STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOHN DOE 1, et al.

Plaintiffs,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

and

Case No.: 20-CV-454

The Honorable Frank D. Remington

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,

Defendant-Intervenors.

DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL

Defendant Madison Metropolitan School District ("District" or "MMSD") and Defendant-Intervenors Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School, and Gender Sexuality Alliance of Robert M. La Follette High School (collectively referred to as "Defendants"), jointly submit this brief in opposition to Plaintiffs' Motion for Injunction Pending Appeal. (Doc. 125.) This Court should deny Plaintiffs' request for an injunction requiring MMSD to disregard its previously published

"Guidance & Policies to Support Transgender, Non-Binary & Gender-Expansive Students" (referred to here as the "Guidance") and immediately adopt different practices, because Plaintiffs have not shown a single factor necessary for granting such extraordinary relief at this stage.

Plaintiffs have failed to show that an injunction is necessary to preserve the status quo, but rather ask this court to disrupt it. Additionally, Plaintiffs are unable to show they will suffer irreparable harm without an injunction, both because have not shown that the injunction they seek would be rendered futile without an injunction, and because the harm they allege is entirely speculative. Plaintiffs' claim for injunctive relief must also be denied because they are unable to show that they have any chance of success on the merits. They have not shown standing to seek declaratory relief or that their claim is ripe. They do not have a fundamental right to dictate the District's procedures for education and affirming students. Nor does the Conscious Clause give Plaintiffs the right to dictate the District's approach regarding transgender and gender non-conforming students. An additional reason why Plaintiffs' request should be denied is that the District's Guidance furthers compelling interests in educating, keeping safe, and preventing discrimination against students. Finally, the grant of an injunction under the circumstances of this case would be inequitable and should be denied for that additional reason.

PROCEDURAL HISTORY

Plaintiffs filed a Complaint in February seeking declaratory relief and a permanent injunction prohibiting the District from following certain aspects of its previously published "Guidance & Policies to Support Transgender, Non-Binary & Gender-Expansive Students" (referred to here as the "Guidance"). (Doc. 1.) Shortly thereafter, Plaintiffs moved to proceed anonymously and for a temporary injunction prohibiting the District from following the same aspects of its Guidance as requested in its original Complaint. (Doc. 2; Doc. 8; Doc. 28.)

On June 3, 2020, this Court denied Plaintiffs' motion to proceed anonymously and subsequently entered an Order requiring Plaintiffs to disclose their identities to this Court and

attorneys for the litigants by June 12, 2020. (*See* Doc. 84; Doc. 111.) Plaintiffs appealed that Order and moved to stay the Order pending appeal. (*See* Doc. 111; Doc. 110.)

This Court granted Plaintiffs' motion to stay pending appeal but denied Plaintiffs' request to proceed immediately with the temporary injunction motion, stating that it would prejudice the Defendants to force them to litigate the merits without first obtaining individual discovery from the Plaintiffs. (Doc. 122; *see also* Doc. 124 at 10.) Plaintiffs then filed this motion for injunction pending appeal. (Doc. 125.) Plaintiffs again seek the same relief they sought before: to prohibit the District from following certain aspects of the Guidance encouraging teachers and staff to refer to students by their preferred names and pronouns and to require instead that MMSD staff report such behavior to parents. (*See* Doc. 125 at 1.)

On July 16, 2020, the case record was transferred to the Court of Appeals. (Doc. 135.) And on July 22, 2020, the Court of Appeals accepted jurisdiction over Plaintiffs' appeal. (Doc. 136.) Plaintiffs have yet to disclose their identities to this Court or to the attorneys for the Defendants. As a result, Defendants have not had any opportunity to conduct any individualized discovery.

FACTS

A. Using a Different Name or Pronoun is Not a Medical Issue or Medical Treatment.

Asking to be referred to by a different name or pronoun set, by itself, is insufficient to demonstrate that a child or adolescent meets criteria for Gender Dysphoria. (Expert Affidavit of Dr. Scott Leibowitz (hereafter "Leibowitz Aff.") ¶ 13.)[1] Gender Dysphoria is the clinical

[1] Dr. Scott Leibowitz, M.D.'s expert affidavit was filed concurrently with this joint opposition as a separate document. Dr. Leibowitz is board-certified in child and adolescent psychiatry and is the Medical Director of Behavioral Health for the THRIVE program, a gender identity development program, at Nationwide Children's Hospital in Columbus, OH, where he is also an Associate Professor of Psychiatry at The Ohio State University College of Medicine. His CV is attached as Ex. A to the Leibowitz Affidavit.

diagnostic classification used when an individual has clinically-significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth. (*Id.* ¶ 10.)

A minor using a different name or pronoun in the school setting is not a medical issue and does not constitute medical treatment, nor does it imply that a young person requires clinical care. (*Id.* ¶¶ 9, 30.) Rather, name and pronoun usage is often related to identity exploration and expression, and therefore is not necessarily a clinical treatment matter. (*Id.*) And there is no scientific evidence to demonstrate that the use of a different name or pronoun in a school setting will lead a young person to become transgender or have lifelong medical treatment needs. (*Id.* ¶ 31.) In fact, in Dr. Leibowitz's experience, many young people who have opted to use a different name and pronoun for a period of time ultimately choose to return to using their own birth-assigned name or birth-assigned pronouns as more fitting for their identity after experiencing what it is like to be referred to as something different. (*Id.*) While using a different name or pronoun set may be a part of social gender transition that many transgender or gender-dysphoric youth opt to partake in, it does not automatically imply that a young person is socially transitioning. (*Id.* ¶ 32.)

Plaintiffs' expert, Dr. Stephen Levine, incorrectly concludes that a request to use a different name or pronoun set means a youth is: (1) gender dysphoric; (2) socially transitioning; and (3) eventually going to medically transition if they use a different name or pronoun. (*Id.* ¶ 20.) He goes so far as to imply that a gender affirming model means a provider will recommend transition interventions within an hour. (*Id.* ¶ 21.) To the contrary, gender-affirming care means that a medical provider will: (1) accept that an individual can have a gender identity that differs from the gender associated with their birth-assigned sex; (2) create an environment that does not reinforce stereotypes around femininity and masculinity; and (3) accept a transgender person's experience

as valid. (*Id.*) Gender affirming treatment *does not* mean that a young person who wants to be called to by a different name or pronoun should be provided hormones or surgery within one hour. (*Id.*)

Dr. Levine further mischaracterizes the research on social gender transition and the impact of using a different name or pronoun at different points in development. (*Id.* ¶ 23.) The most recent research on identity outcomes of prepubertal children does not indicate that using a different name or pronoun *causes* Gender Dysphoria. (*Id.* ¶ 24.) Social-gender transition refers to steps that people take to present themselves as the gender with which they most identify. (*Id.* ¶ 22.) Studies in peer-reviewed journals demonstrate that social-gender transition may in fact be helpful for prepubertal children who assert a different gender identity. (*Id.* ¶ 25.)

As for adolescents who choose to socially transition to another gender, there is similarly no research showing that social-gender transition itself is *causative* of persistent Gender Dysphoria into adolescence. (*Id.* ¶ 26.) Dr. Levine falsely assumes that "gender affirming methodology" means that outside entities are *causing* Gender Dysphoria to persist from adolescence into adulthood. (*Id.*) Dr. Leibowitz's clinical experience, however, demonstrates that affirming an adolescent's own assertion of who *they* affirm to be, in no way causes or intensifies Gender Dysphoria. (*Id.*) Rather, it creates a healthy therapeutic environment to explore and understand the young person's experience of gender, without any notions of bias or intention. (*Id.*)

For the young people who are directly affected, there is research that demonstrates the use of a chosen name in different settings (including schools) reduces depressive symptoms, suicidal ideation, and suicidal behavior. (*Id.* ¶ 36.) The research demonstrates evidence of potential harm when *not* using the chosen name for the transgender adolescent. (*Id.*) When a youth, who might be

exploring their identity in a particular setting is able to do so, it can be *beneficial* to the young person's emotional wellbeing and identity. (*Id.* ¶ 37.)

B. Best School Practices and Policies Allow Students to use Different Names and/or Pronouns at School.

The ability to explore one's identity through the use of a different name or pronoun in a non-home setting could be of immense benefit to an adolescent who feels unsafe to do so at home. (*Id.* ¶ 44.) This is true whether or not an adolescent meets criteria for Gender Dysphoria. (*Id.*) School policies that protect youths' privacy regarding the choice to use a different name or pronoun best serve some of the most vulnerable youth—those who have caregivers who may not support identity *exploration*—regardless of whether or not they meet criteria for Gender Dysphoria. (*Id.* ¶ 49.) Dr. Leibowitz states that in his clinical experience, being able to explore or express one's identity in one or more settings is important for young people to live a positive, satisfying life. (*Id.* ¶ 44.) In fact, there is research that gender nonconforming youth (who are not necessarily gender-dysphoric) are at risk for poor mental health outcomes when not supported in different settings, including the school. (*Id.* ¶ 46.)

Gender-nonconfoming individuals who do not meet the criteria for Gender Dysphoria often feel comfortable exploring the difference between gender identity and gender expression in non-home settings where they do not have to fear rejection or putting their basic needs at risk. (*Id.*). In fact, it is a well-established clinical practice when working with minors and families for a mental health care provider to maintain as confidential from their parents a young person's disclosures about a non-life-threatening aspect of their identity that they ask the provider not to share with their family. (*Id.* ¶ 50.) Young people are often exploring aspects of themselves and are not quite ready to disclose certain personal issues to their caregivers or parents. (*Id.*) Having a confidential outlet of this sort can be extremely beneficial for young people. (*Id.*)

Some caregivers or parents may incorrectly interpret the request to use a different name or pronoun to mean that their adolescent is transgender. (*Id.* ¶ 51.) For some adolescents, such a disclosure could lead to fears of rejection, homelessness, and abuse. (*Id.*) Gender exploration would ideally involve caregivers in the process, but not all youth are fortunate enough to have such parental support. (*Id.* ¶ 53.) Some may feel that school is their only safe haven. (*Id.*) Others might fear being brought to a counselor who will specifically try to influence or change their feelings. (*Id.*) Since variations in gender expression or gender identity are not inherently problematic, it is beneficial for an adolescent's development and in particular their education for their learning environment to offer a supportive option without the fear that a personal self-discovery process will spill over into an unhealthy home environment. (*Id.*)

If a student actually did suffer from Gender Dysphoria and needed medical care, then parents or guardians would likely know—even when school policies protect youths' privacy regarding the choice to use a different name or pronoun. (*See id.* ¶¶ 39–41, 45, 56.) A young person needing clinical attention would typically demonstrate more signs of emotional, psychological, or behavioral distress such as depression, anxiety, and high-risk behaviors, to name a few. (*Id.* ¶ 45.) Moreover, the likelihood that pre-pubertal children (i.e., children who are approximately 6 to 11 years old), would be independent enough to approach a school educator or teacher and ask them to use a different pronoun set or name without help from a parent or caregiver is extremely low, and the likelihood of their doing so *and wanting to keep this private* from their parents, is even lower. (*Id.* ¶¶ 40, 41.) Dr. Leibowitz states that in his 12 years of clinical practice, he has never encountered a child of this age group who sought to use a different pronoun set or name at school without parental or caregiver involvement or awareness. (*Id.* ¶ 41.)

Thus, a school policy that allows youth requesting to use a different name or pronoun to

do so is beneficial for their emotional and psychological development. (*Id.* ¶ 57.) Further, a school policy that protects the privacy of youth by not involving their caregiver(s) when the youth so requests prevents potential harm to students, particularly those living in environments that might be unsafe if such an exploration process were to be disclosed. (*Id.* ¶ 58.) Such a policy would not harm other youth since using a different name or pronoun does not constitute medical treatment and youth requiring any form of mental-health treatment would show other signs or symptoms that should alert their caregivers. (*Id.* ¶ 59.)

C. The District's Guidance Implements These Best Practices.

The Madison Metropolitan School District's "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" (the "Guidance"), in place since April 2018, implements these best practices. (*See* Doc. 3, Ex. 1.) The Guidance reflects the District's "efforts to provide safe, healthy and positive school environments for all transgender, non-binary, and gender-expansive youth." (*Id.* at 1.) The Guidance recognizes that transgender students experience statistically adverse outcomes compared to their cisgender[2] peers, including much greater incidences of harassment, assault, lack of support, homelessness, violence in the home, and long-term mental health problems. (*See id.* at 4–5.) The Guidance also recognizes that these students experience higher levels of victimization because of their gender identity or gender expression and they often struggle to thrive in school as a result. (*See id.* at 7.)

In order to combat these adverse outcomes, the Guidance seeks to create an inclusive

[2] Someone who is "cisgender" is "a person whose gender identity corresponds with the sex the person had or was identified as having at birth." *Merriam-Webster.com*. 2020. https://www.merriam-webster.com (August 6, 2020).

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community, which contributes to a safer school environment for LGBTQ+ youth, helps LGBTQ+ students feel more connected to their schools, and reinforces peer acceptance of LGBTQ+ students. (*See id.* at 8.) The Guidance also aligns with federal and state laws that prohibit discrimination and bullying, as well as the District's own policies against the same. (*See id.* at 9–12.)

When a student comes out as transgender, non-binary, gender-fluid, etc., the Guidance recommends a Gender Support Plan. (*See id.* at 15.) "A Gender Support Plan is a document that creates shared understanding about the ways in which a student's authentic gender will be accounted for and supported at school." (*Id.*) The very first page of the Guidance's section on Gender Support Plans addresses family communication and states that "[f]amilies are essential in supporting [MMSD's] LGBTQ+ students." (*Id.* at 16.) It recognizes that "family acceptance continues to have a profound impact on the physical and mental health outcomes of [MMSD's] LGBTQ+ young people" and states that MMSD will, "with the permission of [its] students, . . . strive to include families along the journey to support [its] LGBTQ+ youth." (*Id.*) The Guidance includes families by making them aware of the Guidance and encouraging them to advocate for their child's educational success, including them in the gender support plan meeting, and meet with them upon request to review their child's gender support plan at any time. (*See id.*) That said, following the best practices described in Section B above, the Guidance states that MMSD teachers and staff will maintain transgender, non-binary, and gender-expansive students' privacy if they have not come out to their families regarding their gender identity and they do not wish to do so. (*Id.*) The Guidance states that "[d]isclosing a student's personal information such as gender identity or sexual orientation can pose imminent safety risks, such as losing family support and housing." (*Id.*)

In practice, the Guidance *has* successfully provided for the safety and wellbeing of

transgender, non-binary, and other gender-expansive students in its schools, and especially for those students who have not come out to their parents or guardians. (*See* Doc. 60, Affidavit of Amira Pierotti in Support of Proposed Intervening Defs.' Mot. to Intervene (hereafter "Pierotti Aff.") ¶¶ 10–15; Doc. 61, Affidavit of Nora Miesbauer in Support of Proposed Intervening Defs.' Mot. to Intervene (hereafter "Miesbauer Aff.") ¶¶ 8–12; Doc. 62, Affidavit of Morgan Post in Support of Proposed Intervening Defs.' Mot. to Intervene (hereafter "Post Aff.") ¶¶ 8–12.) The Guidance creates a welcoming and safe space for all transgender, non-binary, and other gender-expansive students and protects those students who may have a less-welcoming environment at home. (Pierotti Aff. ¶¶ 12–15; Miesbauer Aff. ¶¶ 10–12; Post Aff. ¶¶ 10–12.) The relief sought by Plaintiffs will harm MMSD students and especially all transgender, non-binary, and other gender-expansive students by making MMSD schools a potentially unsafe place for them. (Pierotti Aff. ¶ 16; Miesbauer Aff. ¶ 13; Post Aff. ¶ 13.)

D. Defendants Do Not Even Know Who Plaintiffs Are.

The only information provided by Plaintiffs' affidavits submitted in support of the Complaint is how many children they have and which schools their children attend. (*See, e.g.*, Doc. 14, Affidavit of John Doe 1 ¶ 2; Doc. 16, Affidavit of John Doe 5 ¶ 2; Doc. 27, Affidavit of Jane Doe 8 ¶ 2.) Neither Plaintiffs' affidavits nor any of the pleadings filed by Plaintiffs say anything about who they are.

Plaintiffs have not asserted any actual harm they or their children have incurred due to the District's Guidance. In fact, counsel for Plaintiffs have admitted to this Court that there is nothing atypical about Plaintiffs or their children, apart from the fact that they object to the Guidance. (Doc. 48, Def. MMSD's Br. in Support of Its Mot. to Dismiss and in Opposition to Pls.' Mot. to Proceed Using Pseudonyms at 8–9.)

LEGAL STANDARDS

When considering Plaintiffs' motion for injunction pending appeal, this Court is guided by the following standard under Wisconsin law:

> Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial. A temporary injunction is not to be issued unless the movant has shown a reasonable probability of ultimate success on the merits. Temporary injunctions are to be issued only when necessary to preserve the status quo. Injunctions are not to be issued without a showing of lack of adequate remedy at law and irreparable harm, but at the temporary injunction stage the requirement of irreparable injury is met by showing that, without it to preserve the status quo *pendente lite*, the permanent injunction sought would be rendered futile.

Werner v. A.L. Grootemaat & Sons, Inc., 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) (footnotes omitted). Accordingly, a court may issue an injunction pending appeal only when the moving party shows that: (1) it is likely to suffer irreparable harm without the injunction; (2) it has no other adequate remedy at law; (3) an injunction is necessary to preserve the status quo; and (4) it has a reasonable probability of success on the merits. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. Each of these four factors must be present before a court may grant temporary injunctive relief, but even when those factors are present, granting an injunction is left to the court's discretion. *See id*; *Werner*, 80 Wis. 2d at 524.

ARGUMENT

Wis. Stat. § 808.07(2) allows a trial court to issue an injunction during the pendency of an appeal, but that interim relief is only available if the party seeking such relief meets the stringent standards under Wis. Stat. § 813.02(1). *See Werner*, 80 Wis. 2d at 520 (emphasizing that the four required elements apply to both temporary and permanent injunctions). In general, courts issue temporary injunctions only when necessary to "restrain irreparable mischief, suppress oppressive and interminable litigation, or prevent a multiplicity of suits." *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc*., 33 Wis. 2d 98, 103, 146 N.W.2d 447 (1966). Courts have broad discretion to deny

a temporary injunction when the moving party fails to show that the non-moving party is doing, threatens, or is about to do, an act that will violate the moving party's rights and render the judgment ineffectual. *See Werner*, 80 Wis. 2d at 519; *see also* Wis. Stat. § 813.02(1)(a).

In this case, Plaintiffs fail every step of the analysis. They have failed to show that the District is doing or is about to do something that will violate their rights and defeat the purpose of a final judgment. Plaintiffs claim that the District's Guidance violates their constitutional rights to direct the upbringing of their children by allowing teachers and staff to refer to students by their affirmed names and pronouns. (*See* Doc. 125, ¶¶ 2–3). But Plaintiffs have failed to allege or show that the Guidance affects their rights in any way. (*See* Compl., ¶¶ 67–68.) The District's Guidance does not prohibit Plaintiffs from meeting with staff to discuss any issues surrounding their child's gender identity. To the contrary, the Guidance directs staff to involve parents along the journey of supporting the LGBTQ+ youth and encourages parents to be involved with their child's gender support plan. (*See* Doc. 3, Ex. 1, Guidance at 16.) Specifically, the Guidance advises staff to give parents the resources and support they need and leaves it "up to the student and their family to decide who at school is informed." (*See id.* at 16, 17.) Plaintiffs cannot show that they will suffer irreparable harm in the absence of an injunction pending appeal.

Even more fundamentally, Plaintiffs' request must fail because it would not preserve the status quo but, instead, would grant Plaintiffs the ultimate relief they seek. Plaintiffs argue that an injunction may be granted even if it does not preserve the status quo. (*See* Pls.' Br. at 38–39.) That argument contravenes settled Wisconsin law. Courts have repeatedly reaffirmed that an injunction may be granted only if it is necessary to preserve the status quo. *See, e.g., Waste Mgmt, Inc. v. Wis. Solid Waste Recycling Auth.*, 84 Wis. 2d 462, 267 N.W.2d 659 (1978); *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997); *Best*

Disposal Systems, Div. of Waste Mgmt. of Wis., Inc. v. Milwaukee Metro. Sewerage Dist., 128 Wis. 2d 537, 386 N.W.2d 504 (Ct. App. 1986); *Isaacs Holding Corp. v. Premiere Prop. Grp., LLC*, 2004 WI App 172, 276 Wis. 2d 473, 687 N.W.2d 774; *Milwaukee Deputy Sheriffs' Ass'n*, 370 Wis. 2d 644, ¶ 20. Plaintiffs cite no contrary authority.

Plaintiffs attempt to draw support from federal cases in arguing that this Court may ignore the status quo and adopt instead the "sliding scale" approach that some federal courts employ. (*See* Pls.' Br. at 11.) That argument disregards binding precedent. Although Wisconsin courts may look to federal cases for guidance when applicable state law is based on federal law, there are clear and obvious differences between Wis. Stat. § 808.07(2) and Federal Rule of Civil Procedure 62. *See, e.g., Scullion v. Wis. Power & Light Co.*, 2000 WI App 120, ¶ 15, 237 Wis. 2d 498, 614 N.W.2d 565. There is simply no legal basis for this Court to abandon the settled standard for injunctive relief under Wisconsin law, which specifically requires preservation of the status quo.

I. The Requested Injunction Would Impermissibly Disrupt the Status Quo.

A. This Court Should Reject Plaintiffs' Invitation to Disregard the Status Quo.

Plaintiffs' request for injunction pending appeal should be denied on the grounds that it would disrupt, not preserve, the status quo. The purpose of a temporary injunction is to maintain the status quo—not give one party new rights or alter the positions of the parties. *See Shearer v. Congdon*, 25 Wis. 2d 663, 668, 131 N.W.2d 377 (1964). Accordingly, a temporary injunction should not be issued if it would compel one party to act in ways that constitute all or part of the ultimate relief sought. *Slinger*, 210 Wis. 2d at 373.

Plaintiffs put forward multiple arguments as to why this Court should disregard the status quo as an element, but they are all specious. Plaintiffs argue that "such a requirement has no foundation in the text" (Pls.' Br. at 39), but to the contrary, Wis. Stat. § 808.07(2)(a)(3) expressly provides that the court may "[m]ake any order **appropriate to preserve the existing state of**

affairs or the effectiveness of the judgment subsequently to be entered," clearly reflecting that interim relief pending appeal is meant to preserve the status quo. Next, Plaintiffs argue that recent decisions have not treated preservation of the status quo as an essential element, citing *Wisconsin Legislature v. Evers*, No. 2020AP608 (Wis. Apr. 6, 2020) and *Kocken v. Wisconsin Council 40, AFSCME, AFL-CIO*, 2007 WI 72, ¶ 22, 301 Wis. 2d 266, 732 N.W.2d 828. Contrary to Plaintiffs' suggestion, neither of those cases addressed or ruled on the status-quo element, and it is fundamental that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Plaintiffs also attempt to draw support from federal court precedent, but in doing so they disregard binding state court precedent. For example, in *Slinger*, the Wisconsin Court of Appeals concluded that the circuit court's order for temporary injunction was a misuse of discretion because it caused the school district to be placed in a different athletic conference, which impermissibly provided the district with the relief it ultimately sought, "instead of maintaining the status quo as the law requires." *Slinger*, 210 Wis. 2d at 367, 373–74.

Similar to *Slinger,* granting Plaintiffs' injunction pending appeal would impermissibly give Plaintiffs the relief they ultimately seek instead of maintaining the status quo. The "status quo" refers to the situation that currently exists. *See Status Quo,* Black's Law Dictionary (11th ed. 2019). The situation throughout the District has been—and will continue to be—inclusivity in classroom environments based on an affirming approach that provides all students with access to the support they need to thrive. (*See* Doc. 3, Ex. 1, Guidance at 1.) To prevent discrimination and protect students from bullying and harassment, the Guidance allows District staff to keep students' chosen names and pronouns confidential and private. (*See id.* at 18.) Requiring the District to suddenly

implement different standards would impermissibly compel the District to take new actions that effectively grant Plaintiffs the ultimate relief they seek—an injunction requiring parental notice and consent. Giving Plaintiffs a newfound right to radically alter the District's position at this stage in the litigation is the exact opposite of preserving the status quo.

An injunction pending appeal is not appropriate when the status quo will be maintained without such a drastic exercise of equitable powers. *See Shearer*, 25 Wis. 2d at 668 (emphasizing that courts should grant temporary injunctive relief only when judgment would be futile otherwise). Plaintiffs' requested injunction would significantly change the rights and responsibilities of the parties, would undermine the integrity of the fact-finding process, and would jeopardize this Court's ability to reach a fair decision on the merits. *See Isaacs Holding Corp. v. Premiere Prop. Grp., LLC*, 2004 WI App 172, 276 Wis. 2d 473, 687 N.W.2d 774 (noting that a temporary injunction that changes the status quo would undermine the court's final decision).

B. An Injunction Is Unnecessary to Preserve the Status Quo.

Plaintiffs argue that even if this Court applies settled precedent to require preservation of the status quo, their requested relief accomplishes that goal by "prevent[ing] the District from enabling children to *change* gender identity at school without parental notice and consent." (Pls.' Br. at 39.) Under Plaintiffs' logic, "the 'status quo' for children in the District is their current identity . . . ," and the injunction they seek would "preserve their children's identities, as they are today, in case their children begin to wrestle with gender dysphoria while this lawsuit and appeal are pending." (*Id.* at 39-40.) That argument fails.

Plaintiffs' version of status quo defies logic. Plaintiffs offer no evidence about their children's current identities. They do not allege whether their children self-identify as either cisgender or transgender. Plaintiffs also fail to allege that their children have ever raised any issues

involving gender identity. Further, Plaintiffs have not revealed their children's identities to this Court or the attorneys for Defendants. Absent evidence to support what their children's 'status quo' identity is, Plaintiffs cannot possibly allege that the Guidance would disrupt that 'status quo.' There is no justification for the argument that halting the District's Guidance is necessary to preserve unidentified identities.

Under the situation that currently exists, the District has adopted the Guidance to provide teachers and staff direction when addressing students that self-identify as a gender different from the sex assigned at birth or who are struggling with gender-identity issues. (Doc. 3, Ex. 1, Guidance at 1, 3.) The status quo is adhering to this Guidance. Plaintiffs seek an injunction that would order the District to abandon its existing approach and reveal potentially discriminatory information about students. Such an injunction is clearly unnecessary to preserve the existing state of affairs.

In the world as it currently exists, parents may seek diagnosis and treatment for their children whenever they deem it necessary. The Guidance does not prevent parents from being involved in medical or other significant decisions for their children. Plaintiffs have failed to explain how the District's Guidance interferes with that right, and they do not need an injunction to exercise it. Plaintiffs' theory that an injunction is necessary to preserve their children's identities makes no sense. Plaintiffs' argument strips the "status quo" of all meaning and must be rejected.

II. Plaintiffs Will Not Suffer Irreparable Harm.

A. Plaintiffs Do Not Need Interim Relief to Protect their Rights.

An injunction may only be granted when the moving party shows that they will suffer irreparable harm without it. *Fromm & Sichel, Inc. v. Ray's Brookfield, Inc.*, 33 Wis. 2d 98, 146 N.W.2d 447 (1966). At the temporary injunction stage, a movant must show that the permanent injunction sought would be rendered futile without a temporary injunction to preserve the status

quo. *Werner*, 80 Wis. 2d at 520. Conversely, a movant cannot succeed if they cannot show that the permanent injunction they seek will be useless without temporary injunctive relief. *See id.*

Here, Plaintiffs have not shown that they will suffer irreparable harm without a temporary injunction, nor have they shown that the ultimate relief they seek will have no purpose without an injunction pending appeal. Even without a temporary injunction, Plaintiffs are free to pursue the relief they seek after the Court of Appeals rules on the appeal. Plaintiffs have not offered any evidence showing that injunctive relief is necessary to avoid immediate and irreparable harm.

Wisconsin law simply does not permit trial courts to issue temporary injunctions when doing so would bypass proper examination of the merits and determination of the issues. *See Bartell Broadcasters, Inc. v. Milwaukee Broadcasting Co.*, 13 Wis. 2d 165, 172, 108 N.W.2d 129 (1961). A temporary injunction should not be granted in a case like this, where it would have the effect of granting all the relief sought and practically dispose of the case. *Id.* at 171; *Bloomquist v. Better Bus. Bureau of Milwaukee*, 17 Wis. 2d 101, 103–04, 115 N.W.2d 545 (1962).

Granting Plaintiffs' injunction pending appeal would be tantamount to awarding Plaintiffs judgment without ever giving the District or the Defendant-Intervenors their day in court. As requested in their original Complaint, Plaintiffs are again asking this Court to compel the District to abandon its current Guidance and require its staff to notify parents and obtain consent before they can refer to students by their preferred names and pronouns. But due process simply does not allow this Court to award final relief before Defendants have ever had any opportunity for individualized discovery.

B. The Harm that Plaintiffs Allege is Entirely Speculative.

The injunction Plaintiffs seek in this case is contrary to the underlying purpose of a temporary injunction: to preserve the status quo by preventing harm so imminent that there is a

present need for equitable relief. *See Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 563 N.W.2d 585 (Ct. App. 1997); *Pure Milk Prods. Co-op v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). A plaintiff cannot obtain temporary injunctive relief unless it demonstrates a sufficient probability that the defendant's future conduct will injure the plaintiff or violate the plaintiff's right of will. *See Pure Milk Prods. Co-op*, 90 Wis. 2d at 800.

Plaintiffs' irreparable harm argument fails because it is based entirely on speculation of future hypothetical injuries. Plaintiffs claim that the Guidance interferes with their rights, "*should* [their children] experience gender dysphoria." (Pls.' Br. at 31) (emphasis added). Plaintiffs further claim that the Guidance "*may* cause Plaintiffs' children to solidify and retain a transgender identity," and "*may* prevent Plaintiffs from providing professional mental health support." (*Id.*) (emphasis added). But Plaintiffs do not ground these conjectures in past, present, or even probable future harm. Critically, Plaintiffs do not assert that their children have ever struggled with gender-identity issues in the past or are currently struggling with them. In fact, the statistical likelihood that a child will be diagnosed with Gender Dysphoria is very low. And importantly, gender-nonconforming behavior and transgender identity are not mental disorders. (*See* Doc. 48 at 4; American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 454 (5th ed. 2013); *see also* Leibowitz Aff. ¶ 11.).

Even assuming contrary to the evidence that one of Plaintiffs' children has in the past or is currently struggling with their gender identity, the District does not prevent them from being involved in their child's development. Absent evidence that the District's conduct in the past has interfered with their rights, Plaintiffs have no basis for speculating that the District's conduct in the present—following the same Guidance that has been in place for over two years—threatens their rights into the future.

Plaintiffs assert, based on Seventh Circuit precedent, that irreparable harm should be presumed whenever a movant asserts a constitutional claim. (*See* Pls.' Mot. for Injunction Pending Appeal at 35.) Contrary to Plaintiffs' assertion, however, the Seventh Circuit Court of Appeals has ruled that a party seeking temporary injunctive relief must show irreparable harm, even when constitutional rights are at stake. *See Wheeler v. Wexford Health Sources, Inc.*, 689 F.3d 680, 682 (7th Cir. 2012). Issuing an injunction pending appeal based on a mere possibility of irreparable harm is inconsistent with the idea that injunctive relief is an extraordinary remedy that should be awarded only upon a clear showing that the plaintiff is entitled to such relief. *Orr v. Shicker*, 953 F.3d 490, 502 (7th Cir. 2020); *see also Fromm & Sichel, Inc.*, 33 Wis. 2d at 103. *See also Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) ("The speculative nature of Lyons' claim of future injury requires a finding that this prerequisite of equitable relief has not been fulfilled.").

Even if Plaintiffs were to establish somehow that the District's actions in carrying out its Guidance might cause them harm in the long run, Plaintiffs' request for temporary relief pending appeal would still come up short. And it should be noted that any potential future harm is even less probable now that MMSD is virtual until at least the end of October.[3] Plaintiffs have not shown they will suffer irreparable harm without an injunction pending appeal.

III. Plaintiffs Are Unlikely to Prevail on the Merits.

A. Plaintiffs Have Not Shown That They Have Standing To Seek a Declaratory Judgment or That Their Claim is Ripe.

Plaintiffs cannot show that they are likely to succeed on the merits because they provide no factual or legal basis demonstrating they are entitled to a declaratory judgment. In Wisconsin, the legislature created the right of a declaratory judgment and set the elements necessary to obtain

[3] *See* MMSD News Release, Decision to start the school year virtually (July 17, 2020), available at https://www.madison.k12.wi.us/july-17-2020-decision-start-school-year-virtually.

one. Wis. Stat. § 806.04. Plaintiffs do not provide factual or legal support to meet any of the four requisite elements in their motion. Defendants will focus on two of those necessary elements here: the lack of a legally protectable interest and the lack of an issue ripe for judicial determination. *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982) (citing Edwin Borchard, *Declaratory Judgments*, at 26–57 (2d ed. 1941)).

Plaintiffs fail to provide any factual or legal support to show that they have a personal interest in the controversy here. They present no evidence about themselves or their children in support of their motion. Nor could they. Plaintiffs refused to identify themselves to counsel for Defendants in this matter, even pursuant to a strict protective order. They provide no information about whether any of their children would ever consider using a different name or pronoun set.

Without such information, Plaintiffs are on significantly weaker grounds than the plaintiff in *Lake Country Racquet & Athletic Club*, who was a property owner and taxpayer in the village but had no other interest in the zoning treatment of a different piece of property in the village. *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 23, 259 Wis. 2d 107, 655 N.W.2d 189. The club had no standing because it failed to show any "personal stake in the outcome of this action." *Id.* Similarly, Plaintiffs here do not have a personal interest in the controversy at issue.

Nor have Plaintiffs shown that their claims are ripe. The facts are not sufficiently developed and would inevitably entangle the courts in an abstract disagreement. *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694, 470 N.W.2d 290 (1991). Plaintiffs base their claim for relief on a set of facts that are so contingent and uncertain so as to necessitate an advisory opinion. *Id.* at 695. After all, Plaintiffs' concerns only become certain if one of their children becomes interested in exploring their gender, that interest develops into a desire to use a different name and

pronoun set, and the child seeks to use a different name or pronoun set at school without discussing it with them. Plaintiffs' speculative leaps do not stop there, but continue with their assumption that their child's conduct at school means they have Gender Dysphoria and should be treated, notwithstanding the fact that they have failed to show any symptoms and the parents have never sought professional assistance to determine whether their child actually has Gender Dysphoria.

Plaintiffs have not brought forth any evidence to allow this Court to find that they are likely to succeed on the merits of their declaratory judgment action, even before this Court considers Plaintiffs' arguments about their constitutional rights. For this reason alone, the Court should deny their request for a preliminary injunction pending appeal.

B. Plaintiffs Do Not Have a Fundamental Parental Right to Dictate the District's Procedures for Educating and Affirming Students.

Plaintiffs do not have a fundamental right to control the District's Guidance for how to educate students. Over and over again, Courts have rejected such arguments, concluding that 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(ren) attend public school, the parental right to control the upbringing of child(ren) 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).

In distinguishing between a parent's right to raise their children and a school's ability to control its curriculum and school environment, courts have authority to prevent schools from telling parents what the parents can teach their children and prevent parents from telling schools

what the school can teach their children. *Id.* ¶ 37 (citing *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 533-34 (1st Cir. 1995), *abrogated on other grounds by Martinez v. Cui*, 608 F.3d 54 (1st Cir. 2010)). As the *Burmaster* court concluded, "parents simply do not have the constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Id.* ¶ 39.

The *Burmaster* court reviewed case after case supporting its conclusion. *Id.* For example, in *Brown v. Hot, Sexy and Safer Productions, Inc.*, the First Circuit held that parents did not have a right to exempt their children from a high school assembly presentation about AIDS that included explicit references to sexuality that the parents viewed as sexually explicit and vulgar. In reaching its decision, the First Circuit explained that parents have the right to choose "a specific educational program—whether it be religious instruction at a private school or instruction in a foreign language. . . . We do not think, however, that this freedom encompasses a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." *Id.* at 533. The Court of Appeals offered a common sense reason for this rule: "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter." 68 F.3d. at 534.

Over and over again, courts have reached the same conclusion with respect to schools' choices regarding educational content, teaching methods, and policies and practices that fulfill a school's educational mission. In *C.N. v. Ridgewood Board of Education*, for example, the Third Circuit found that parental rights were not violated by their child's participation in an involuntary survey that sought information about drug and alcohol use, sexual activity, physical violence, and suicide attempts. 430 F.3d 159, 183–84 (3d Cir. 2005); *see also Fields v. Palmdale School District*,

427 F.3d 1197, 1210 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006) (survey including sexual topics intended to "reduce barriers to students' ability to learn"). Parents did not have a right to exempt their child from mandatory participation in community service program, *Immediato v. Rye Neck School District* 73 F.3d 454 (2d Cir. 1996), nor did they have the right to exempt their child from certain reading programs the parents found objectionable. *Fleischfresser v. Directors of School District 200*, 15 F.3d 680 (7th Cir. 1994). Nor do parents have the right to bar transgender students from using restrooms and locker rooms consistent with their gender identity because their doing so allegedly exposes the parents' non-transgender children to the "'risk [of] being exposed to opposite sex nudity at school' and 'risk [of] exposing their own undressed or partially unclothed bodies to members of the opposite sex' in 'intimate, vulnerable settings like restrooms, locker rooms and showers.'" *Parents for Privacy v. Barr*, 949 F.3d 1210, 1233 (9th Cir. 2020).

Plaintiffs ignore the well-established legal principle that their right to direct the care, custody and control of their children does not allow them to dictate a public school's educational methods, practices, and procedures. 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 one 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 attempts to usurp their role." (Doc. 124 at 16.) But in that 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 "obstruct[ed] the parental right to choose the proper method of resolution" of matters related to the pregnancy. *Id.* at 306. Distinguishing this case from the administration of a survey described

above, the *C.N.* court noted that the coach's conduct "str[uck] at the heart of parental decision-making authority on matters of the greatest importance," and compared it to other cases that "directly aimed at the parent-child relationship," involving the right of family members to remain together. *C.N.*, 430 F.3d at 184. That is not the situation here.

1. The Guidance Does Not Interfere with Parental Decision-Making.

Plaintiffs argue that their challenge to the Guidance should be reviewed under strict scrutiny because it "strikes at the heart of parental decision-making authority," (Doc. 124 at 17), but that argument is contrary to fact.

First, the Guidance does not interfere with the parents' right to make health care decisions for their children, as Plaintiffs claim. As Dr. Leibowitz explains, allowing children to explore their identity through the use of a different name or pronoun set is not medical treatment and does not require a medical diagnosis. (Leibowitz Aff. ¶¶ 9, 13, 30.) In fact, the request to use a different name or pronoun set is not even a diagnostic criterion for Gender Dysphoria. (*Id.* ¶ 13.)

Indeed, there is no evidence that the District is providing medical treatment by creating a safe and accepting environment to further the District's education mission. "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). Here, Plaintiffs take issue with the potential actions of school staff and teachers, not medical providers. But nothing in the Guidance allows the District or its employees to provide medical treatment to students. Plainly stated, use of a different name and pronouns at school is not in itself medical treatment. (*See* Leibowitz Aff. ¶¶ 9, 30.)

Moreover, a teacher's knowledge that a student prefers a different name or pronouns will *not* prevent Plaintiffs or any other parent from getting their children the medical treatment needed

for Gender Dysphoria. As Dr. Liebowitz explains, a child experiencing Gender Dysphoria would show signs—obvious to a parent or caregiver—of gender-related concerns or clinical distress. (*See id.* ¶¶ 39–41, 45, 56.) Those signs, not a request to use a different pronoun set or name, would be the reason why a parent would know that treatment is necessary for their child.

Nor is there any research that supports a position that using a different pronoun set and name at school will lead to a lifelong transgender identity. Dr. Levine may suggest otherwise, but he relies on research that defines social transition to be a far more comprehensive set of changes than just use of a different pronoun set and name in one setting. (*See id.* ¶¶ 20–26, 31–32.) Dr. Levine cites no authority that supports his opinion that use of a different pronoun set and name in one setting causes them to have Gender Dysphoria. or increases the likelihood that the condition would endure. (*See id.* ¶¶ 22-26.)

There are many other problems with Plaintiffs' attempt to conflate acceptance of gender expression with medical treatment. Plaintiffs support their arguments with the affidavit of a psychiatrist who has little experience in treating children. Gender exploration is a normal aspect of youth development that does not mean a child has Gender Dysphoria. (*See id.* ¶¶ 9, 30–32.) Plaintiffs allege that if their children develop Gender Dysphoria then they should have a say in the appropriate treatment, but the Guidance does not prevent them from asking a qualified provider to determine whether their child has that condition and does not in any way interfere with their decisions regarding medical treatment the child should receive.

2. Parents' Statutory Right of Access to School Records Is Not Implicated by the Guidance Is Irrelevant to the Parental Rights Claim.

Plaintiffs cannot save their argument by asserting that Wisconsin law gives them unfettered access to their children's pupil records; it does not. To be clear, Wisconsin law requires schools to allow requesting parents to review two out of four defined categories of student records. Wis. Stat.

§ 118.125(2)(a), (b), & (d) (allowing access to Behavioral records and Progress records, but not "[n]otes or records maintained for personal use by a teacher" or "[r]ecords necessary for, and available only to persons involved in, the psychological treatment of a pupil"). The Gender Support Plan referenced in the Guidance would not necessarily fall into the definition of either of the two categories of student records parents are allowed to access. Wis. Stat. § 118.125(1)(a), (c).

And importantly, even if Wisconsin law and FERPA provide parents the right to certain student records as well as the ability to consent to name changes, none of those statutory rights offer any support for Plaintiffs' asserted parental rights to overturn the District's Guidance. *See Parents for Privacy*, 949 F.3d at 1232 (holding that although state and federal statutes may expand upon constitutional protections by creating new statutory rights, statutes do not alter the protections afforded by the Constitution itself).

C. The Conscience Clause Does Not Allow Plaintiffs to Dictate the District's Approach to Transgender and Gender-Nonconforming Students.

Plaintiffs cannot show that Wisconsin's Conscience Clause, Wisconsin Constitution, Art. I, § 18, affords them the right to challenge District procedures intended to further transgender and other gender non-conforming students' educational success. In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the state's interest in compulsory education gave way to the Amish's free exercise and parental rights claims that they should be able to educate their children outside the public school system, but the Court also recognized the "power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Id.* at 213. Plaintiffs fail to cite any case supporting their assertion that the Conscience Clause overrides the District's authority and responsibility to create procedures for the good of all of its students. Like the U.S. Constitution, Wisconsin's Constitution requires the government to "strike a balance . . . between freedom of conscience and state . . . interests," such as public safety

and child welfare. *State v. Miller*, 202 Wis. 2d 56, 68, 549 N.W.2d 235, 240 (1996), *abrogation on other grounds recognized by Coulee Catholic Schs. v. Labor and Indus. Review Com'n, Dept. of Workforce Dev.*, 2009 WI 88, 320 Wis. 2d 275, 768 N.W.2d 868; *see also State v. Neumann*, 2013 WI 58, 348 Wis. 2d 455, 832 N.W.2d 560 (upholding child neglect conviction of parents who did not seek medical care for child due to religious beliefs); *Peace Lutheran Church & Academy v. Sussex*, 2001 WI App. 139, ¶ 22, 246 Wis.2d 502, 631 N.W.2d 229; *State v. Yoder*, 49 Wis.2d 430, 434, 182 N.W.2d 539 (1971), ("[t]he determination of whether a law infringing religious liberty is justified requires the weighing of the burden on the free exercise of one's religion and the importance of the state's interest asserted in justification . . . .").[4] And not once has any court concluded that the Conscience Clause gave a parent the right to demand a public school to change its educational practices.

A Conscience Clause claim requires Plaintiffs to prove that they "ha[ve] a sincerely held religious belief . . . that is burdened by application of the state law at issue." *Miller*, 202 Wis. 2d at 66. Absent such a showing, the claim fails.

Plaintiffs fail to show any way in which the Guidance interferes with their religious beliefs, since they have refused to offer any factual basis to suggest that their children are actually taking advantage of the Guidance. A student's ability to use a different name or pronouns in reliance on the Guidance is purely voluntary, and Plaintiffs are free to tell their children not to do so. Plaintiffs may also teach their children about their religious beliefs regarding gender identity and Gender Dysphoria. *See Parker v. Hurley*, 514 F.3d 87, 105 (1st Cir. 2008) ("[T]he mere fact that a child

[4] Contrary to Plaintiffs' assertions, the test under the Wisconsin Constitution is not conventional "strict scrutiny." (Doc. 124 at 28.) Instead, the "compelling interest/least restrictive alternative test" operates as a balancing test under which many governmental regulations not specifically aimed at religion survive constitutional review.

is exposed on occasion in public school to a concept offensive to a parent's religious belief does not inhibit the parent from instructing the child differently.") And Plaintiffs are free to choose whatever treatment approach they wish their children to follow if they are to *actually* be diagnosed with Gender Dysphoria.

Finally, even if Plaintiffs' claim of a burden based on the speculative belief that their children may one day begin to use a different name or pronouns at school without their knowledge were sufficient, that alleged burden is easily outweighed by compelling interests supporting the District's Guidance. *See, e.g.*, *Miller*, 202 Wis. 2d at 68 ("[W]e seek to strike a balance under the [state] Constitution between freedom of conscience and the state's public safety interest.").

D. The District's Guidance Furthers Compelling Interests in Educating, Keeping Safe, and Preventing Discrimination Against Students.

The District's Guidance furthers three interrelated compelling governmental interests—education, safety, and anti-discrimination—and is the least restrictive alternative for doing so. Even though the Ninth Circuit Court of Appeals applied rational basis to its review of a school survey, it found that schools have a "compelling interest in the broad ends of education, the scope of which extend far beyond 'curriculum'" to not only "teach[ ] the basics of reading, writing, and arithmetic" but also to "serv[e] higher civic and social functions, including the rearing of children into healthy, productive, and responsible adults and the cultivation of talented and qualified leaders of diverse backgrounds." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005), *opinion amended on denial of reh'g sub nom. Fields v. Palmdale Sch. Dist. (PSD)*, 447 F.3d 1187 (9th Cir. 2006).

The court further noted that school practices may be supported by a state's *parens patriae* interest in protecting the health, safety and wellbeing of young people. *Fields*, 427 F.3d at 1210.

Many other cases have also declared states have a compelling interest in "safeguarding the physical and psychological well-being of a minor." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (internal quotation marks and citation omitted); *see also Parham v. J. R.*, 442 U.S. 584, 603 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control . . . in many [] ways."); *Pickup v. Brown*, 42 F. Supp. 3d 1347, 1368 (E.D. Cal. 2012); *Goehring v. Brophy*, 94 F.3d 1294, 1300 (9th Cir. 1996) (holding that a university had a compelling interest in the "health and well-being of its students"); *State v. Caminiti*, 2016 WI App 41, ¶ 33, 369 Wis. 2d 223, 880 N.W.2d 182 (State "has 'a compelling interest in protecting children' from certain types of harmful parental discipline.")[5]; *State v. Peck*, 143 Wis. 2d 624, 634–35, 422 N.W.2d 160, 164 (Ct. App. 1988) ("[p]reservation of the public health and safety" outweighed religiously motivated use of marijuana as a sacrament); *Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 22, 246 Wis. 2d 502, 517–18, 631 N.W.2d 229, 237 (compelling interest in "the saving of lives and preservation of property" outweighed sincerely held religious objections to installing a sprinkler system).

A final compelling interest furthered by the Guidance is the District's interest in preventing discrimination against transgender and other gender nonconforming students. *See, e.g., Doe v. Boyertown Area School District*, 897 F.3d 518, 528 (3d Cir. 2018) ("[T]ransgender students face extraordinary social, psychological, and medical risks and the School District clearly had a compelling state interest in shielding [transgender students] from discrimination."); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1051 (7th Cir. 2017) ("transgender

[5] *State v. Caminiti* is an unpublished Wisconsin Court of Appeals opinion issued after July 1, 2009, a copy of which is attached hereto.

individuals face discrimination, harassment, and violence because of their gender identity"). The Supreme Court recently concluded that discrimination against someone for being transgender, as well as lesbian, gay, or bisexual, is sex discrimination. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1738 (2020). And the U.S. Supreme Court has long recognized that "eradicating discrimination" on the basis of sex serves a "compelling state interest[] of the *highest order*." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623–24 (1984) (emphasis added).

Plaintiffs' demand to strike down a Guidance established for the protection of transgender and gender nonconforming youth seeks to further discriminate against District students because of their gender-based characteristics. The discriminatory nature of Plaintiffs' demand for parental access to information regarding gender is evident when the District is under no obligation to share information about a whole range of other ways in which students may identify themselves or express their religious or political beliefs at school, but not at home. The District, for example, has no obligation to share with a student's atheist parents its knowledge that a student has participated in a student prayer group or otherwise expressed their identification with, or rejection of, the religious, ethnic or political identity of their parents or guardians.

The District's Guidance identifies school achievement (Doc. 3, Ex. 1, Guidance at 7); health, safety, and peer acceptance (*Id.* at 4–6, 8); as well as non-discrimination (*Id.* at 9–11), as interests its Guidance is intended to support. It identifies data to support the need for the Guidance, such as the National School Climate Survey administered by GLSEN (Gay Lesbian Straight Education Network) (*Id.* at 5–8) and the 2015 Dane County Youth Assessment (DCYA), which showed the adversities in education, family support, mental health and safety faced by transgender youth in Dane County (*Id.* at 4) as support for the Guidance. GLSEN's National Climate Study not only showed the ways in which LGBTQ students face serious challenges to their health, safety,

and ability to succeed at school (*Id.* at 5–7), but also that a curriculum that is inclusive of LGBTQ+ students results in positive outcomes for students. (*Id.* at 8.) The Guidance further cites to state law prohibiting discrimination against students based on sex, as well as sexual orientation (Wis. Stat. § 118.13), the District's policies against bullying (Student Anti-Bullying Board Policy 4510), interpreting the Guidance to require the District to "protect our transgender, non-binary, and gender-expansive students from bullying and harassment," and the District's Student Non-Discrimination Board Policy 4620 prohibiting discrimination and harassment on the basis of "sexual orientation, gender identity, gender expression." (*Id.* at 10–11.)

The Guidance encourages LGBTQ+ students to include their families to support their use of a different names and pronouns (*Id.* at 16), but supports a youth's decision not to share that information with their parents in order to protect youth from "imminent safety risks, such as losing family support and housing" (*Id.* at 16). Dr. Leibowitz's affidavit supports the "immense benefit to an adolescent who feels unsafe to do so at home" from a protective school practice, such as this one. (Leibowitz Aff. ¶ 44.) Such benefits occur "whether or not an adolescent meets criteria for Gender Dysphoria" (*Id.*) because in Dr. Leibowitz's "clinical experience, being able to explore or express one's identity in one or more settings is an important aspect of healthy individuation for young people that has the best potential for positive long-term life satisfaction." (*Id.*)

The Guidance provides the least restrictive means for fulfilling the District's compelling interests in protecting the health, safety, and educational success of transgender and gender non-conforming students. A protective practice such as this one "benefits some [youth], harms no-one," and therefore "protects the safety of all youth." (*Id.* ¶ 60.) The Guidance is voluntary. Any student may *choose* to take advantage of it to be able to use a different name or pronouns at school, but no youth is *required* to do so. It is reasonable to defer to the judgment of the students themselves

about whether they may safely let their parents or guardians know about their choice to use a different name and pronouns at school, because the students are the ones best equipped to make that assessment. And any parent who objects to their child making use of the Guidance can simply inform their child of their position. Similar accommodations of students whose parents objected to their sharing restrooms or locker rooms with transgender students were the least restrictive alternative to parents' challenge to the school's restroom and locker room policy for transgender students. *Boyertown*, 897 F.3d at 531.

Moreover, the uniform enforcement of this Guidance to protect transgender and gender non-conforming youth from discrimination is the least restrictive means of furthering the District's compelling interest in preventing gender-based discrimination. *See Equal Employment Opportunity Comm'n v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 595 (6th Cir. 2018), *aff'd sub nom. Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020) (finding that "eradication of employment discrimination based on the criteria identified in Title VII" was "the least restrictive means that Congress could have used to effectuate its purpose"). Giving parents the right to demand information about whether their children have used a different name or gender at school, rather than simply asking their children, would undermine the purpose of the Guidance to protect all youths' health, wellbeing, and ability to succeed at school, including those who may be most in need of those protections.

Because the Guidance survives strict scrutiny, there is no question that it survives rational basis review.

IV. The Requested Injunction Would Be Inequitable under the Circumstances.

Even assuming that the moving party satisfies all of the elements for temporary injunctive relief, the decision whether to grant such a motion falls squarely within the trial court's

discretionary powers. *Werner*, 80 Wis. 2d at 524 (1977) (emphasizing the permissive language of "may" in the temporary injunction statute); *see also, e.g.*, *McKinnon v. Benedict*, 38 Wis. 2d 607, 157 N.W.2d 665 (1968); *Pure Milk Prods. Co-op.*, 90 Wis. 2d at 802-03; *Carlin Lake Ass'n, Inc. v. Carlin Club Props., LLC*, 2019 WI App 24, ¶ 44, 387 Wis. 2d 640, 929 N.W.2d 228. Trial courts retain such broad discretion because injunctive relief is an extraordinary remedy that "is not given as a matter of course for any and every act done or threatened to the person or property of another." *McKinnon*, 38 Wis. 2d at 616 (internal quotation marks and citation omitted). Because "injunctions are not to be issued lightly but only to restrain an act that is clearly contrary to equity and good conscience," the plaintiff has the burden of demonstrating that on balance equity favors issuing the injunction. *Carlin Lake.*, 387 Wis. 2d 640, ¶ 44 (citation omitted).

Plaintiffs have not shown that the balance of harms favors an injunction. As previously discussed, the Guidance does not harm Plaintiffs in the ways that they allege it does. The Guidance does not interfere in any way with Plaintiffs' fundamental role to seek diagnosis and treatment for their children; it simply implements an affirming approach to students' self-identities while they are at school. And Plaintiffs have every right and opportunity to consult a mental-health professional about potential Gender Dysphoria, if that concern ever were to arise.

On the other hand, an injunction pending appeal would clearly harm the District by requiring it to abandon core aspects of the Guidance that it has successfully implemented after extensive research and staff training. (*See* Doc. 3, Ex. 1, Guidance at 3–4, 8.) Requiring parental notice and consent prior to affirming a child's preferred name or pronoun could potentially subject the District to discrimination claims and statutory violations. *See Whitaker v. Kenosha Unified School Dist. No. 1 Board of Educ.*, 858 F.3d 1034, 1047–50 (7th Cir. 2017) (concluding that a school district violated Title IX when it enforced a policy requiring an individual to use a bathroom

that does not conform with his or her gender identity); Wis. Stat. § 118.13(1) (prohibiting pupil discrimination in curricular or extracurricular activities because of the person's sex or sexual orientation).

Plaintiffs' injunction would prohibit teachers and staff from referring to certain students by the name or pronoun they prefer, even though other students can be referred to by nicknames or middle names. Such differentiation in treatment is precisely the harm that anti-discrimination laws are meant to prevent. *See* Wis. Admin. Code § PI 9.02(5) (2017-18) (defining discrimination to mean any action or practice which is detrimental to a person and differentiates or distinguishes among persons, or which limits or denies a person or group of persons opportunities based, in whole or in part, on sex). Granting Plaintiffs' injunction pending appeal would therefore significantly harm the District by compelling it to take discriminatory actions against its students. On balance, equity does not favor the injunction.

Even if this Court concluded that Plaintiffs established all injunctive relief factors and have the necessary standing to pursue their claims, this Court is not required to issue an injunction pending appeal. *See Akin v. Kewaskum Cmty. Schs. Joint Sch. Dist. No. 2*, 64 Wis. 2d 154, 162, 218 N.W.2d 494 (1974). In fact, this Court's decision to not do so would likely be upheld on appeal. *See Joint Sch. Dis. No. 1, Wis. Rapids v. Wis. Rapids Ed. Ass'n*, 70 Wis. 2d 292, 308, 234 N.W.2d 289 (1975) ("It is a basic rule that the granting or refusal of a temporary injunction . . . will not be upset unless an abuse of discretion is shown.").

For example, in *Akin*, the trial court declined to issue a temporary injunction that would have enjoined a school district's remodeling efforts even though the taxpayers seeking the injunction had necessary standing and established irreparable and permanent injury. *Akin*, 64 Wis. 2d at 162. After weighing the effect of the temporary injunction on the taxpayers against the effect

on the children, the court sided with the school district and chose to defer factual questions surrounding the school district's actions to trial. *Id.* Emphasizing that the court's decision to issue or withhold an injunction is discretionary, the Wisconsin Supreme Court affirmed the trial court's decision to deny the temporary injunction. *Id.*

Trial courts cannot examine the merits and determine ultimate issues at the temporary injunction stage because such questions are intended to be developed at trial. *Bartell Broadcasters, Inc.*, 13 Wis. 2d at 172–73. When a plaintiff raises an issue of law or contested allegations in its request for a temporary injunction, trial courts have particular discretion to defer the question until trial on the merits. *Id.* at 173; *Mogen David Wine Corp. v. Borenstein*, 267 Wis. 503, 508–09, 66 N.W.2d 157 (1954). For these reasons, courts should exercise their equitable powers with caution and only where a plaintiff clearly demonstrates the reason and necessity for an injunction. *Bartell Broadcasters, Inc.*, 13 Wis. 2d at 173. Here, Plaintiffs have not so demonstrated.

CONCLUSION

For the reasons set forth above, Defendants Madison Metropolitan School District and Defendant-Intervenors respectfully request that this Court deny Plaintiffs' motion seeking an injunction pending appeal.

DATE: August 6, 2020

Respectfully submitted,

Counsel for Defendant-Intervenors 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, WI SBN 1029261

Asma Kadri Keeler, WI SBN 1114761
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53158
(414) 207- 4032
ldupuis@aclu-wi.org
akadri@aclu-wi.org

QUARLES & BRADY LLP

By

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

Of counsel

AMERICAN CIVIL LIBERTIES UNION FOUNDATION, INC.
Lesbian Gay Bisexual Transgender Project
John A. Knight (*admitted pro hac vice*)
150 North Michigan Avenue, Suite 600
Chicago, Illinois 60601
(312) 201-9740
jknight@aclu-il.org

Counsel for Defendant Madison Metropolitan School District

BOARDMAN & CLARK LLP

By

Barry J. Blonien
Barry J. Blonien, State Bar No. 1078848
James E. Bartzen, State Bar No. 1003047
Sarah J. Horner, State Bar No. 1113185
U.S. Bank Building, Suite 410
1 South Pinckney Street
P.O. Box 927

Madison, WI 53701-0927
(608) 257-9521
bblonien@boardmanclark.com
jbartzen@boardmanclark.com
shorner@boardmanclark.com

369 Wis.2d 223
Unpublished Disposition
See Rules of Appellate Procedure, Rule 809.23(3), regarding citation of unpublished opinions. Unpublished opinions issued before July 1, 2009, are of no precedential value and may not be cited except in limited instances. Unpublished opinions issued on or after July 1, 2009 may be cited for persuasive value.
NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER.
Court of Appeals of Wisconsin.

STATE of Wisconsin, Plaintiff–Respondent,
v.
Alina N. CAMINITI, Defendant–Appellant.
State of Wisconsin, Plaintiff–Respondent,
v.
Matthew B. Caminiti, Defendant–Appellant.

Nos. 2015AP122–CR, 2015AP123–CR.
|
April 7, 2016.

Appeals from judgments of the circuit court for Dane County: Ellen K. Berz, Judge. *Affirmed.*

Before KLOPPENBURG, P.J., HIGGINBOTHAM, and BLANCHARD, JJ.

Opinion

¶ 1 BLANCHARD, J.

***1** Alina and Matthew Caminiti, a couple with two young children, were convicted at a joint jury trial of multiple counts of intentionally causing bodily harm to their children, in violation of WIS. STAT. § 948.03(2)(b) (2013–14).[1] The evidence at trial included statements by Alina and Matthew that each had engaged in what they referred to as "rod discipline" of their children. By the Caminitis' own accounts, rod discipline involved striking the children on their bare bottoms with wooden spoons or rods, using sufficient force to cause bruising. The State does not dispute the Caminitis' contention that their practice of rod discipline was an exercise of their sincerely held religious beliefs.

¶ 2 Alina and Matthew argued to the circuit court that this prosecution abridges their substantive due process right to discipline their children, and their rights to the free exercise of religion under the United States Constitution and to freedom of conscience under the Wisconsin Constitution. The court rejected these arguments, and Alina and Matthew appeal their respective judgments of conviction and orders denying pretrial motions to dismiss based exclusively on these constitutional issues.[2] On appeal, the Caminitis pursue only arguments based on facial constitutional challenges to the set of statutes at issue. For the reasons provided below, we affirm.

BACKGROUND

¶ 3 The parties do not dispute the following facts.

Nature of Charged Conduct

¶ 4 In November 2010, Alina and Matthew's two children were just under 2–1/2 years old and 11 months old. At that time, sheriff's office investigators interviewed Alina and Matthew as part of an investigation into allegations of physical abuse of children. Alina gave statements to the investigators that included the following.

¶ 5 Alina used "rod discipline" on the two children, beginning in each case when the child was two to three months old, and thereafter on a routine basis. This entailed delivering "one to three spanks" using a wooden spoon or dowel—that is, a solid, cylindrical rod—to the bare bottom or upper thighs of each child, being "very careful" in doing so. "When they were younger, [Alina] would use a wooden spoon, and as they got older or meatier, she would graduate to [use of] a wooden dowel."

¶ 6 Regarding injuries resulting from rod discipline, Alina said that "red or light purple" bruising was "common" on the older child when she was six to twelve months old, and that "one to three spankings resulted in a bruise." If Alina "went to spank [the older child] and saw a bruise, [Alina] would spank on the other side of the buttock or on a different part of the leg." When the older child was about ten months old, the child "was having problems sitting down, and Alina believed it was from spanking."

As for the younger child, Alina recalled observing bruising about five times, and separately said that this child was "probably bruised every time [the child] was spanked."

¶ 7 Matthew told investigators that he also used "rod discipline" on the two children, using the same methods as Alina, and did so more often than Alina did: from two times a week to "two times in a month and beyond." Matthew began by using a small, flat wooden spoon, when the children were about two months old, and then "graduated" to a wooden dowel as the children became "meatier."

***2** ¶ 8 As to bruising or injury, Matthew told investigators that he struck the children "hard enough to inflict pain" and to leave bruises. On one occasion, when the older child was approaching the age of two years, Matthew drew blood from the child after the tip of a wooden dowel caught her calf.

Religious Context

¶ 9 Matthew is an "elder" in a Christian church. Church members use corporal punishment to discipline their children in a manner that they believe is consistent with biblical injunctions that include the following: "He who spares his rod hates his son, but he who loves him disciplines him diligently." Matthew averred in an affidavit filed as part of a pretrial motion that church members interpret the word "diligently" in this biblical injunction to mean that parents are to use rod discipline when the children are "very young." Matthew interprets the Bible to teach that, "as soon as a parent sees foolishness expressed, at whatever age, ... it is not to be taken lightly."

¶ 10 Matthew said that the purpose of rod discipline is to inflict pain so that "the child knows [that the child has] disobeyed." "[I]t was clear with the children what they needed to do and if they disobeyed, then the spankings followed."

¶ 11 Matthew averred: "If Wisconsin law does not permit us to include rod spanking of our young children as part of their upbringing, then in obeying [Wisconsin criminal] law, we are disobeying Scriptures," which would mean "that we are spiritually dead ... and our children will be spiritually dead." At an evidentiary hearing, Matthew testified that failure to obey scripture "culminates in eternal loss."[3]

¶ 12 In a similar vein, Alina told the investigators that the purpose of rod discipline is "to inflict pain on the child," as a form of "training" and to encourage "listening." Alina would use rod discipline when the older child was "angry or not listening, [or] not being quiet," and when the younger child was "not listening." For example, Alina explained that on one occasion, after Alina handed the older child to someone else in church and the child began to cry, Alina took the child to another room and spanked her.

¶ 13 After Alina's parents expressed concern about bruising they observed on the children, Alina wrote a letter to her parents. In the letter, Alina spoke of using rod discipline as a method to deal "quickly, consistently and in a way that will make" "any form of selfishness" by the children "not happen again." "Especially in regard to [the older child's] crying with other people, my main focus ... has been to get [the child] to fear, respect and listen to me all throughout the day."

Procedural History

***3** ¶ 14 The amended information charged Alina with three counts of intentionally causing bodily harm to a child in violation of WIS. STAT. § 948.03(2)(b) (two counts naming the older child as victim and one naming the younger child), and Matthew with five counts of the same offense (four counts naming the older child, and one naming the younger child).

¶ 15 The Caminitis filed a pretrial motion for dismissal on the ground that WIS. STAT. § 948.03(2)(b) is unconstitutional because it interferes with the free exercise of their religion and is vague and overbroad. The Caminitis later filed a second motion to dismiss, contending that the prosecution impermissibly infringed on their "constitutionally protected familial relationship" with their children.

¶ 16 We put aside in this summary the vagueness and overbreadth issues, which the Caminitis do not pursue on appeal. As to the remaining issues, the circuit court denied the motions to dismiss. In the course of doing so, the court found that Alina and Matthew each held a sincere belief that their shared religion obligated them to use rod discipline, but that the State's interest in protecting children from abuse outweighs the Caminitis'

freedom to exercise their rights to attempt to control their children, and to follow religious teachings, through the use of rod discipline.

¶ 17 The jury convicted Alina on all three counts of intentionally causing bodily harm to a child in the amended information, convicted Matthew on four counts of the same offense, and acquitted Matthew on one count of the same offense (involving the older child). Alina and Matthew now appeal their convictions on two grounds: that WIS. STAT. § 948.03(2)(b) "invades their constitutionally protected relationship with their children" under the substantive due process clause, and that the statute "burdens the religious practice of the Caminitis" under both the free exercise clause of the First Amendment and the freedom of conscience clause, art. I, § 18, of the Wisconsin Constitution.

DISCUSSION

¶ 18 We first summarize the nature of the single offense that was charged in each of the counts of conviction and that the Caminitis challenge as unconstitutional on its face, then address the Caminitis' substantive due process argument, and finally their arguments under the federal constitutional free exercise clause and the state constitutional freedom of conscience clause.

I. OFFENSE AT ISSUE

¶ 19 Wisconsin criminalizes specified conduct as physical abuse of a child at the felony level. WIS. STAT. § 948.03. As pertinent here, "[w]hoever intentionally causes bodily harm to a child is guilty of a Class H felony." Section 948.03(2)(b). " 'Bodily harm' means physical pain or injury, illness, or any impairment of physical condition." WIS. STAT. § 939.22(4).

¶ 20 However, there is a complete defense in the form of a privilege when the accused was "responsible for the child's welfare" at the time of the offense and the conduct entailed "reasonable discipline." WIS. STAT. §§ 939.45(5)(a)3.; 939.45(5)(b). The "reasonable discipline" sufficient to create this complete defense "may involve only such force as a reasonable person believes is necessary." *Id.*

¶ 21 As the State correctly points out, the constitutional challenges here, properly understood, are to the above statutes as those statutes have been interpreted in such authority as *State v. Kimberly B.*, 2005 WI App 115, ¶ 29, 283 Wis.2d 731, 699 N.W.2d 641. Two aspects of the case law are significant. First, when a defendant raises the reasonable discipline privilege as an affirmative defense, the State carries the burden of proving beyond a reasonable doubt both the elements of the alleged child abuse and also that the privilege does not apply. *See id.*, ¶ 29.

***4** ¶ 22 Second, regarding the nature of reasonable discipline, including the component concept of reasonable force:

> Reasonable force is that force which a reasonable person would believe is necessary. Whether a reasonable person would have believed the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of the defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> ... There is no inflexible rule that defines what, under all circumstances, is unreasonable or excessive corporal punishment. Rather, the accepted degree of force must vary according to the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

Id., ¶¶ 32–33 (citations omitted).

¶ 23 These legal principles were reflected in an instruction that the jury received at trial in this case:

> Discipline of a child is an issue in this case because the defendants are the parents of both children.
>
> As to each count, the State must prove by evidence which satisfies you beyond a reasonable doubt that a specific defendant did not act reasonably in the discipline of the named child.
>
> Wisconsin recognizes the right of a parent to inflict corporal punishment to correct or discipline a child. The law allows a parent to use reasonable force to discipline his or her child. Reasonable force is that force which a reasonable person would believe is necessary and not excessive.

> Whether a reasonable person would have believed that the amount of force used was necessary and not excessive must be determined from the standpoint of the defendant at the time of that defendant's acts. The standard is what a person of ordinary intelligence and prudence would have believed in the defendant's position under the circumstances that existed at the time of the alleged offense.
>
> In determining whether the discipline was or was not reasonable, you should consider the age, sex, physical and mental condition and disposition of the child, the conduct of the child, the nature of the discipline, and all the surrounding circumstances.

¶ 24 These statutes and legal principles apply to each of the counts of conviction challenged in this appeal, which vary only as to the time period covered and the particular child allegedly abused. As shorthand, when we refer to the simultaneous application of the above-referenced statutes and legal principles we will generally speak of "the intentional physical abuse charge," or "the statutes here."

II. THE CONSTITUTIONAL CHALLENGES

***5** ¶ 25 As our supreme court has explained:

> The constitutionality of a statute is a question of law which [an appellate] court approaches de novo without deference to the court[ ] below. There is a presumption of constitutionality for legislative enactments and every presumption favoring validity of the law must be indulged. Further, the challenger bears the burden to prove a statute unconstitutional beyond a reasonable doubt.

State v. Post, 197 Wis.2d 279, 301, 541 N.W.2d 115 (1995) (citations omitted).

¶ 26 When a party challenges a law as being unconstitutional on its face, that party "must show that the law cannot be enforced 'under any circumstances,' " unlike under an as-applied challenge, which courts are to assess "by considering the facts of the particular case in front of us, 'not hypothetical facts in other situations.' Under such a challenge, the challenger must show that his or her constitutional rights were actually violated." *League of Women Voters of Wisconsin Educ. Network, Inc. v. Walker,* 2014 WI 97, ¶ 13, 357 Wis.2d 360, 851 N.W.2d 302 (quoted sources omitted).

¶ 27 The Caminitis in their principal brief present arguments based on facial constitutional challenges, not as-applied challenges, to the intentional physical abuse charge.[4] Therefore, we focus on the facial challenge arguments advanced by the Caminitis.

A. Substantive Due Process: Familial Relations

¶ 28 The Caminitis' first constitutional argument, which we will call the "familial relations" argument, is that the intentional physical abuse charge unjustifiably interferes with the substantive due process rights of parents under the Fourteenth Amendment in two ways, which we summarize in the analysis section below.[5] The Fourteenth Amendment provides in pertinent part that no "State shall 'deprive any person of ... liberty, ... without due process of law.' " Substantive due process "provides heightened protection against government interference with certain fundamental rights and liberty interests." Important here, this includes the liberty interest "of parents in the care, custody, and control of their children." *See Troxel v. Granville,* 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000) (quoted sources omitted). The State here does not dispute that "control" in this context includes the right of parents to use reasonable methods in disciplining their children. *See Doe v. Heck,* 327 F.3d 492, 522 (7th Cir.2003), as amended on denial of reh'g (citing *Troxel,* 530 U.S. at 78, and *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923)).

1. Standard of Judicial Review

***6** ¶ 29 The parties disagree about the level of review we are to apply to the intentional physical abuse charge when considering the Caminitis' familial relations argument: strict scrutiny or a balancing test.

¶ 30 The Caminitis argue that strict scrutiny review applies, because the statutes here burden a fundamental liberty interest. Under strict scrutiny review a challenged law may be upheld only if it is shown to be necessary to further a compelling state interest and if it addresses that

interest through the least restrictive means available. *See Kenosha County DHS v. Jodie W.,* 2006 WI 93, ¶¶ 39–41, 293 Wis.2d 530, 716 N.W.2d 845 (applying strict scrutiny to the examination of whether circuit court's application of statute defining grounds for involuntary termination of parental rights violated parent's substantive due process rights).

¶ 31 The State acknowledges that the United States Supreme Court has recognized a fundamental liberty interest in familial privacy and integrity, *see Troxel,* 530 U.S. at 72–73, which in some contexts would require strict scrutiny review, and that the right to discipline one's children falls within this protected liberty interest. However, the State submits that federal circuit court cases interpreting the plurality's approach in *Troxel* have identified a separate standard that is to be used in the specific context of a review of laws addressing child abuse based on a substantive due process challenge. *See Doe,* 327 F.3d at 519–25; *Croft v. Westmoreland Cty. Children & Youth Serv.,* 103 F.3d 1123, 1125 (3d Cir.1997). Based on this authority, the State argues that courts are to balance "the fundamental liberty interests of the family unit with the compelling interests of the state in protecting children from abuse," using a heightened level of scrutiny, but not strict scrutiny. *See Croft,* 103 F.3d at 1125.

¶ 32 We need not resolve this dispute. For reasons we now explain, we conclude that, assuming without deciding that the higher standard advocated by the Caminitis applies, the statutes here survive strict scrutiny review because they are necessary to further a compelling state interest and address that interest through the least restrictive means available.

2. Compelling Interest

¶ 33 The Caminitis concede that the State has "a compelling interest in protecting children" from certain types of harmful parental discipline. They qualify the concession, however, by arguing that this compelling interest extends only to the criminalization of discipline resulting in physical *injury,* not to discipline resulting in physical *pain* that leaves no evidence of physical injury, and that the statutory prohibition on unreasonably inflicting "physical pain" is therefore unconstitutional.[6] *See* WIS. STAT. § 939.22(4). Under the Caminitis' view, the State lacks a compelling interest in criminalizing how parents might discipline their children using methods that produce "only" physical pain but not physical injury, based on the unstated premise that discipline producing physical pain and not injury is necessarily less harmful to children than conduct that produces physical injury.[7]

¶ 34 We reject this argument on two related grounds: (1) there is no basis to accept the unstated premise that the infliction of physical pain not resulting in physical injury is always less harmful than the infliction of physical injury; (2) this argument effectively ignores the complete defense represented by the reasonable discipline privilege. First, discipline that produces physical pain not resulting in physical injury could include conduct that, depending on details, could qualify as a form of torture: administering shocks by passing electric current through a child's body; hanging a child upside down by his or her feet; or confining a child in a cold or hot place, or in a small space. Any of these could be extremely painful without necessarily causing physical injury, and any could be potentially more harmful to a child than a wide range of conduct that causes physical injuries, such as a bruise or cut caused by a blow from a hand, belt, or rod.

***7** ¶ 35 Second, the Caminitis do not even begin to develop a persuasive argument that the State lacks a compelling interest in preventing parents from intentionally and *unreasonably* administering discipline to their children that causes physical pain but not physical injury. By definition, under the terms of the reasonable discipline privilege, the administration of discipline causing physical pain must be unreasonable in order to result in a conviction.

¶ 36 The Caminitis make the general statement that "not all pain is harmful." This general statement is not objectionable. However, the statutes here do not criminalize all parental discipline that results in pain. For the reasons we have already stated, the right to familial relations does not prevent the State from criminalizing unreasonable discipline that results in physical pain any more than it prevents the State from criminalizing unreasonable discipline that results in physical injury.

¶ 37 Without citing authority for the proposition, the Caminitis in their reply brief assert for the first time that we should ignore the affirmative defense of reasonable discipline, "because it is unquestionably a burden" for parents "to be hauled into court, [and] put to the humiliation and expense of a trial for administering a non-injurious spanking to a child." We reject this argument because it is inconsistent with the premise of arguments made in the Caminitis' principal brief that we may consider all pertinent statutes, as interpreted in *Kimberly B.,* and because the Caminitis provide insufficient reason for us to ignore the reasonable discipline privilege on this ground.

¶ 38 The Caminitis refer in passing to many cases from other jurisdictions. However, as far as we can tell, and as far as the Caminitis provide explanations, each case falls into one or more of the following categories: the case supports a proposition not contested by the State; the case supports the proposition that lawmakers in other jurisdictions may decide to provide less protection for children than does Wisconsin, a proposition that does not in itself raise a constitutional issue; or the case addresses a context that is readily distinguishable on its face (such as regulation of corporal discipline by teachers in schools) and the Caminitis fail to explain how the case might support their argument. For example, the Caminitis twice cite a 157–year–old Vermont case that does not appear to advance any contested point they make. *See, e.g., Lander v. Seaver,* 32 Vt. 114 (1859) (holding that considerable allowance should be made for a teacher who used corporal discipline on a student based on good motives and did not act in anger or with malice).

¶ 39 For these reasons, we reject the only developed argument that we can discern offered by the Caminitis to rebut the State's position that the intentional physical abuse charge advances a compelling state interest.

3. Less Restrictive Alternative

***8** ¶ 40 The State submits that there is no less restrictive alternative to the intentional physical abuse charge to address the compelling state interest in protecting children from unreasonable discipline by a parent in way that would not "lower the standard of child protection in Wisconsin to the detriment of the State's children." The following is the only argument not already addressed above that the Caminitis make in response. The statutes here criminalize the use of force when a reasonable person would consider it not reasonably "necessary" under the circumstances, but it is unconstitutional to allow a jury to decide whether a parent's reason for imposing discipline is reasonably "necessary." Under the Caminitis' view, every parent is constitutionally entitled to determine, without government interference, when discipline is reasonably necessary. Their position is unqualified: the State "has no legitimate interest whatsoever" in allowing a jury in a criminal case to consider the reasons for a parent's use of physical force in disciplining his or her child. We are not persuaded.

¶ 41 We agree with the State that this amounts to a "bold and remarkable" assertion that the Caminitis fail to support as a legal argument. As purported support, they question whether jurors could fairly evaluate whether a religious belief could justify a particular type and amount of discipline as being reasonably necessary. However, as referenced in a separate section below, there is no dispute that the statutes here are facially neutral and make no distinctions based on religious belief. Moreover, the Caminitis' position directly contradicts our supreme court's explanation that "a parent's fundamental right to make decisions concerning a child's care has limitations. The state's authority is not nullified merely because a parent grounds his or her claim to control the child in religious belief." *See State v. Neumann,* 2013 WI 58, ¶ 126, 348 Wis.2d 455, 832 N.W.2d 560.

¶ 42 For these reasons, we reject all arguments made by the Caminitis to rebut the State's position that there are no less restrictive alternatives to the intentional physical abuse charge, and affirm the circuit court's decision to reject the familial relations argument.[8]

B. Free Exercise and Freedom of Conscience

¶ 43 The Caminitis' second constitutional argument comes in two parts, a challenge under the free exercise clause of the First Amendment and a challenge under the freedom of conscience clause, art. I, § 18, of the Wisconsin Constitution.

1. Free Exercise

¶ 44 The Caminitis submit that using rod discipline is central to their religious beliefs, and from this premise argue that it violates the free exercise clause of the First Amendment to prosecute them for following those beliefs. The Caminitis take the position that the protections of the free exercise clause apply if the challenged law discriminates against certain religious beliefs or prohibits conduct that is undertaken for religious reasons.

¶ 45 In response, the State explains that the United States Supreme Court in *Employment Division, Department of Human Resources, Oregon v. Smith,* 494 U.S. 872, 879–80, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), has held that all citizens must abide by any criminal law of general applicability that does not discriminate on religious grounds, as recognized by our supreme court in *Neumann,* 348 Wis.2d 455, ¶ 125 n. 76, 832 N.W.2d 560. Effectively conceding the point by failing to address this authority, and without refuting the proposition that the

statutes here are neutral laws of general applicability, the Caminitis essentially assert that it always violates the free exercise clause for a jury to find child discipline to be unreasonable when the discipline is motivated by or informed by religious belief, because this would necessarily involve "viewpoint discrimination." However, the Caminitis fail to support this highly counterintuitive suggestion with authority that might distinguish *Smith,* which is a controlling interpretation of our federal constitution by the United States Supreme Court.

2. Freedom of Conscience

***9** ¶ 46 The freedom of conscience clause in WIS. CONST., art. I, § 18 provides "stronger protection of religious freedom" than does the First Amendment. *See State v. Miller,* 202 Wis.2d 56, 64, 549 N.W.2d 235 (1996), *abrogated on other grounds by City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), *as recognized in Coulee Catholic Schools v. LIRC,* 2009 WI 88, ¶ 62, n. 27, 320 Wis.2d 275, 768 N.W.2d 868. Thus, unlike under the First Amendment, under the state constitution a four-part, burden-shifting test applies:

> [T]he challenger carries the burden to prove: (1) that he or she has a sincerely held religious belief, (2) that is burdened by application of the state law at issue. Upon such proof, the burden shifts to the State to prove: (3) that the law is based on a compelling state interest, (4) which cannot be served by a less restrictive alternative.

Id., 202 Wis.2d at 66, 549 N.W.2d 235.

¶ 47 As noted above, the State in the main does not dispute the circuit court's finding that the practice of rod discipline here was an exercise of sincerely held religious beliefs that was burdened by the statutes. This leaves the question of whether the State has demonstrated that it has a compelling interest that cannot be served by a less restrictive alternative.

¶ 48 In discussion above we have addressed and resolved in favor of the State the parties' discernable arguments on these issues. We now address one argument that the Caminitis emphasize in the freedom of conscience context not already addressed above, at least not in the following terms.

¶ 49 The Caminitis emphasize that, because a "religion is based on faith," its requirements to adherents do "not necessarily" appear " 'reasonable' or rational" to a jury. In this same vein, their principal brief contains extensive references to religious sources that they submit support the notion that rod discipline is of deepest significance to the Caminitis and fellow worshippers, regardless of contrary prevailing beliefs and attitudes in the public at large. However, we agree with the following partial response of the State:

> A less restrictive alternative that would create a different standard for religiously minded child disciplinners would immunize such people from child abuse prosecutions in even the most egregious cases. *Cf. Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 495–96, 69 S.Ct. 684, 93 L.Ed. 834 (1949) ("it is difficult to perceive how ... these constitutional guaranties afford [the Caminitis] a peculiar immunity from laws against [child abuse] unless ... [they are] given special constitutional protection denied all other people") (*Giboney* involved union picketing in restraint of trade).

***10** ¶ 50 For these reasons, we affirm the circuit court's decision to reject the free exercise and freedom of conscience arguments.

CONCLUSION

¶ 51 For all of these reasons, we affirm the decisions of the circuit court to deny the Caminitis' motions to dismiss based on the constitutional issues we have addressed.

Judgments affirmed.

Not recommended for publication in the official reports.

All Citations

369 Wis.2d 223, 880 N.W.2d 182 (Table), 2016 WL 1370164, 2016 WI App 41

Footnotes

1 All references to the Wisconsin Statutes are to the 2013–14 version unless otherwise noted.

2 Alina and Matthew were charged separately, but were tried jointly and their cases have been consolidated on appeal. They filed identical pretrial motions, in response to which the circuit court issued identical pretrial rulings which the Caminitis now jointly appeal, drawing no meaningful distinctions between the conduct of one versus the other, and making no arguments on appeal that are applicable to only one of them.

3 On appeal, the State emphasizes statements that each of the Caminitis made at sentencing that could be interpreted to cast doubt on the sincerity of their religious beliefs regarding rod discipline, at least by the time of the sentencing hearing if not earlier. However, the State on appeal bases its primary arguments on the premise that the circuit court correctly found that the Caminitis held pertinent, sincere religious beliefs during pertinent time periods. We do not further address the topic of the sentencing hearing statements.

4 There is a single, passing reference to "as applied" analysis in the Caminitis' principal brief, in the freedom of conscience argument. We decline to abandon our neutral role to attempt to develop an argument from this reference. *See M.C.I., Inc. v. Elbin,* 146 Wis.2d 239, 244–45, 430 N.W.2d 366 (Ct.App.1988). In their reply brief, the Caminitis change course and explicitly attempt to argue using the as-applied approach. The rule is "well-established" that we generally do not consider arguments raised for the first time in a reply brief, *see Bilda v. County of Milwaukee,* 2006 WI App 57, ¶ 20 n. 7, 292 Wis.2d 212, 713 N.W.2d 661, and we conclude that it would be inappropriate to deviate from that rule in this instance.

5 Without citation to authority, the Caminitis briefly assert that "[t]o the extent that" their "family relationships are intruded upon" by the intentional physical abuse charge, this would violate the free exercise and freedom of conscience clauses. We do not address this undeveloped argument regarding these constitutional doctrines.

6 The Caminitis use shifting terminology for two concepts that we will refer to using only two phrases from the intentional physical abuse charge: "physical pain" and "physical injury." *See* WIS. STAT. § 939.22(4). The Caminitis speak of: "injury"; "actual injury"; "serious injury"; "actual bodily injury"; "physically harmful"; "actually harmful"; "greater than a slap"; "substantial pain"; "non-injurious spanking"; a pain that is "transitory," "minimal," "momentary," "minor," or "very minor." By using these various formulations, the Caminitis may intend to suggest arguments that we do not address in the text, but we deem any such attempted arguments to be undeveloped. Put differently, the only developed arguments that we clearly understand the Caminitis to make in this connection involve the concept, which we address in the text, of causing physical pain without causing physical injury.

7 The Caminitis make this same argument in the context of the "no less restrictive alternative" prong of the analysis, arguing that the intentional physical abuse charge is overly restrictive in criminalizing discipline that causes physical pain but not physical injury. We reject this argument in both contexts for the reasons we provide in the text.

Separately, given the particular arguments made by the Caminitis and our discussion in the text, it is not necessary for us to resolve a dispute between the parties as to whether the State's theory of prosecution at trial was exclusively limited to rod discipline that produced bruising (physical injuries), as opposed to rod discipline that produced bruising in some instances but in other instances produced physical pain with no accompanying bruising.

8 In further support of their "less restrictive alternatives" argument, the Caminitis cite to cases and statutes from other jurisdictions that may allow parents to discipline their children more harshly than Wisconsin law permits. However, the Caminitis cite to no authority supporting the proposition that any federal or Wisconsin constitutional provision requires that Wisconsin provide children with no greater protection from physical abuse than is provided by any other jurisdiction.