF APPELLANT

WISCONSIN INSTITUTE FOR LAW & LIBERTY

RICK ESENBERG
LUKE N. BERG

330 E. Kilbourn Ave., Ste. 725
Milwaukee, WI 53202

ALLIANCE DEFENDING FREEDOM

ROGER G. BROOKS
KATHERINE L. ANDERSON

15100 N. 90th Street
Scottsdale, Arizona 85260

Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Ordinances

Other Authorities

Rules and Regulations

ISSUES PRESENTED

1. Whether parents have standing to challenge a policy that facially violates their rights and requires staff to hide the violation when it is occurring.

The Court held that Plaintiff lacks standing.

2. Whether the Court erred by failing to enjoin the Policy.

The Court denied Plaintiff's preliminary injunction motion.

3. Whether the work-product doctrine and/or Wisconsin's statutes protect, from discovery, an attorney's mental impressions, conclusions, opinions, legal theories, etc., in emails and drafts exchanged with an expert. Whether the related fees and strike orders were erroneous.

The Court ordered Plaintiff to produce all communications and drafts between Plaintiff's counsel and expert, awarded fees on a motion to compel, and then issued a strike order after Plaintiff appealed.

4. Whether Defendants' expert's deposition transcript should be sealed on appeal.

The Court ordered it sealed after Plaintiff appealed.

INTRODUCTION

When the Wisconsin Supreme Court remanded this case, it directed the trial court to rule on the parents' long-outstanding preliminary injunction motion. Instead, the Court dismissed the case for lack of standing, in conflict with well-established precedent and its own prior ruling, even though the only motion pending was Plaintiff's injunction motion.

Worse yet, there is now evidence that the District is *currently* violating parents' constitutional rights. The District admits it has and is facilitating gender transitions at school without parents' awareness, even for students under eighth grade, though it claims not to know how often. And Defendants' expert [redacted]

A preemptive lawsuit is the only way to prevent lifelong harm to minors and preserve parents' constitutional rights, because parents cannot know the future or what the District is hiding from them. No professional organization recommends that untrained school officials secretly facilitate gender transitions without involving parents and experts; even Defendants' expert [redacted]

ORAL ARGUMENT AND PUBLICATION

This case warrants both.

BACKGROUND

A. Procedural History

Plaintiff assumes the Court's familiarity with this case and provides updated background material since the Supreme Court's decision. *Doe v. Madison Metro. Sch. Dist.*, 2022 WI 65, 403 Wis. 2d 369, 976 N.W.2d 584 ("*Doe I*").

The challenged Policy allows students of any age to change gender identity at school by selecting a new "affirmed name and pronouns," "regardless of parent/guardian permission." App. 64. All staff must use this new name or they violate "the [District's] non-discrimination policy." App.64. Staff are prohibited from "disclos[ing] … a student's gender identity to others, *including parents* … unless the student has authorized such disclosure." App.60. The Policy instructs staff to conceal this from parents by "us[ing] the student's affirmed name and pronouns in the school setting, and their legal name and pronouns with family," App.62, and by recording the new "affirmed" name and pronouns in a form "in your confidential file, not in student records," App.65–66, in violation of state law. Wis. Stat. §118.125; *Doe I*, 2022 WI 65, ¶3.

Fourteen parents with children in the District filed this case three years ago and immediately moved for an injunction. R.28. The Circuit Court declined to hear that motion until after the parents' anonymity appeal, R.95:25–31, so they moved for an injunction pending appeal, which it partially granted, preventing staff from lying to parents directly (that limited injunction is no longer in place). R.157.

Plaintiffs asked the Supreme Court for a broader injunction, but a four-Justice majority declined to decide that question, in part because the original motion remained pending below. *Doe I*, ¶¶30–40.

Three Justices—the only three to reach the merits—would have enjoined the Policy, because it "deprive[s] parents of their constitutional rights without proof that parents are unfit, a hearing, a court order, and without according parents due process." *Doe I*, ¶¶67–95, 97–98 (Roggensack, J., dissenting). "[S]ocial transitioning is a healthcare choice for parents to make" and "[w]ithout an injunction, the parents have no way of becoming involved in such a fundamental decision." *Id*. ¶92.

The majority remanded with instructions "to proceed with the adjudication of the parents' claims" and "address the pending [injunction] motion." *Id*. ¶¶35, 41. Shortly thereafter, Plaintiff[1] identified herself and requested a prompt schedule on her long-outstanding motion, R.195. At Defendants' request, the Court set a lengthier schedule to allow time for discovery. R.217, 226. In their response, Defendants argued that Plaintiff lacked standing, an argument identical to one raised and rejected in a motion to dismiss two years earlier. *Compare* R.232:22–26 *with* R.48:8–11; R.79; R.95:39–42.

During a hearing on September 29 (unrelated to the injunction motion), the Circuit Court, *sua sponte*, floated dismissing the case if it agreed with Defendants' argument as to standing. R.260:21–22. Plaintiff objected because her motion was the only motion pending, Defendants had raised (and lost) the same argument in their motion to dismiss, and summary judgment would be premature. R.259; 260:24–25, 28–33.

During the hearing on October 13—ostensibly on Plaintiff's injunction motion—the Circuit Court asked only about standing. R.288:58. Plaintiff continued to object that Defendants had not filed any motion, and that whatever-it-was could not be considered either a motion to dismiss or a summary judgment motion. R.288:23–33. The Circuit

[1] Most others withdrew when their children stopped attending the District, for various reasons. *E.g.*, R.107.

Court stated that it viewed the posture as something in "between," R.288:29, and rejected Plaintiff's objections, but allowed her to file a supplemental brief on standing, R.288:31–32, which she did, R.290.

During another hearing on November 7, the Court asked whether the parties agreed that there were no disputed facts for purposes of standing. R.310:43–52. Plaintiff disagreed, emphasizing that there were potentially relevant disputes between the experts, and that discovery was ongoing, R.310:47–48, 48–49. The Court directed the parties to file statements as to which facts were relevant to standing. On November 11, Plaintiff deposed Defendants' expert, and [redacted], which she pointed out in her statement. R.307.

Nevertheless, days later, the Circuit Court issued a decision and final order dismissing the case on standing. App.4–36.

B. Additional Support for Plaintiff's Claims

1. The District is Currently Violating Parents' Rights and Causing Harm to Children

There is now evidence that the District *is currently violating parents' rights and causing harm to children*. In discovery, the District admitted to at least two situations, *below 8th Grade*, in which it has implemented a Gender Support Plan "where the District is not certain whether either parent is currently aware." R.254:18. The actual number may be substantially higher. The District said it "is still locating records," without any indication of how far along it was, R.254:17, and the Court cut off the discovery process before Plaintiff could resolve this. Worse, if teachers follow the District's direction to keep such plans in their "confidential file," App.65, the District *itself* may not even know how many there are without polling every single teacher.

With respect to the broader category of students who are being addressed using a different name and pronouns without their parents' awareness (but *without* a Gender Support Plan),[2] the District responded that it "does not maintain a record of" that. R.254:18. Yet the Intervenors have established that this is happening regularly. R.60 ¶¶13–14; R.61 ¶¶11–12; R.62 ¶¶11–12. The most recent Dane County youth survey found that nearly 2% of identify as transgender, and another 2.5% were "not sure," so the numbers of youth dealing with this are quite high.[3]

2. Increasing Concern from Experts About Social Transition

When Plaintiff filed this case, she invoked two leading practitioners who have expressed concern that treating a minor as the opposite sex can have profound, long-term, and harmful effects. Plaintiff's expert, Dr. Stephen Levine, who has decades of experience with gender dysphoria and who was the chairman of the Standards of Care Committee that developed the 5th version of the WPATH guidelines, explains that "therapy for young children that encourages transition cannot be considered to be neutral, but instead is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy." R.31 ¶69.

Dr. Kenneth Zucker, who for decades led "one of the most well-known clinics in the world for minors with gender dysphoria,"[4] has

---

[2] The District's Policy does not require a Gender Support Plan before students change their name and pronouns at school. App.64.

[3] https://www.dcdhs.com/documents/pdf/Youth/DCYA-2021-Overview-Report.pdf

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

publicly argued that "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence."[5]

Plaintiff also noted that *even* the World Professional Association for Transgender Health (WPATH), which Defendants have endorsed, R.141 ¶14, acknowledges that "[s]ocial transitions in early childhood" are "controversial," that there is insufficient evidence "to predict the long-term outcomes," and urges professionals to *defer to parents* even if they "do not allow … a gender-role transition." R.11:24.

Since then, many other experts have expressed similar concerns. The U.K.'s NHS is currently reevaluating its model of transgender care,[6] and the doctor in charge of the review, Dr. Hilary Cass, wrote in her interim report last February: "[I]t is important to view [social transition] as an *active intervention because it may have significant effects on the child or young person in terms of their psychological functioning. … [I]t is not a neutral act*, and better information is needed about outcomes."[7]

Another well-known practitioner, Dr. Erica Anderson, who is transgender and was recently on the board of WPATH, has publicly spoken out against "schools depriving parents of the knowledge of what's going on with their children," arguing that such policies are "a terrible

---

[5] *See* R.30:3–4; R.31 ¶¶63–64, 67.

[6] https://www.england.nhs.uk/commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/gender-dysphoria/independent-review-into-gender-identity-services-for-children-and-young-people/.

[7] https://cass.independent-review.uk/publications/interim-report/.

idea,"[8] and that "cutting [parents] out" of this decision is "misguided," "unethical," and "irresponsible."[9]

There is also growing awareness of adolescents who come to "regret gender-affirming decisions made during adolescence" and later "detransition," which many find to be a "difficult[ ]" and "isolating experience."[10] In one recent survey of 237 detransitioners, 70% said they realized their "gender dysphoria was related to other issues," and half reported that transitioning did not help.[11]

This Court does not need to resolve the debate about the harms versus benefits of minors socially transitioning. The important point is that this is a serious health-related decision, with long-term implications, exactly the sort of decision that parents must be involved in. A parent's role is sometimes to say "no" to protect their children from their own, often short-sighted, desires.

3. ***Defendants' Expert*** [redacted]

[redacted]

[8] https://www.foxnews.com/us/trans-psychologist-files-brief-md-school-district-hiding-transitions-parents-terrible-idea.

[9] https://quillette.com/2022/01/06/a-transgender-pioneer-explains-why-she-stepped-down-from-uspath-and-wpath/.

[10] WPATH SOC8 at S47, https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644

[11] https://doi.org/10.1080/00918369.2021.1919479 at 1606.

[redacted]

4. Plaintiff's Testimony

Plaintiff's standing is based in part on the obvious point that parents cannot know what the District is concealing from them. Plaintiff's expert explains that a child's struggle with gender-identity can arise seemingly "out of the blue" to parents, R.31 ¶78, R.142 ¶13, as another parent who went through this testified, R.32 ¶¶2–9. Dr. Leibowitz [redacted]

Plaintiff testified she does not want the District "conceal[ing]" information from her. R.231 129:13–18, 181:7–9, 186:11–14, 195:6–196:2, 224:11–14. If her child's "gender expression [at school] w[ere] concealed from [her] purposely," *id.* 181:7–9, it would "prohibit [her] from … helping [her] child," *id.* 211:16–212:9. And, while she "would like to think" her child would tell her, she was "not sure" that her child would, given "[her] beliefs on [this topic]." *Id.* 110:13–111:6. She also testified that she "d[idn't] know" whether she would recognize the signs if her child started struggling with this, because "kids hide things well." *Id.* 132:1–133:5. She acknowledged that *"to [her] knowledge*," she has no reason to believe her child is currently dealing with gender identity issues, *id.* 109:2–14, but she of course cannot know what the District "conceals from [her] purposely," *id.* 181:7–9, 195:9–196:2, and she also "do[esn't] know" whether her child will struggle with this (or if so when), because she "can't really predict … the future." *Id.* 109:15–110:8.

If her child ever seeks to change name and pronouns, she wants the District to "[n]otify [her] and allow [her] to take the lead," *id*. 128:18–20; 101:15–16, because there might be "other root issues," and transitioning "could potentially cause problems," *id*. 118:20–119:13; 189:16–21. She wants to be involved to obtain a "psychological evaluation … by medical professionals," *id*. 198:13–20, and to provide "therapy and counsel." *Id*. 193:21–25; 196:14–20; 226:22–227:3. As she recognized, "a child is a child and may[ ] not [be] sure what's best for them." *Id*. 193:21–22.

STANDARD OF REVIEW

This Court ordinarily treats any disputed facts "in the light most favorable to … the parties opposing summary judgment [here Plaintiff], and draw[s] all reasonable inferences from those facts in their favor." *Engelhardt v. City of New Berlin*, 2019 WI 2, ¶8, 385 Wis. 2d 86, 921 N.W.2d 714. Because the Court below short-circuited the usual summary judgment and discovery process, this Court should also treat any unresolved discovery-related disputes, disputes about the experts' testimony, characterizations of Plaintiff's deposition, or facts Plaintiff was in the middle of attempting to discover in the same way.

Standing and the discovery issues are legal questions that this Court reviews de novo. *McConkey v. Van Hollen*, 2010 WI 57, ¶12, 326 Wis. 2d 1, 783 N.W.2d 855; *State v. Hydrite Chem. Co.*, 220 Wis. 2d 51, 59 (Ct. App. 1998). This Court reviews the denial of an injunction for an abuse of discretion. *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 428, 293 N.W.2d 540 (1980).

ARGUMENT

I. Parents Have Standing to Preemptively Challenge a Policy to *Hide* a Violation of Their Rights From Them

"[A] plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief." *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶44, 255 Wis. 2d 447, 649 N.W.2d 626. Indeed, the Declaratory Judgment Act "is primarily anticipatory or preventative in nature." *Lister v. Bd. of Regents of Univ. of Wisconsin Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976). It is expressly designed to "allow courts to … resolve identifiable, certain disputes … prior to the time that a wrong has been threatened or committed." *Putnam*, 2002 WI 108, ¶43.

Given the preemptive nature of declaratory judgment actions, the ripeness required is, "[b]y definition," "different from the ripeness required in other actions." *Id.*, ¶44; *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶41, 244 Wis. 2d 333, 627 N.W.2d 866. The facts must be "sufficiently developed to allow a conclusive adjudication," *id.*, but not "all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694–95, 470 N.W.2d 290 (1991). Instead, what matters is that the facts *relevant to the legal question* are not so "shifting and nebulous," or "so contingent and uncertain," that the dispute is effectively an "abstract disagreement[ ]." *Id.*; *Putnam*, 2002 WI 108, ¶44. Here, the Policy is undisputed. The only question is the legal one—can schools treat a minor child as the opposite sex without parental notice and consent? There is nothing abstract about this dispute; schools either can or cannot exclude parents from this major psychotherapeutic decision.

District Council 48 illustrates. There, a union sought a preemptive declaration that employees were entitled to a due-process hearing before

Milwaukee County could deny vested pension benefits if terminated for cause. 2001 WI 65, ¶¶2–3. The Court held the union had standing and a ripe claim, because "the vast majority of individual employees" would also have standing and ripe claims, even though "[v]ery few individuals [were] in a position to assert that their termination for 'cause' [was] imminent." *Id*. ¶¶45–47. "Waiting until [this] event[ ] actually occur[s]," the Court explained, "*would defeat the purpose of the declaratory judgment statute*." Both "judicial economy and common sense dictate[d]" that the union could seek a declaration preemptively to avoid the "potential denial of [its members'] pensions."

Plaintiff seeks "a declaration about the decision-making process," *id*. ¶44, so that if her child begins to struggle with gender identity issues—or is *currently* struggling and the District concealing it from her—she will be allowed to decide whether a transition is in her child's best interests.

Plaintiff's standing here is much stronger than for the "vast majority of employees" in *District Council 48*, who the Court held would have standing and ripe claims. Due to the secrecy from parents, Plaintiff *will not know* when the District is violating her constitutional rights and harming her child. Thus, Plaintiff *cannot* wait. Indeed, the District admits it has treated children *under 8th grade* as the opposite sex without either parent's awareness (how often it is doing this, the District itself claims not to know). *Supra* Background B.2.

Dr. Levine explains that a child's struggle with gender identity can arise suddenly and seemingly "out of the blue" from a parent's perspective. R.31 ¶¶78, 26, 62 (describing "rapid onset gender dysphoria"); R.142 ¶13. Defendants' expert [redacted]

Plaintiff also submitted testimony from a parent who experienced this. R.32. During middle school, his daughter suddenly, and without her parents' awareness, decided that she was a boy and transitioned at school, in secret from her parents, despite previously having shown "no discomfort whatsoever with being a girl or any interest in being a boy." *Id*. ¶¶2–3, 6–10. After they found out and sought expert counsel, the "consensus" among "over 12 mental health professionals," was that his daughter's "sudden beliefs about being transgender were driven by her underlying mental health conditions," and multiple clinicians said "affirm[ing]" her belief was "against [her] long-term best interest." *Id*. ¶¶14–15, 19.

Plaintiff testified she would be prevented from "helping [her] child," if she's "not aware of what's going on at school," R.231 211:16–212:9, and does not want the District "conceal[ing]" information from her, *id*. 129:13–18; 181:7–9; 186:11–14; 195:6–196:2; 224:11–14. She is "not sure" she would be aware if her child struggled with this, because her child "knows [her] beliefs on [this topic]," and because "kids hide things well." *Id*. 110:13–111:6; 132:1–133:5; 226:1–6. She cannot know what the District "conceals from [her]," or what the future holds for her child, *id*. 109:15–110:8; 181:7–9 195:9–196:2, an obvious point [redacted]

Given that any child may begin to struggle with gender identity at any time and be a "complete surprise" to the parents, and given that the District will conceal treating the child as the opposite sex from the parents, the substantial risk of harm in this case is "imminent" at all times. It may be occurring currently for any given parent, including Plaintiff herself (and is, beyond dispute, currently happening for some parents in the District), and it may begin at any time. The District may have been concealing information about Plaintiff's child at the time of

her deposition—her answers were based on *her knowledge*. *E.g.*, R.231 109:2–4. Or her child may have begun struggling with this since, or may soon in the near future. Only a preemptive lawsuit and injunction can ensure that the District will defer to her if and when this issue arises for her child, the timing of which is unknowable. And the threatened harm is severe.

Even setting aside that the District will conceal the constitutional violation when it occurs, and the relaxed standing requirements for declaratory judgment actions, the Supreme Court has long recognized that a *threatened* injury is sufficient for standing, which Defendants have conceded. R.292:3 (admitting that "potential future injuries" qualify). There are only two basic requirements for standing—"plaintiffs must show [1] that they suffered *or were threatened with* an injury [2] to an interest that is legally protectable." *Marx v. Morris*, 2019 WI 34, ¶35, 386 Wis. 2d 122, 925 N.W.2d 112. (And it is well-established that, unlike in federal courts, standing is "not a matter of jurisdiction," *McConkey*, 2010 WI 57, ¶15.)

Plaintiff thus invokes a "legally protectable interest," namely her constitutional right to be the primary decision-maker with respect to her minor child. *Infra* Part II.

The Policy also "threaten[s]" Plaintiff with multiple types of injury. First, it directly threatens to harm Plaintiff's child. Many mental-health professionals believe that transitioning during childhood can do lasting harm by reinforcing a child's self-perception, which, in turn, can have long-lasting negative ramifications on a child's physical, mental, and psychological well-being. R.31 ¶¶60–69; 142 ¶¶7–10, 16–19, 30–32. Even Defendants' expert [redacted]

Second, the Policy directly threatens Plaintiff's constitutional right to control major mental health decisions involving her child, an injury in itself. *Infra* Parts II.A, II.B. Third, the Policy threatens to prevent Plaintiff from learning what her child is dealing with and providing professional help. *Infra* p.30. Fourth, the Policy threatens to prevent Plaintiff from choosing a treatment approach that does not involve an immediate transition. *Infra* pp.29, 34–35. Fifth, the Policy threatens Plaintiff's relationship with her child by facilitating a secret "double life" at school. R.142 ¶¶31–32.

Wisconsin courts have regularly found standing based on threats of injury far more remote, and much less severe, than here. In *Norquist v. Zeuske*, an land-owner had standing to challenge to a freeze on property assessments because "property values *may* decrease resulting in higher real property taxes." 211 Wis. 2d 241, 249, 564 N.W.2d 748 (1997). In *Putnam*, Time Warner customers had standing to challenge a late-fee provision even though "late-payment fees might never be imposed on these customers, because the customers themselves control whether they will be late." 2002 WI 108, ¶45. And in *State ex rel. Parker v. Fiedler*, a neighbor to a halfway house had standing to challenge the early release of a parolee even though "one cannot say for certain that [the parolee] will harm either the individual relators or others." 180 Wis. 2d 438, 453, 509 N.W.2d 440 (Ct. App. 1993). More recently, the Wisconsin Supreme Court emphasized that "a century's worth of precedent makes clear that *threatened*, as well as actual, pecuniary loss can be sufficient to confer standing." *Fabick v. Evers*, 2021 WI 28, ¶11 n.5, 396 Wis. 2d 231, 956 N.W.2d 856.

The Circuit Court's standing analysis is based on legal and factual errors. First, the Court emphasized that Plaintiff did not submit

"evidence of *past* individual harm," App.7–8, 29, which has never been the basis of her claim and is not required for a declaratory judgment action or for standing generally.

Second, the Court relied on its view, directly contradicted by the record, that Plaintiff "present[ed] no evidence that she predicts [or] anticipates [that she] will actually suffer any individual harm." App.4. That is simply false. As just explained, Plaintiff submitted expert testimony that children can begin struggling with gender identity issues at any time, and this can come as a complete surprise to the parents—[redacted]—and Plaintiff herself testified that she cannot know what the District conceals from her, what the future holds for her child, and would not necessarily know if her child began struggling with this.

A simple analogy illustrates the point. If the District's policy toward bee stings were to administer an experimental drug, with potentially long-term effects, without parental notice or consent, no court would require parents to wait until their child had been stung or to prove that their child was particularly likely to be stung in the future. The harm is imminent at all times, and by the time the violation occurs, the harm has been done. That hypothetical is equivalent to Plaintiff's claim here: a child's experience of gender incongruence is a serious issue that requires "a skilled mental health professional," R.31, ¶73, the first manifestation could come at school, without the parents' awareness, R.31, ¶78, R.142, ¶13, R.32, *as it already has*, for multiple children. Indeed, the statistics cited above, *supra* p.12, suggest a child is considerably *more* likely to suffer gender confusion or distress than to suffer a bee sting at school. Yet the Policy allows schools to secretly facilitate a controversial and experimental form of "psychosocial treatment" with, at best, unknown long-term implications and, at worst, significant harm. R.31, ¶¶60–69.

Plaintiff, like all parents, can challenge this Policy preemptively to protect her constitutional rights and children from harm. She *has no other option*, since the District will hide the violation and harm from her.

II. This Court Should Order a Temporary Injunction

The Circuit Court denied Plaintiff's injunction motion by instead dismissing the case on standing, even though there was no such motion pending. Not only was the standing analysis wrong, *supra* Part I, but the Court's bizarre process—considering some things outside the pleadings, while short-circuiting the usual summary judgment process—was an abuse of discretion in and of itself. Excluding and hiding from parents consequential decisions about their own children is a clear violation of parents' rights and causes irreparable harm to parents' rights, their children, and the parent-child relationship. This Court should not only reverse the dismissal, but also direct the entry of a temporary injunction to avoid these harms and preserve parents' role while this case proceeds, the "usual" result in this posture. *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 102, 146 N.W.2d 447 (1966).

A. The Policy Violates Parents' Rights

1. Parents Have Decision-Making Authority

One of the most fundamental and longest recognized "inherent rights" protected by Article 1, §1 of the Wisconsin Constitution (and the Fourteenth Amendment) is the right of parents to "direct the upbringing and education of children under their control." *See, e.g.*, *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶15, 387 Wis. 2d 1, 927 N.W.2d 486; *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998); *Wis. Indus. Sch. for Girls v. Clark Cty.*, 103 Wis. 651, 79 N.W. 422, 428 (1899). Indeed, parents have the "*primary* role in decisions" with respect to their minor children—not their school, or even the children themselves. *Jackson*, 218 Wis. 2d at 879; *Parham v. J. R.*, 442 U.S. 584, 602 (1979)

("Our jurisprudence historically has reflected … broad parental authority over minor children."). And the fact that "the decision of a parent is not agreeable to a child or … involves risks" "does not diminish the parents' authority to decide what is best for the child," nor does it "automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603–04. Parents' decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," and are "in the best position and under the strongest obligations to give [their] children proper nurture, education, and training." *Parham*, 442 U.S. at 602; *Jackson*, 218 Wis. 2d at 879. Any government action that "directly and substantially implicates" parents' rights is "subject to strict scrutiny review." *A.A.L.*, 2019 WI 57, ¶22.

Article 1, §18 also protects parents' right to raise their children in accordance with their religious beliefs. *See*, *e.g.*, *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971). This right is similar but distinct in that it protects parents' role in significant decisions that implicate religious beliefs. *E.g.*, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 205 (1972). Any "interference with" parents' rights under Article I, §18, is also subject to strict scrutiny, *Coulee Catholic Sch. v. LIRC*, 2009 WI 88, ¶62, 320 Wis. 2d 275, 768 N.W.2d 868.[12]

[12] The Wisconsin Constitution's protection of parental rights has been settled "for nearly a century." *Jackson*, 218 Wis. 2d at 879. An originalist review also supports this fundamental right. Article I, §1 recognizes Wisconsin citizens "have certain inherent rights." One of these is parents' authority over their own children. In 1836, the Wisconsin Territory adopted "all the rights, … heretofore granted … to the territory of Michigan." *See* Organic Act of Oct. 25, 1836, Section 12. Michigan had already implicitly recognized parents' inherent rights. Laws of the Territory Michigan

Parental rights reach their peak on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005); *Yoder*, 406 U.S. at 233–34. One such area traditionally reserved for parents is medical care: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603; R.31 ¶¶134–38. Indeed, the "general rule" in Wisconsin "requir[es] parents to give consent to medical treatment for their children." *See In re Sheila W.*, 2013 WI 63, ¶¶16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). Another category of decisions at "the heart of parental decision-making authority" are those "rais[ing] profound moral and religious concerns." *Bellotti*, 443 U.S. at 640; *C.N.*, 430 F.3d at 184.

Courts have recognized that schools violate parents' rights if they usurp their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290

(1833) at 305 (Act of June 26, 1832) (allowing courts to appoint a guardian "to perform the duties of a parent" only if the parents were "unfit"); *id.* at 330 (Act of April 23, 1833) (parental consent for marriage). That inherent right had also been universally recognized in the common law. *People ex rel. Nickerson v.* _____, 19 Wend. 16, 1837 WL 2850 (N.Y. Sup. Ct. 1837) ("The father is the natural guardian of his infant children [and] … is entitled to their custody, care, and education. *All the authorities concur.*"). The Supreme Court of the Territory of Wisconsin had also recognized parents' inherent duty to their children, which is based on their natural guardianship. *See McGoon v. Irvin*, 1 Pin. 526, 1845 WL 1321, at *4 (Wis. Terr. July 1845) ("By every principle of law upon the subject … parents are under legal obligation to maintain and support their children."). In 1849, the Wisconsin Legislature codified parents' rights in a guardianship statute, providing that parents are "entitled to the custody of the person of the minor, and to the care of his education." Wis. Rev. Stat. (1849), Title XXI, Ch. 80, § 5, p. 399. A 1955 Legislative Council historical report on the parent-child relationship explained that "the rights of the parents are summed up in their right as *natural* guardians of their child." Research Report on Child Welfare, Vol. 5, Part 2, Wis. Leg. Council Reports, at p. 17 (August, 1955). Parents' "natural guardianship" (i.e. inherent) rights include "not only the right to custody… but also *the right to make major decisions*." *Id.* pp. 18–19.

(3d Cir. 2000), a coach suspected a team member was pregnant, and, rather than notifying her parents, discussed the matter with others, eventually pressuring her into taking a pregnancy test. *Id*. at 295–97, 306. The mother argued the coach's "failure to notify her" "obstruct[ed] [her] right to choose the proper method of resolution." *Id*. at 306–07. The court agreed she "sufficiently alleged a constitutional violation" and condemned the "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials … must respect these rights."

A federal district court has granted a preliminary injunction against a similar policy, recognizing that parents' decision-making authority necessarily "includes the right … to have a say in what a minor child is called and by what pronouns they are referred." *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). The Court added, "[i]t is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns."

Another court recently denied a motion to dismiss a parents' rights claim against a teacher who taught her first-grade students about her views of gender and "encouraged their children 'not to tell their parents about her instruction,'" because "[t]eaching a child how to determine one's gender identity at least plausibly is a matter of great importance that goes to the heart of parenting." *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185, at *3, *17 (W.D. Pa. Oct. 27, 2022). The violation here is much more egregious—the District will secretly facilitate a social transition at school and conceal it from parents.

2. The Policy Violates Parents' Rights in Multiple Ways

The Policy takes a major, controversial, psychologically impactful, and potentially life-altering decision, R.31 ¶¶29–44, 60–69, 98–120, out of parents' hands and places it with educators, who Defendants concede have no expertise whatsoever in diagnosing and treating gender dysphoria, R.48:11, and with young children, who lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602. The District is effectively making a treatment decision without legal authority and without informed consent from the parents. *See Sheila W.*, 2013 WI 63, ¶¶16–24 (Prosser, J., concurring); R.31 ¶¶65 (explaining that transitioning is "a form of psychosocial treatment"), 121–39 (discussing informed consent). Even Defendants' expert [redacted]

Notably, Defendants have failed to cite *even a single source* or professional association endorsing childhood social transitions without parental involvement or a careful assessment by a medical professional, or advocating that schools should conceal this from parents. Defendants' expert [redacted]. The sources Defendants do invoke (WPATH) recommend *the opposite*—deferring to parents. R.11:24.

Each child is unique, and parents must be involved for "accurate and thorough diagnosis," for "effective psychotherapeutic treatment and support," and to provide informed consent. R.31 ¶¶54–59, 71–84. Defendants' own expert [redacted].

The Policy further violates parents' rights by prohibiting staff from communicating with parents about a serious issue their children are facing, substituting District staff for parents as the main source of input. R.183:2 ("teachers should not volunteer information."); *see H.L. v. Matheson*, 450 U.S. 398, 410 (1981) (parents' rights "include[ ] counseling [their children] on important decisions"). In no other context do schools *prohibit* teachers from communicating openly with parents about serious issues with their children.

The Policy also directly interferes with parents' ability to provide professional assistance their children may urgently need. Gender dysphoria can be a serious psychological issue that requires support from professionals, R.31 ¶¶57, 78–79, as even Defendants concede, R.94 ¶17. And children experiencing gender dysphoria frequently face other co-morbidities, including suicidal ideation and self-harm, and so should be evaluated. R.31 ¶¶57, 78–79, 114. District staff lack legal authority to provide children with that critical professional support, as they admit. R.48:11.

The Policy also "undermin[es] the family unit," as one parent recounts from personal experience. R.32, ¶19. Facilitating a secret "double life" at school not only harms the family but is also "psychologically unhealthy in itself, and could readily lead to additional psychological problems." R.31 ¶82.

The Policy even violates state law. Parents have a statutory right to access "all records relating to [their child] maintained by a school," Wis. Stat. §118.125(1)(d), (e), (2). There is a narrow exception for "[n]otes or records maintained for *personal use* by a teacher" *if* "not available to others." *Id*. §118.125(1)(d)1. The District's "gender support plan" form directs staff to "keep this interview in your confidential file, not in student records," App.65—a blatant abuse of the exception to evade parents' statutory right. The form obviously is not solely for a teacher's

"personal use," as it records how *all staff* are *required* to address the student on pain of discipline.

Finally, for many parents, including Plaintiff, these issues implicate their religious beliefs about how personhood and identity is defined—whether as a gift from God or by self-declaration. R.23:2–4. The Policy directly interferes with parents' right both to choose a treatment approach and to guide, advise, and support their children in a manner consistent with their religious beliefs. *Id*.

And all this without any finding of parental unfitness—a well-established process in Wisconsin, with statutory clarity, transparency, and procedural safeguards, the very opposite of a secret, unilateral action by unaccountable District employees. *Infra* pp.32–33.

3. The Policy Fails Strict Scrutiny.

The Policy's main justification is protecting children's privacy, App.60, but this is not a compelling interest because children do not have privacy rights *vis-à-vis their parents*. *Wyatt v. Fletcher*, 718 F.3d 496, 499 (5th Cir. 2013); *e.g.*, Wis. Stat. §118.125(2)(a).

The Policy also suggests that it is necessary to keep students safe, App.62, but the state "has no interest in protecting children *from their parents* unless it has some definite and articulable evidence … that a child has been abused or is in imminent danger of abuse." *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1019 (7th Cir. 2000). The District cannot *assume* that parents will do harm. Doing so directly violates the "presumption that fit parents act in their children's best interest." *Troxel*, 530 U.S. at 58 (plurality op.); *see also Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (finding a violation where defendants "assumed the exact opposite."). Nebulous, subjective conclusions that a family may not be "supportive" do not meet this stringent standard.

Moreover, the Policy does not require any evidence *or even allegation of* harm before excluding parents; it allows secrecy solely at a child's request, effectively treating school like Las Vegas. R.232:4. Indeed, the Form asks "Will the family be included" and whether the family is "support[ive]" of a transition, without any further criteria. App.65. In other words, unless parents agree with the approach the District believes is best, critical facts about their child will be concealed from them. Parental decision-making authority includes the right to decide that a social transition is not in their child's best interests, even if that is what their child wants. The District cannot usurp parental authority merely because it believes it knows better or concludes parents are not "supportive" enough. *Parham*, 442 U.S. at 603.

Even if excluding parents *were* limited to situations involving "imminent safety risks" (it's not), the Policy does not provide any process or opportunity to respond before excluding parents, as the District openly advocates. R.232:53 ("notice, hearing and a finding to justify non-disclosure would act to eradicate the Guidance's confidentiality."). Yet parents can be supplanted only with "clear and convincing evidence that the [parents'] decision is not in the child's best interest." *A.A.L.*, 2019 WI 57, ¶¶1, 37. This "elevated standard of proof is necessary to protect the rights of parents" and to prevent the state from "substitut[ing] its judgment for the judgment of a fit parent." *Id.* ¶¶35–37.

Wisconsin's Child Protective Services program already addresses those rare situations involving "imminent safety risks" from parents.[13] Indeed, teachers are mandated reporters, Wis. Stat. §48.981(2)(a)(14)–(16). Unlike the Policy, there is a high bar for displacing parents ("abuse or neglect"), *id.* §48.981(2), and robust procedural protections, such as notice, a hearing and, ultimately, court review. *E.g.*, Wis. Stat.

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

§§48.981(3)(c); 48.13; 48.27; 48.30. The Policy does not provide any of this. A school district simply does not have power to act as an ad hoc family court, litigating family law issues and awarding itself parental authority, independent of any court process.

The District also attempts to justify the policy as deferring to students. But schools cannot "defer to students" at the expense of parental authority. Schools do not do so on related decisions, (e.g., name changes in school records,[14] medication (even aspirin) at school[15]) or even less significant ones (e.g. athletics,[16] field trips[17]); all typically require parental consent. The reason, of course, is that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." *Parham*, 442 U.S. at 603. That rationale has scientific support. R.142 ¶28. Even Defendants' expert [redacted]

Ultimately, the premise of the Policy is that the District knows better than parents how to respond when a child struggles with gender identity. That idea is "statist" and "repugnant to American tradition." *Parham*, 442 U.S. at 603.

B. The Policy Is *Currently* Causing Harm

The District *is currently violating parents'* constitutional rights. *Supra* Background B.1. A violation of constitutional rights is itself sufficient harm for an injunction, because, "[w]hen an alleged

[14] 34 CFR §§99.3; 99.4; 99.20(a).

[15] https://www.madison.k12.wi.us/health-services (Medication at School tab)

[16] https://resources.finalsite.net/images/v1620653062/madisonk12wius/ohmai4mkfnixr5svuikg/2019-20_district_athletic_code_final_92019.pdf at III.2.

[17] https://www.madison.k12.wi.us/families/district-policy-guides (Field Trips Tab)

deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary." Wright & Miller, 11A Fed. Prac. & Proc. §2948.1 (3d. ed.); *e.g.*, *Vitolo v. Guzman*, 999 F.3d 353, 360, 365 (6th Cir. 2021). Thus, "[i]n constitutional cases, the [likelihood of success] factor is typically dispositive." *Vitolo*, 999 F.3d at 360; *see also Wisconsin Right To Life, Inc. v. Barland*, 751 F.3d 804, 830 (7th Cir. 2014); *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013).

Even setting aside the constitutional violation, the magnitude of the harm from a secret "affirmed" transition at school is enormous, R.31 ¶69 ("changing the life path of the child"); R.32 ¶¶14–19. Respected psychiatric professionals believe that "affirming" or facilitating a gender-identity transition during childhood is a powerful psychotherapeutic intervention that can become self-reinforcing, causing gender dysphoria to persist when it would otherwise have desisted, with long-term consequences. R.31 ¶¶60–69; *supra* Background B.2.

The first and most obvious consequence is the inherent psychological distress frequently associated with feeling trapped in the wrong body. R.31 ¶¶57, 78, 112–14. There are also many long-term physical challenges, as it is not physically possible to change sex. *Id.* ¶¶102–07. Other risks include isolation from peers, fewer potential romantic partners, and other social risks. *Id.* ¶¶108–114. A growing number of "detransitioners" are speaking out who deeply regret transitioning while minors, *id.* ¶¶115–20; *supra* p.14. Defendants' expert [redacted]

The Policy also directly harms parents' ability to choose a treatment approach that does not involve an immediate transition, such as "watchful waiting" or therapy to help children identify and address the underlying causes of the dysphoria and find comfort with their sex.

R.31, ¶¶29–44. It also prevents parents from providing professional support their children may urgently need. R.142 ¶¶11–15. And a "double life" at school is "psychologically unhealthy in itself" and can lead to "additional psychological problems." R.31 ¶82.

Even WPATH acknowledges that transitions during childhood are "controversial," with insufficient evidence "to predict the long-term outcomes." R.11:24. And Defendants' expert [redacted] Thus, this is a psychosocial experiment on children, in secret from parents, without parents' consent.

Given the District's secrecy policy, an injunction is *the only way to prevent these harms*. The requested injunction is conditional and perfectly tailored to the harm; it merely requires the District to obtain parental consent before staff treat children as the opposite sex. It only applies where the District would otherwise exclude the parents, where the risk of the constitutional violation and harm is 100%.

C. The Other Factors Support an Injunction

An injunction won't harm the District (especially a conditional injunction); it will merely require deference to parents. Any harm the District may assert *from parents* is directly at odds with the "traditional presumption" that parents act in their children's best interests." *Troxel*, 530 U.S. at 69 (plurality op.).

The public interest heavily favors an injunction, since "it is always in the public interest to prevent violation of a party's constitutional rights." *See*, *e.g. Vitolo*, 999 F.3d at 360; *Doe I*, 2022 WI 65, ¶94 (Roggensack, J., dissenting).

Finally, an injunction will preserve the status quo. It will protect the names parents lovingly gave their children and the sexual identities

they were born with. That "status quo" both predates the District's anomalous Policy and far exceeds it in importance. Nothing could be more directly related to "preserving the status quo" than requiring parental consent before facilitating a major *change* to their child's identity. An injunction is also necessary to preserve parental decision-making authority, a "status quo" that predates the Policy by a century.

D. This Court Should Order an Injunction

Defendants may argue the Circuit Court did not decide Plaintiff's preliminary injunction motion, but this Court should reject any such argument, for multiple reasons. Most obviously, it did deny it: Plaintiff's motion was *the only motion pending*, and the court did not enter an injunction. The Circuit Court stated that its decision would be a decision on Plaintiff's injunction motion. R.288:35 ("I'm going to rule on your motion"); R.288:36 ("[I]f … I'm gonna deny the preliminary injunction."). And the Court framed its decision in the context of Plaintiff's motion, App.9–10.

Furthermore, the Wisconsin Supreme Court directed the Court to rule on Plaintiff's long-outstanding motion. *Doe I*, 2022 WI 65, ¶¶35, 41. If this Court believes the Circuit Court *did not* rule on Plaintiff's motion, then it violated the Wisconsin Supreme Court's instructions on remand, which alone would warrant a ruling on the injunction question, rather than remanding again for further delay.

Even setting that aside, the Supreme Court has explained that ordering an injunction is the "usual" result in this procedural posture: "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." *Fromm*, 33 Wis. 2d at 102.

Fromm recognized that remand can sometimes be appropriate where "further fact finding [is] necessary" for purposes of an injunction request, but here none is needed. At Defendants' request, the Circuit Court granted a lengthier schedule precisely so that Defendants could do some "fact finding," and they did so. *Supra* pp.10; R.195, 198, 226:15–33. Thus, Defendants have already done all the fact-finding they believed was necessary for purposes of Plaintiff's motion. The motion was fully briefed, argued, and ready for decision from the Circuit Court; the Court simply dismissed the case instead, over Plaintiff's repeated objection. *Supra* Background A.

The same urgencies that call for issuance of an injunction dictate *a fortiori* that, if this Court concludes for any reason that the injunction question is not presented, the criteria for the Wisconsin Supreme Court's superintending authority would be met: "an appeal from a final judgment is inadequate and … grave hardship will follow a refusal to exercise the power." *State ex rel. Universal Processing Servs. of Wisconsin, LLC v. Cir. Ct. of Milwaukee Cnty.*, 2017 WI 26, ¶48, 374 Wis. 2d 26, 892 N.W.2d 267. Thus, if this Court cannot resolve the injunction question, it should certify it. Wis. Stat. §809.61.

III. The Circuit Court's Discovery Orders Erred in Many Ways

A. Relevant Background

During discovery, Defendants requested "all communications with" Plaintiff's expert, including with "WILL and ADF attorneys." R.277:4. Plaintiff responded that she had none. R.277:6. As to communications between counsel and Dr. Levine, Plaintiff objected on multiple grounds, including the work-product doctrine. R.277:6–9; 310:18.

Rather than narrowing their request, Defendants moved to compel, without regard to whether any communications contain work-

product, on the theory that the doctrine does not apply once an expert submits testimony. R.276. Two days later, before Plaintiff could respond, the Circuit Court stated that it "[was] prepared to rule." R.288:13. Plaintiff objected, and the Court reluctantly agreed to allow a response, but warned that if Plaintiff chose "to prolong this issue with an unnecessary elaboration of the law," it would likely award fees. R.288:13–19. Nevertheless, Plaintiff opted to file a written response. R.289.

The Circuit Court held a hearing on November 7 and ruled orally in Defendants' favor, instructing Defendants to draft an order. App.46. It also awarded fees. App.47–49. In their motion and during that hearing, Defendants did not ask, and the Court did not order, Plaintiff to produce the documents by any particular date. R.310. Plaintiff filed a motion to reconsider because the Court had not applied the statutory standard for fees. R.295.

After the oral ruling, Plaintiff considered and then decided to appeal, but was waiting for a written order, as she communicated to Defendants and the Court, as early as November 9. R.297; 354:10–11; 355:5, 7. Defendants, however, waited until November 11 to submit an order. R.300. Plaintiff also indicated that, once there was an order to appeal, she would seek a stay of the order pending appeal. R.355:7.

Notwithstanding Plaintiff's indications that she was waiting for the order to appeal, R.297; 355:5, Defendants, on November 16, moved to "enforce" the order that was not yet in place. R.302. Plaintiff never had an opportunity to respond. R.354:10.

On Nov. 23, the Court dismissed Plaintiff's case. App.4–36. Five minutes before, the Court signed and filed Defendants' proposed order on their motion to enforce (without any response from Plaintiff). One minute after, the Court entered an order on the original motion to

compel, App.37–38, holding that "the order previously entered is now moot as well as any other pending discovery dispute." App.38.

Plaintiff promptly appealed all three orders on November 28, 2022. R.318–320. Because they were "moot[ed]" by the dismissal order, Plaintiff did not seek a stay. A week later, Defendants moved to retroactively strike Plaintiff's expert's affidavits. R.334. Plaintiff objected, R.354–55, but the Court nevertheless entered an order purporting to strike the affidavits. App.50–51; R.359.

During a hearing on December 12, the Court admitted it had not applied the statutory standard for fees, but concluded afterwards that Plaintiff's position was not "substantially justified." App.52–59. Although the Court "d[idn't] know of a case" to support Defendants' position, and, despite Plaintiff's substantial legal authority (R.289, 294), the Court relied on its prior practice to conclude Plaintiff's position was not "substantially justified," while acknowledging that "this is really a pretty poor basis of a circuit court's decision." App.58.

B. The Circuit Court's Disclosure Order Conflicts with *Dudek*, §804.01, and Federal Practice

In *State ex rel. Dudek v. Cir. Ct. for Milwaukee Cnty.*, the Wisconsin Supreme Court adopted a "broad definition of lawyer's work product," holding that "anything reflecting the mental impressions and professional skills of the lawyer should be protected from disclosure." 34 Wis. 2d 559, 589–90, 150 N.W.2d 387 (1967). As to experts, the Court emphasized that their work "is *often reflective* of the mental processes of the attorney." *Id.* at 597–600. On other hand, given that an "expert's testimony" can be "admissible evidence," the Court recognized that *some* discovery is necessary, "*at least of the reports* of those experts." At same time, "unlimited discovery … could lead to inadequate preparation, concealment and other sharp practices." To balance these competing

considerations, the Court held that expert discovery should generally involve "an exchange of experts' reports" and "the taking of depositions after the exchange of experts' reports." But any materials that contain "the attorney's mental observations and trial strategy" "should not be the subject to pretrial discovery, without a strong showing of good cause."

Since the Court emphasized that "the expert's testimony" can be "admissible evidence," the work-product rule in *Dudek* applies to *both* testifying and non-testifying experts. Indeed, the Court gave, as examples of things *not* discoverable, items often produced by a testifying expert: "portions of experts' reports that are designed only to assist the attorney in preparation of pleadings, in the manner of the presentation of his proof, and cross examination of opposing expert witnesses," and materials generated "in preparation for direct examination."

Section 804.01, adopted in 1976, reflects *Dudek*'s careful balance; indeed, the Committee's Note states that "Subs. (2)(c) and (2)(d) will not change the state practice under [*Dudek*]." With respect to testifying experts, §804.01(2)(d) provides that parties may discover *only* the "*facts known and opinions held* by experts," and usually in only two ways: through "interrogatories … to identify each … expert" and through a "depos[ition] [of] any … expert whose opinions may be presented at trial." Any discovery beyond this requires a motion, and usually fees *to the other side*. *Id*. §804.01(2)(d)1, 3. Defendants never filed such a motion. Thus, Plaintiff correctly objected that the statute "does not generally permit discovery of email exchanges between counsel and a retained expert." R.277:8–9.

Furthermore, parties may only discover "facts known and opinions held" that are "*otherwise discoverable under par. (a).*" Wis. Stat. §804.01(2)(d). As part of the introductory text, this limitation applies to both testifying and non-testifying experts. Section 804.01(2)(a), in turn, authorizes discovery only of "*nonprivileged* matter." The relevant

privileges include work-product immunity, as both *Dudek* and the statute make clear: "[T]he court *shall protect against* disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney." *Id.* §804.01(2)(c).

Likewise, the Federal Rules protect "communications between the party's attorney and any [expert]" and "drafts of any [expert] report." Rule 26(b)(4)(B)–(C). Like *Dudek*, the Advisory Committee Notes emphasize that "discovery into attorney-expert communications and draft reports has [ ] undesirable effects," such as "imped[ing] effective communication" and "interfer[ing] with [experts'] work." The Amendments were "designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery."

Plaintiff gave Defendants more than required under Wisconsin's statute: lengthy reports containing the entire basis for the "facts known and opinions held" by Dr. Levine, with numerous citations to provide the bases for his opinions. R.31; 142. And Plaintiff offered to make him available for a deposition. R.244:8; 354:2–3.

The Circuit Court's intuition, App.58, was likely based on a short-lived aberration in federal practice that has no relevance to Wisconsin law. "Prior to 1993, there was general agreement that Federal Rule of Civil Procedure 26 excluded categorically the discovery of attorney opinion work product, even when provided to testifying experts." *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 713 (6th Cir. 2006). In 1993, however, the federal rules were amended to require an expert's reports to include any "other information considered by the witness" (language *never* present in Wisconsin's rule). *Id.* at 713–17. Based on that change, some federal courts held that attorney-expert communications and draft reports were automatically discoverable, but many others strongly disagreed. *Id.* (listing cases); *Nexxus Prod. Co. v.*

CVS New York, Inc., 188 F.R.D. 7, 9 (D. Mass. 1999) (same). As one court held during that period: "Draft versions of expert reports are also opinion work product, [which] enjoys *almost absolute immunity* and can be discovered only in very rare and extraordinary circumstances." *Moore v. R.J. Reynolds Tobacco Co.*, 194 F.R.D. 659, 662 (S.D. Iowa 2000).

The 2010 amendments resolved this dispute in favor of the view that attorney-expert communications and draft expert reports are protected work-product and *not* discoverable, precisely because "discovery into attorney-expert communications and draft reports" "impedes effective communication" and "interfere[s] with their work," Committee's Note, *supra*—exactly the concern expressed in *Dudek*. 34 Wis. 2d at 597–99.

Thus, the uniform rule in federal courts before 1993 and since 2010 has always been the rule in Wisconsin under *Dudek* and the statute. That the Circuit Court may have recalled the practice in some federal courts between 1993 and 2010 does not change that fact. Thus, the Court's ruling that the work-product doctrine automatically does not protect attorney-expert communications and drafts exchanged between an expert and counsel was legal error that threatens grave harm to Wisconsin law and practice.

C. The Fees Award Clearly Violates the Statute

A court may only award fees for a motion to compel if the losing party's position was not "substantially justified." Wis. Stat. §804.12(1)(c)1. "Substantially justified" means a "reasonable basis in law and fact." *Traynor v. Thomas & Betts Corp.*, 2003 WI App 38, ¶21, 260 Wis. 2d 345, 659 N.W.2d 158.

Plaintiff's arguments above, plus the Court's acknowledgment that it "d[idn't] know of a case directly on point" in support of Defendants'

position, App.57, proves that Plaintiff's position was "substantially justified." The award of fees violated the statutory standard.

D. The Strike Order Was Erroneous for Many Reasons

Defendants may argue that Plaintiff cannot rely on Dr. Levine's affidavit due to the strike order entered *after* Plaintiff appealed. Yet that order was erroneous for multiple reasons, including because the underlying order to compel was wrong.

Even setting that aside, neither Defendants nor the Court identified any authority permitting it to retroactively strike materials from the record, after an appeal. R.335:16–18; App.50–51. The Circuit Court *relied on* Dr. Levine's affidavits in its dismissal decision. App. 9. Because they were in the record at the time of the dismissal and appeal, that is the state of the record on appeal.

It was also an unwarranted sanction because Plaintiff did not violate anything. When Defendants filed their motion, the underlying order was already "moot." App. 38. As noted, Defendants did not ask the Court to order Plaintiff to produce the documents by any particular date, in either their motion or their arguments on November 7. R.276, 310:7, 43. Nor did the Court orally order production by any particular date. App. 41–47. Plaintiff was considering an appeal of the order to compel—as she has a right to—and was waiting for the written order, R.297; 302:2, 355:5, 7, but the Court dismissed the case and "moot[ed]" the order before it was even entered. Had the Court orally ordered production by some date, Plaintiff would have sought a stay, but because it did not, there was no reason to. It was deeply unfair to sanction Plaintiff for

waiting for the order to appeal when Defendants did not seek a deadline and even delayed submitting a proposed order. R.300.[18]

IV. The Seal Order Was Improper

Defendants have submitted and quoted, in public filings, the expert affidavit of Dr. Scott Leibowitz, R.142, and the ACLU has publicized it on their website.[19] Notwithstanding his voluntary, public participation, Defendants moved to seal his deposition transcript—after Plaintiff appealed—and the Court erroneously granted their request. R.359:30–35.

Last summer, the Supreme Court recognized a "strong presumption in favor of openness for judicial proceedings." *Doe I*, 2022 WI 65, ¶ 19. Defendants did not overcome that presumption. They did not point to a single threat relating to his participation or to any sensitive information in the transcript (about a patient, for example). R.345.

The Court rejected Defendants' argument that sealing was necessary to protect Dr. Leibowitz, and no allegedly confidential information was identified, but the Court nevertheless ordered the transcript sealed, solely because the parties have not yet litigated evidentiary objections. R.359:30–35. But no case approves *sealing* a deposition transcript on this ground or based on the existence of arguments about ultimate admissibility. And the *in media res* procedural posture was due to the Court short-circuiting the summary judgment process, not to any conduct of Plaintiff.

---

[18] The *first time* Defendants requested a deadline was in their Nov. 16 motion to "enforce" the not-yet-entered order, *after* Plaintiff indicated she was waiting for the written order to appeal, R.297, 302:2, 355:5. Plaintiff never had an opportunity to respond before the dismissal. App. 38.

[19] https://www.aclu.org/legal-document/doe-v-mmsd-expert-affidavit-dr-scott-f-leibowitz

The seal order is unprecedented and deeply unfair. Defendants have and will publicly quote and rely on Dr. Leibowitz's affidavit. Yet he [redacted] Defendants simply do not want the public to see that. Since Defendants will quote his affidavit, it is only fair that Plaintiff can quote his deposition. This Court should unseal the transcript on appeal.

CONCLUSION

The Circuit Court's decisions should be reversed.

Dated: March 8, 2023.

Respectfully submitted,

WISCONSIN INSTITUTE FOR
LAW & LIBERTY

Electronically signed by Luke N. Berg
Rick Esenberg (#1005622)
Luke N. Berg (#1095644)
330 E. Kilbourn Avenue, Suite 725
Milwaukee, WI 53202
Telephone: (414) 727-9455
Facsimile: (414) 727-6385
Rick@will-law.org
Luke@will-law.org

ALLIANCE DEFENDING FREEDOM

Roger G. Brooks (NC Bar No. 16317)
Katherine L. Anderson (AZ Bar No. 033104)
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Fax: (480) 444-0028
rbrooks@adflegal.org
kanderson@adflegal.org

Attorneys for Plaintiff-Appellant

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and (c) for a brief, except as to length. Plaintiff has simultaneously filed a motion to exceed the word limit. The length of this brief is 10,995 words.

Dated: March 8, 2023.

Electronically signed by Luke N. Berg

LUKE N. BERG