No. 2020AP1032

IN THE WISCONSIN SUPREME COURT

JOHN DOE 1, JANE DOE 1, JANE DOE 3, JANE DOE 4, JOHN DOE 5 AND JANE DOE 5,
Plaintiffs-Appellants-Petitioners,

JOHN DOE 6, JANE DOE 6, JOHN DOE 8 AND JANE DOE 8,
Plaintiffs,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
Defendant-Respondent,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL and GENDER SEXUALITY ALLIANCE OF ROBERT M. LAFOLLETTE HIGH SCHOOL,
Intervenors-Defendants-Respondents.

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

RESPONSE IN OPPOSITION TO PETITION FOR REVIEW

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REASONS FOR DENYING THE PETITION

This Court should dismiss or deny the Petition for several reasons. State statute requires a final decision before a party may petition for review, and there is no final decision here. This Court's purpose is not to correct errors but to develop the law in Wisconsin. And the statutory criteria do not support immediate review either.

Petitioners twice requested interim relief, and both the circuit court and court of appeals ruled that Petitioners were entitled to only some of the relief they requested. The arguments they present in their Petition recite of the same merit-based arguments that the circuit court and court of appeals considered and rejected.

Rather than allow the litigation to unfold in the typical fashion before the circuit court and court of appeals, Petitioners seek to usurp the fact-finding process and shortcut their way to this Court. Petitioners did not file a petition to bypass or a petition for writ of supervision. They filed a petition for review, and there is no special or important reason why this Court should grant it.

I. WISCONSIN LAW DOES NOT PERMIT THIS COURT TO GRANT REVIEW OF A NON-FINAL ORDER.

Petitioners admit that the Petition "reaches this Court via an 'unusual procedural posture.'" (Pet. at 39 (quoting *Leavitt v. Beverly Enters.*, 2010 WI 71, ¶ 1, 326 Wis. 2d 42, 784 N.W.2d 683).) 'Unusual' does not begin to describe the situation. Petitioners enlist this Court to immediately review discretionary rulings by the circuit court and court of appeals granting Petitioners only some of the interim relief they requested, based on disputed facts in a case where the circuit court stayed proceedings before the parties have conducted any discovery—while the court of appeals simultaneously considers whether the circuit court erred by denying Petitioners' request to litigate anonymously. 'Unfounded' is more apt than 'unusual.' This Court cannot accept Petitioners' invitation to disregard the statutory requirement that a party may

petition for review only from a **final** order or decision by the court of appeals. There is no final decision here; therefore, the Petition is premature and must be dismissed.

Wis. Stat. § 808.10(1) provides that a "decision of the court of appeals is reviewable by the supreme court only upon a petition for review granted by the supreme court." Further, Wis. Stat. § 809.62(1m)(a) states that a "party may file with the supreme court a petition for review of an adverse decision of the court of appeals pursuant to [§] 808.10." "Adverse decision" is defined as "a final order or decision of the court of appeals, the result of which is contrary, in whole or in part, to the result sought in that court by any party seeking review." *Id.* § 809.62(1g)(a).

According to Petitioners, finality "is not a hard and fast rule," purportedly stemming from the Wisconsin Supreme Court's decision in *In the Interest of A.R.*, 85 Wis. 2d 444, 445, 270 N.W.2d 581 (1978) (per curiam). (Pet. at 40.) That argument disregards the text of Wis. Stat. §§ 808.10 and 809.62 and misreads *A.R.*

In *A.R.*, the court of appeals granted interim relief pending appeal in a custody dispute, and the government petitioned for immediate review under Wis. Stat. §§ 808.10 and 809.62. The Court dismissed the petition, holding that the term "decision" in § 808.10(1) meant that the ruling under review must "finally dispos[e] of the case in the Court of Appeals." *A.R.*, 85 Wis. 2d at 446. Nothing in that decision suggests that this Court may disregard the finality requirement. To the contrary, the Court in *A.R.* held that an "order granting the motion for relief pending appeal does not finally dispose of the appeal and is therefore not reviewable by the supreme court under [§] 808.10." *Id.*

This Court's decision in *State v. Whitty*, 86 Wis. 2d 380, 386–87, 272 N.W.2d 842 (1978) (per curiam), likewise does not support Petitioners' attempt to secure immediate appellate review under Wis. Stat. § 809.62. *Whitty* involved the review of an appellate court order denying bail pending appeal. The Court in *Whitty* held

that a party must be allowed to petition for review from such an order because the Wisconsin Legislature had expressly authorized the Supreme Court to allow bail pending appeal. *Id.* (citing Wis. Stat. § 969.01(2)(d) (1976)). The Court emphasized that its holding "does not mean that every order of the Court of Appeals denying a permissive appeal . . . is a final decision of that Court from which a petition to appeal may be filed in this court." *Id.* To the contrary, the Court reaffirmed that in "the usual case, an order of the Court of Appeals denying permission to appeal from a nonappealable order, is not reviewable in this court because it is not a decision finally disposing of the case." *Id.* at 388 (citing *A.R.*, 85 Wis. 2d at 445).

Petitioners contend that it would not be unique for this Court to review a temporary injunction decision, and in fact "this Court has regularly considered appeals from the denial of a temporary injunction." (Pet. at 42.) Petitioners are severely confused. Most of the cases that Petitioners cite predate the fundamental reorganization of the Wisconsin court system in the late 1970s; they have no bearing on whether this Court can or should grant the Petition for Review in this case pursuant to Wis. Stat. § 809.62.

Before 1977, this Court was the only appellate court in the State. *See Leavitt*, 326 Wis. 2d 42, ¶ 31. Final judgments were appealable to this Court as a matter of right, *see* Wis. Stat. § 817.09(2) (1976), and so were certain non-final orders listed by statute, including orders that "grant[ed], refuse[d], modif[ied], or dissolve[d] an injunction." *Id.* § 817.33(3)(b) (1976). After the reorganization, this Court "no longer looks to statutory language 'listing or describing the kinds of orders which are or are not appealable' to determine whether [it has] appellate jurisdiction over a particular circuit court order." *Leavitt*, 326 Wis. 2d 42, ¶ 39 (citation omitted).

To be clear, the defects with this Petition are not jurisdictional. *See id.*, 326 Wis. 2d 42, ¶ 51 (Prosser, J., concurring) ("Making an argument that this court lacks *jurisdiction* to review a circuit court

order is roughly equivalent to a minnow taunting a muskellunge. Neither the argument nor the minnow is likely to survive."). But they are fatal all the same. As this Court explained in *State v. Circuit Court of Milwaukee County*, 2017 WI 26, ¶ 37, 374 Wis. 2d 26, 892 N.W.2d 267, the Wisconsin Constitution "grants three separate powers to this [C]ourt: appellate and original jurisdiction; the power to issue all writs necessary in aid of its jurisdiction; and superintending authority over all courts." By bringing a Petition for Review under Wis. Stat. § 809.62, Petitioners invoke this Court's *appellate jurisdiction*.[1] And appellate review requires a final decision or order. *See* Wis. Const. art. VII, § 3. ("The supreme court may review *judgments* and *orders* of the court of appeals, may remove cases from the court of appeals and may accept cases on certification by the court of appeals.") (emphasis added).

This Court has repeatedly stressed the importance of finality in appellate review. For example, in *State ex rel. A.E. v. Green Lake County Circuit Court*, 94 Wis. 2d 98, 101, 288 N.W.2d 125 (1980), this Court explained that the "final judgment-final order rule is designed to prohibit piecemeal disposal of litigation and thus plays an important role in the movement of cases through the judicial system." The rule is not without exception, but Petitioners have not shown why it should be abandoned here. As this Court instructed in *Aparacor, Inc. v. DILHR*, 97 Wis. 2d 399, 404, 293 N.W.2d 545 (1980), where "the court of appeals grants permission to appeal, this court will not, case by case, review the court of appeals' exercise of discretion." Granting Petitioners' request would "divest the court of appeals of the discretion entrusted to it" and undermine the basic structure of Wisconsin courts. *Id.*

Petitioners suggest that the issues they seek to present in this Petition are "entirely 'separate from the underlying appeal,'" and reflect ""a final disposition' of the injunction question." (Pet. at 41.) But that is not at all what finality means in this context. As this

[1] Indeed, Petitioners concede that they do not seek a supervisory writ or a petition to bypass. (Pet. at 45 n.17, 18.)

Court explained in *A.R.*, "[t]he statute contemplates only one decision in each case," and that decision "must be the one finally disposing of the case in the court of appeals." 85 Wis. 2d at 446. The circuit court's partial denial of the interim relief pending appeal, and the court of appeals' order denying further relief, are not "final orders," no matter how Petitioners try to spin them. And the issues presented in the injunction motions are inextricably intertwined with the merits, which in turn requires discovery and fact-finding before the circuit court.

Even if this Court were to construe this Petition as a request for a supervisory writ, immediate review would be inappropriate. This Court has made plain that a "writ of supervision is not a substitute for an appeal." *State ex rel. Kalal v. Circuit Ct. for Dane Cty.*, 2004 WI 58, ¶ 17, 271 Wis. 2d 633, 681 N.W.2d 110 (internal quotations and citation omitted). A supervisory writ "is considered an extraordinary and drastic remedy that is to be issued only upon some grievous exigency." *Id.* Petitioners cannot meet the standard for a supervisory writ at this juncture.

The **only** decision that the court of appeals made so far in this case was to affirm the circuit court's discretionary decision to grant only some of the relief Petitioners sought pending interlocutory appeal on the anonymity issue. Petitioners concede as much. (*See* Pet. at 38–39 ("The overarching question is whether the lower courts abused their discretion by denying an injunction . . . .").) Yet Petitioners fail to identify any "grievous exigency" that could justify immediate review. *See State ex rel. Kalal*, 271 Wis. 2d 633, ¶ 17. Petitioners blame the circuit court for the "procedural irregularity" surrounding their request (Pet. at 43), but the problem surfaces solely because Petitioners assume that the traditional rules of finality do not apply here. They do.

The second question that Petitioners ask this Court to review is even more problematic from an appellate-procedure perspective. Petitioners demand immediate review of the circuit court's decision to postpone consideration of their motion for temporary

injunction from March 11 until May 26, 2020, while that court considered a pending motion to dismiss. (Pet. at 5.) But Petitioners fail to explain the urgency—particularly after the court partially granted Petitioners' request for interim relief.

There is simply no reason why this Court should review now whether the circuit court correctly interpreted Wis. Stat. § 802.06(1)(b) because it will have no impact on this case going forward—regardless of how this Court rules. Petitioners may seek review of the circuit court's interlocutory order **after final judgment is issued**. As Wis. Stat. § 809.10(4) states, "[a]n appeal from a final judgment or final order brings before the court all prior nonfinal judgments, orders and rulings adverse to the appellant and favorable to the respondent made in the action or proceeding not previously appealed and ruled upon." *See also, e.g.*, *In re Incorporation of Town of Fitchburg*, 98 Wis. 2d 635, 650, 299 N.W.2d 199 (1980). This Court should reject Petitioners' invitation to dispose of appellate review on a piecemeal basis and instead apply the traditional rules of finality. And because there is no final decision to review, the Petition must be dismissed.

II. NONE OF THE STATUTORY CRITERIA FOR REVIEW ARE SATISFIED HERE.

Petitioners identify two procedural issues for review. First, they ask this Court to review whether the circuit court and court of appeals erred in applying the discretionary standard that governs injunctive relief pending appeal. Second, Petitioners ask this Court to decide whether the circuit court correctly interpreted a provision of state civil procedure. (Pet. at 5.) There are no legitimate grounds for this Court to review either issue.

Instead of arguing the reasons why immediate review is warranted, Petitioners focus on purported errors and cloud the issues with disputed facts. This case is not at the merits stage of review, and those arguments are inappropriate here. *See, e.g.*, *State v. Weber,* 164 Wis. 2d 788, 789, 476 N.W.2d 867 (1991)

(clarifying that "the issues before the court are the issues presented in the petition for review and not discrete arguments that may be made, pro or con, in the disposition of an issue."). Therefore, this Court should deny the Petition.

This Court has broad discretion to decline review where, as here, the issues presented do not meet the statutory criteria in Wis. Stat. § 809.62(1r). Reviewing the rulings on interim relief pending appeal would merely determine whether the courts ruled correctly, not develop the law—the precise circumstance that the criteria weeds out. *See Cook v. Cook*, 208 Wis. 2d 166, ¶ 51, 560 N.W.2d 246 (1997) (explaining the Wisconsin Supreme Court's primary function is to define and develop the law); *State v. Minued*, 141 Wis. 2d 325, 328, 415 N.W.2d 515 (1987) (per curiam) (discussing that error-correction review is inappropriate in light of principles set forth under Wis. Stat. § 809.62(1r)).

Error-correction is not this Court's primary responsibility. As this Court explained in *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78, ¶ 48, 326 Wis. 2d 729, 786 N.W.2d 78, the "'principal criterion in granting or denying review is not whether the matter was correctly decided or justice done in the lower court, but whether the matter is one that should trigger the institutional responsibilities of the Supreme Court.'" (quoting Wis. S. Ct. IOP (Jan. 1, 2010)). *See also State v. Gajewski*, 2009 WI 22, ¶ 11, 316 Wis. 2d 1, 782 N.W.2d 104 (per curiam) (dismissing petition as improvidently granted because "this review is more about error correction than law development and more about the significance of undisputed facts than about a need to clarify the law"). This Court should decline review here because the issues presented do not meet any of the criteria necessary for review. Wis. Stat. § 809.62(1r)(a)–(e).

The criteria set forth in Wis. Stat. § 809.62(1r)(a)–(e) "fairly represent the most common reasons [the Court] grant[s] review," and "will be considered" upon the filing of a petition for review. *State ex rel. Dep't of Nat. Res. v. Wisconsin Ct. of App., Dist. IV*,

2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114; Wis. Stat. § 809.62(1r). Petitioners have the burden to identify the relevant criteria or otherwise provide substantial and compelling reasons for review. *See* Wis. Stat. § 809.62(1r) Judicial Council Committee's Note 1981. "Supreme Court review is a matter of judicial discretion, not of right, and will be granted only when special and important reasons are presented." Wis. Stat. § 809.62(1r).

Petitioners do not identify any special or important reason that would justify review of the two issues they raise. Petitioners spend a majority of their time discussing the underlying merits and then make a fleeting attempt to conform their issues to the criteria for review, but that attempt fails. The issues Petitioners identify do not justify this Court's immediate review. Therefore, this Court should deny the Petition.

A. The Petition Does Not Raise a Constitutional Issue.

Petitioners contend that "the primary reason" this Court should review the lower court rulings on their temporary injunction motions "is to protect parents' constitutional rights and their children from lifelong harm." (Pet. at 19.) But Petitioners fail to explain how a discretionary ruling on a request for injunctive relief presents a "real and significant question of federal or state constitutional law." Wis. Stat. § 809.62(1r)(a). Petitioners do not argue that the standard for granting temporary injunctions under Wis. Stat. § 813.02 is unconstitutional. *See Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154 (outlining the factors courts consider on temporary injunction requests); (*See also* Pet. at 33.) To the contrary, Petitioners expressly acknowledge that "[t]he basic requirements for an injunction are well-established." (Pet. at 33.) That concession alone belies any suggestion that the discretionary rulings on injunctive relief present a constitutional issue.

The circuit court's interpretation of Wis. Stat. § 802.06(1)(b) likewise does not present a constitutional issue. This statute is a Wisconsin Rule of Civil Procedure that governs defensive pleadings and is triggered when a party files a motion to dismiss. Wis. Stat. § 802.06(1)–(2). There is no question, let alone a constitutional one, that when a party files a motion, the circuit court can exercise its discretion in setting deadlines pursuant to rules of civil procedure. *See Hefty v. Strickhouser*, 2008 WI 96, ¶ 31, 312 Wis. 2d 530, 752 N.W.2d 830. "[E]very court has inherent power, exercisable in its sound discretion, consistent within the Constitution and statutes, to control disposition of causes on its docket." *Id.*, ¶ 31 n. 8.

Petitioners frankly raise the same arguments they presented below on their motions for temporary injunctive relief pending appeal. Petitioners could not be any more blatant in their attempt to use this Petition to undo what they believe were erroneous rulings. The procedural questions that Petitioners identify as the issues presented on review have nothing to do with federal or state constitutional law.

B. The Issues Petitioners Raise Will Not Help Develop, Clarify, or Harmonize the Law.

Petitioners fail to show that the law governing discretionary decisions pending appeal requires development, clarification, or harmonization of any kind. Wis. Stat. § 809.62(1r)(c). If this Court were to grant the Petition and conduct immediate review, then it would employ the same "erroneous exercise of discretion" standard that the court of appeals applied and that has existed for decades. *See Codept, Inc. v. More-Way North Corp.*, 23 Wis. 2d 165, 171, 127 N.W.2d 29 (1964) ("It is an elementary rule of law that the granting or refusal of a temporary injunction is a matter lying within the discretion of the trial court."). Circuit courts have long enjoyed broad discretion to decide whether and in what form to grant injunctive relief. *See, e.g.*, *Forest Cty. v. Goode*, 219 Wis. 2d 654, 670, 579 N.W.2d 715 (1998); *Hoffmann v. Wisconsin Elec.*

Power Co., 2003 WI 64, ¶ 23, 262 Wis. 2d 264, 664 N.W.2d 55. Such broad discretion is necessary, because the analysis for injunctive relief is fact-specific. *See Forest Cty.*, 219 Wis. 2d at 670.

There exists no law to develop, clarify, or harmonize here. The lower court rulings on Petitioners' requests for interim relief resulted from a discretionary application of the facts. And, regardless, subsection (c) of the criteria for review requires more: that a decision by this Court would "help develop, clarify, or harmonize the law, **and**" the issue either (1) **does not** merely call for application of **well-settled principles**; (2) presents a **novel question** of statewide impact; or (3) is **not factual** in nature. Wis. Stat. § 809.62(1r)(c) (emphasis added). Reviewing the circuit court and court of appeals' discretionary decisions on Petitioners' requests for injunctive relief does the opposite. It calls for application of well-settled injunction principles; does not present a novel question; and is almost entirely factual in nature.

The relief Petitioners sought below was governed by longstanding principles underlying temporary injunctions and has not sprouted any novel questions since. Both lower courts properly exercised their discretion when applying the four-factor injunction standard. Any review scrutinizing such decisions would be inappropriate at this time. *See* Wis. Stat. § 809.62(1r)(c)3.

Petitioners further maintain that reviewing whether the circuit court correctly interpreted Wis. Stat. § 802.06(1)(b) "is warranted to resolve a split among circuit court judges." (Pet. at 37). But circuit courts do not make law. *See Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826 (Ct. App. 1993) (explaining that a circuit court decision is neither precedent nor authority upon which the court of appeals may rely). Therefore, any review of the circuit court's interpretation of a provision of state civil procedure would not "help develop, clarify, or harmonize the law." Wis. Stat. § 809.62(1r)(c). Even if a split existed (and there is no evidence that it does), the issue would not fall within the scope of criteria essential to this Court's review.

C. The Court of Appeals' Decision Does Not Conflict With Other Controlling Opinions.

In an effort to satisfy the fourth criteria for review, Petitioners contend that the rulings below are directly 'in conflict with' this Court's 'controlling' precedents as to temporary injunctions." (Pet. at 33.) But Petitioners identify no controlling precedent that the lower courts neglected to follow. To the contrary, Petitioners cite *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977) to support the requirements for obtaining a temporary injunction. (Pet. at 33.) The circuit court employed the *Werner* four-factor test, and the court of appeals affirmed the circuit court's discretionary determination to grant partial temporary injunctive relief. (P-App. at 10–12; P-App. at 1–9.) When doing so, the court of appeals relied on *Milwaukee Deputy Sheriffs' Ass'n*, 370 Wis. 2d 644, ¶ 20—another ruling that followed *Werner* and enumerated four factors a party must demonstrate to obtain a temporary injunction. (P-App. at 6.)

The court of appeals' decision could not have been more in line with controlling opinions of this Court and other court of appeals' decisions. Further discussion into the weight the court of appeals and circuit court gave to each factor amounts to error-correction and would thus be inappropriate. Petitioners cannot rehash the lower courts' fact-specific interlocutory decisions in an effort to argue that they present a conflict when those courts have not yet made any final decision that would warrant review.

D. The Petition is Silent on the Remaining Statutory Criteria for Review.

Despite carrying the burden to convince this Court to invoke discretionary review pursuant to five statutory criteria, the Petition is silent on two of them. Wis. Stat. § 809.62(1r)(b), (e). Both unmentioned criteria can be easily dismissed here because no support exists for review on either grounds. First, the Petition does not demonstrate a need for this Court to consider establishing,

implementing, or changing a policy within its authority. Wis. Stat. § 809.62(1r)(b). The Petition is premature and comes before any final decision on the merits. Thus, any policy change by this Court would also be premature.

Second, no passage of time or change in circumstances makes the court of appeals' decision ripe for reexamination here. Wis. Stat. § 809.62(1r)(e). The court of appeals has made only one decision so far: an order on November 9, 2020 affirming the circuit court's discretionary decision to grant in part Petitioners' requested interim injunctive relief. (P-App. at 1–9.) Given that the court of appeals issued this order less than two months ago and factual circumstances remain unchanged, there is no need for review.

OTHER DEFECTS THAT PREVENT A MERITS RULING

I. THE PARTIES HAVE NOT YET CONDUCTED DICSOVERY; PLAINTIFFS HAVE NOT EVEN IDENTIFIED THEMSELVES.

Petitioners have not revealed their or their children's identities to the court or counsel for Respondents. Neither Petitioners' affidavits nor any of the pleadings filed by Petitioners say anything about who they are. The only information provided by Petitioners' affidavits submitted in support of the Complaint is how many children they have and which schools their children attend. (*See, e.g.*, R. 10, Affidavit of John Doe 1 ¶ 2; R. 12, Affidavit of John Doe 5 ¶ 2; R. 23, Affidavit of Jane Doe 8 ¶ 2.) Petitioners offer no evidence about their children's identities either. They do not allege whether their children self-identify as either cisgender or transgender. Petitioners also fail to show that their children have ever raised a single issue involving gender identity.

At the outset of this lawsuit, Petitioners 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. (R. 4.) On June 3, 2020, the circuit court denied Petitioners' motion to proceed anonymously and subsequently entered an order requiring Petitioners to disclose their identities to the court and attorneys for the litigants by June 12, 2020 under the restrictions of a protective order. (*See* R. 74.) Petitioners appealed that order and moved to stay the order pending appeal. (*See* R. 83; R. 84.)

The circuit court granted Petitioners' motion to stay pending appeal but denied Petitioners' request to proceed immediately with the temporary injunction motion, stating that it would prejudice the Respondents to force them to litigate the merits without first obtaining individual discovery from the Petitioners. (R. 91; *see also* R. 95 at 26:5–30:22.) Due to the Petitioners' own refusal to disclose their identities and their own request for a stay pending appeal, neither party has conducted discovery. Without any discovery (or even an opportunity to conduct such discovery), Petitioners cannot use this Petition for Review as a vehicle to the merits that this Court (or any lower court) cannot determine until discovery of all facts relevant to each Petitioner's individual circumstances permits Respondents to adequately respond.

Further, without Petitioners' identities or any individualized discovery whatsoever, there is an outstanding question as to whether Petitioners have standing to bring this action. Petitioners cannot obtain an injunction when they have no standing to bring this lawsuit in the first place. This is an action for declaratory judgment, which is governed by Wis. Stat. § 806.04. A court may entertain a complaint seeking declaratory judgment only if a justiciable controversy exists.

Both the Complaint and the injunction motion fail to allege anything that, if proven, would show any Petitioner has been or will be impacted by the Madison Metropolitan School District's "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" (the "Guidance"). Petitioners seem to take the position that this is a facial constitutional challenge,

which somehow obviates the need for standing, but this is false. Whether a facial or as-applied constitutional challenge, standing is still required; only in the First Amendment context are the rules of standing modified. *See, e.g.*, *State v. Stevenson*, 2000 WI 71, ¶ 12, 236 Wis. 2d 86, 613 N.W.2d 90 ("Litigants claiming that a statute suffers from a constitutional infirmity generally must have a personal and vested interest in the outcome of the litigation . . . . Yet, in the First Amendment context the traditional rules of standing have been modified due to the gravity of a 'chilling effect' that may cause others not before the court to refrain from constitutionally protected speech or expression.") (citations omitted). While the issue of standing is not before this Court at this time, the question surrounding Petitioners' standing in this lawsuit is an obvious defect that prevents any ruling on the merits.

PETITIONERS' MISSTATEMENTS OF FACT AND LAW

The foregoing arguments make clear there are several reasons for this Court to deny or dismiss the Petition. However, pursuant to Wis. Stat. § 809.62(3)(c), Respondents address Petitioners' misstatements of fact and law set forth in the Petition that have a bearing on the question of what issues properly would be before the Court if the petition were granted.

I. PETITIONERS MISSTATE THE STANDARD FOR INJUNCTIVE RELIEF.

Because the standard for injunctive relief goes directly to the first issue presented in the Petition, Respondents take this opportunity to address Petitioners' misstatement of that standard.

Despite conceding that "[t]he basic requirements for an injunction are well-established", Petitioners misstate that the status quo is not part of that requirement. (Pet. at 33.) But it has been since 1977. In *Werner*, the Wisconsin Supreme Court set forth the temporary injunction standard and expressly held that "[t]emporary injunctions are to be issued only when necessary to

preserve the status quo." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310 (1977). For over 40 years since *Werner*, Wisconsin courts have considered the status quo in determining whether a party is entitled to injunctive relief. *See, e.g.*, *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 429, 293 N.W.2d 540 (1980); *Waste Mgmt., Inc. v. Wis. Solid Waste Recycling Auth.*, 84 Wis. 2d 462, 465–66, 267 N.W.2d 659 (1978); *School Dist. of Slinger v. Wis. Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370–74, 563 N.W.2d 585 (Ct. App. 1997).

In 2016, the Wisconsin Court of Appeals converted the *Werner* standard into a clear four-factor test. *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. And in July 2020, the Wisconsin Supreme Court reaffirmed it, establishing that a court may issue a temporary injunction only when the moving party demonstrates four elements: "(1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits." *Service Emps. Int'l. Union, Local 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35.

For Petitioners to ignore the status quo and list only three factors when longstanding precedent requires four is simply incorrect. Petitioners suggest that they will brief the issue of "whether there is a fourth requirement relating to the status quo" if this Court grants the Petition. (Pet. at 33 n. 13.) But there is no such issue. Just five months ago this Court made that clear. *Vos*, 393 Wis. 2d 38, ¶ 93. There is a fourth requirement relating to the status quo. Any suggestion that a temporary injunction may be granted without considering whether it is necessary to preserve the status quo misstates controlling law.

II. PETITIONERS MISSTATE SEVERAL FACTS.

In this section, Respondents explain the inaccuracies and omissions in Petitioners' factual statements. Respondents also explain the District's Guidance and the need for it. While Respondents offer their own factual allegations below as a counter to the misstatements made by Petitioners in their Petition for Review, Respondents note that neither the circuit court nor the court of appeals adopted any parties' factual allegations, including Respondents'.

Petitioners take issue with the Guidance from the Madison Metropolitan School District ("MMSD" or "the District") that allows its students who wish to express a different gender identity to discuss their wishes with teachers or staff without fear of being outed to their parents, allowing students to discuss their gender with their parents when they are ready to do so. They allege that simply by allowing a student to use a different name and pronoun, MMSD is providing medical care without parental consent. They assume that a student exploring their gender is making a major health related decision without the knowledge or consent of parents. Petitioners were not able to provide evidence to convince the circuit court or the appellate court that these allegations or assumptions were credible, which they are not.

A. Using a Different Name or Pronoun Is Not A Disease and Does Not Require a Diagnosis.

WPATH Standards of Care state, "Being Transsexual, Transgender, or Gender Non-Conforming is a Matter of Diversity, Not Pathology." (R. 7 at 11; *see also* P-App. at 249, 259, Expert Affidavit of Scott F. Leibowitz, MD ("Leibowitz Aff."), ¶¶ 11, 30.) The fact that Petitioners want to suggest that students' exploration of their gender is abnormal or a cause for parental concern does not make it so.

Petitioners assume that all individuals using different names or pronouns are both transgender and have gender dysphoria. In fact, Petitioners' argument for an injunction is largely predicated on two false assumptions: (1) that the use at school of a name and pronouns different from those associated with a student's sex assigned at birth is sufficient to diagnose the student with gender dysphoria; and (2) that allowing the student to use a different name and pronouns is "medical treatment" requiring a gender dysphoria diagnosis. These assumptions are wrong and unsupported by the facts in the record. (*See* P-App. at 249–50, 254–55, 259, Leibowitz Aff., ¶¶ 10–11, 13, 22–23, 30–32.)

Petitioners have no scientific basis for their assumption that students wishing to explore their gender identity must have gender dysphoria and that the use of a different name or pronouns equates to a gender transition. As Dr. Scott Liebowitz explained,[2] "the use of a different name or pronoun" is neither sufficient nor required for a diagnosis of gender dysphoria. (P-App. at 250–51, Leibowitz Aff., ¶ 13.) Gender dysphoria is not defined by pronoun use, but by the existence of "clinically-significant distress that results from a lack of alignment between an individual's gender identity and their assigned sex at birth." (P-App. at 249, Leibowitz Aff., ¶ 10.) And "[w]hile using a different name and/or pronoun set may be a part of social gender transition that many transgender and/or gender dysphoric youth opt to partake in, by no means does this action automatically imply that a young person is socially transitioning." (P-App. at 259, Leibowitz Aff., ¶ 32.)

A point Petitioners fail to acknowledge is that neither the circuit court nor the court of appeals adopted their version of the facts. This Court should reject Petitioners' attempt to pass off its allegations as factual findings. They have not provided this Court

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[2] Unlike Petitioners' purported expert, Dr. Leibowitz has treated over 600 families in his long-standing practice as a child and adolescent psychiatrist specializing in the diagnosis and treatment of gender dysphoria. (P-App. at 246–48, Leibowitz Aff., ¶¶ 3–5; *compare* R. 28, Expert Affidavit of Dr. Stephen B. Levine, ¶¶ 4–5.)

with any more reason to adopt those allegations—many of which defy common sense and are disputed by the only expert in this matter to specialize in treating children and adolescents. Respondents address five of those statements below.

First, Petitioners' purported expert, Dr. Stephen Levine, implies but never actually states that all transgender individuals have gender dysphoria—likely because it is untrue.

Second, Petitioners assume that using a different name or pronoun set at school involves making "important, health-related decisions." (Pet. at 39.) Neither the circuit court nor the court of appeals made such a finding. And Dr. Leibowitz states otherwise in his affidavit. (P-App. at 248–49, Leibowitz Aff., ¶ 9.) Nor is using a different name or pronoun necessarily social transition treatment. (P-App. at 259, Leibowitz Aff., ¶ 32.)

Third, Petitioners allege that a student wishing to explore their gender identity may face "lifelong consequences," that the MMSD Guidance "interferes with parents' right to choose a course of treatment that does not involve an immediate transition," and that "children questioning their gender identity often need mental health support," but neither of the lower courts have accepted these allegations as findings of fact. (Pet. at 28–30.) On the contrary, using a different name or pronoun in the school setting is not a medical issue, nor does it mean that someone needs clinical care. (P-App. at 248–49, Leibowitz Aff., ¶ 9). Moreover, a teacher's knowledge that a student prefers a different name or pronouns will not prevent Petitioners or any other parent from getting their children medical treatment, as Dr. Leibowitz explained. (*See* P-App. at 259–63, 265–66, Leibowitz Aff., ¶¶ 33, 39–41, 45, 54, 56.)

Fourth, based on Petitioners' assumption that using a different name and pronoun in school is social transition treatment, Petitioners claim that the practice is "controversial" among professionals. (Pet. at 7–8.) But, as noted above, name and pronoun usage at school is not itself social transition treatment for gender

dysphoria. (P-App. at 254–55, 259, Leibowitz Aff., ¶¶ 22–23, 32.) Whether there is a controversy about this form of medical treatment is therefore irrelevant to both issues presented by their Petition. As support for this assertion, they rely on the WPATH standards discussing social transition in early childhood (described as "long before puberty") in general, rather than name and pronoun usage at school. (Pet. at 9–10; *but see* R. 7 at 24.)

Petitioners also assume, without evidence, that pre-pubescent children in MMSD schools will realistically seek to use different names and pronouns or otherwise manifest a gender identity different than their sex assigned at birth without parental knowledge or involvement. As Dr. Liebowitz explained, it is extremely unlikely that pre-pubescent school-age children (ages 6–11) would approach their teachers about using a different name or pronoun without help and support from their parents. (P-App. at 262, Leibowitz Aff., ¶¶ 41–42.)

Fifth, Petitioners assume that affirmation of a student's gender in childhood makes it more likely that such child will be transgender or have gender dysphoria as an adult. Dr. Leibowitz debunked that assumption: "[T]here is no scientific evidence to demonstrate 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." (P-App. at 259, Leibowitz Aff., ¶ 31.)

B. MMSD Guidance Allows Children To Explore Their Gender Identity At Their Pace.

The Guidance, in place since April 2018, implements best practices for students. (*See* P-App. at 113–47.) The Guidance reflects the District's "efforts to provide safe, healthy and positive school environments for all transgender, non-binary, and gender-expansive youth." (P-App. at 115.)

The Guidance recognizes that transgender students experience statistically adverse outcomes compared to their cisgender peers.

(*See* P-App. at 118–19.) 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* P-App. at 121.)

In order to combat these adverse outcomes, the Guidance seeks to create an inclusive 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* P-App. at 122.) The Guidance aligns with federal and state laws that prohibit discrimination and bullying, as well as the District's own policies against the same. (*See* P-App. at 123–26.)

In practice, the Guidance has successfully provided for the safety and wellbeing of transgender, non-binary, and other gender-expansive students in its schools. (*See* R. 53, Affidavit of Amira Pierotti in Support of Proposed Intervening Defs.' Mot. to Intervene (hereafter "Pierotti Aff.") ¶¶ 10–15; R. 54, Affidavit of Nora Miesbauer in Support of Proposed Intervening Defs.' Mot. to Intervene (hereafter "Miesbauer Aff.") ¶¶ 8–12; R. 55, 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. (R. 53, Pierotti Aff. ¶¶ 12–15; R. 54, Miesbauer Aff. ¶¶ 10–12; R. 55, Post Aff. ¶¶ 10–12.) The relief sought by Petitioners 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. (*See* R. 53,Pierotti Aff. ¶ 16; R. 54, Miesbauer Aff. ¶ 13; R. 55, Post Aff. ¶ 13.)

C. Petitioners Offer No Evidence That They Are Harmed or Are Likely to Be Harmed By the Guidance.

The only information provided by Petitioners' affidavits submitted in support of the Complaint is how many children they have and which schools their children attend. (*See, e.g.*, R. 10, Affidavit of John Doe 1 ¶ 2; R. 12, Affidavit of John Doe 5 ¶ 2; R. 23, Affidavit of Jane Doe 8 ¶ 2.) Neither Petitioners' affidavits nor any of the pleadings filed by Petitioners say anything about who they are. Petitioners make no mention of whether their children have been diagnosed with gender dysphoria, have expressed interest in exploring their gender identity, or have spoken to any MMSD staff or teachers about their gender identity.

Petitioners have not asserted any actual harm they or their children have incurred due to the District's Guidance. In fact, counsel for Petitioners have admitted to this Court that there is nothing atypical about Petitioners or their children, apart from the fact that they object to the Guidance. (R. 42, Def. MMSD's Br. in Support of Its Mot. to Dismiss and in Opposition to Pls.' Mot. to Proceed Using Pseudonyms at 8–9.) Petitioners 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. (R. 42 at 4; American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 454 (5th ed. 2013); *see also* P-App. at 249, Leibowitz Aff., ¶ 11.)

Petitioners do not even assert that they have asked MMSD whether their children are using different names or pronouns at school, a question which the District must answer truthfully under the injunction pending appeal granted by the circuit court. These misstatements of fact fill the bulk of the Petition and cannot be accepted prior to any examination of the merits.

CONCLUSION

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

QUARLES & BRADY LLP

DATE: December 23, 2020

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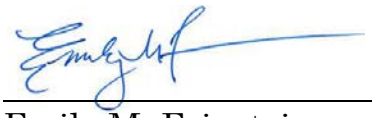
FORM AND LENGTH CERTIFICATION

I hereby certify that this Response in Opposition to Petition for Review conforms to the rules contained in s. 809.19(8)(b) and (c) for a response to petition produced with a proportional serif font. The length of the response is 6,915 words.



Emily M. Feinstein

ELECTRONIC CERTIFICATION

I hereby certify pursuant to Wis. Stat. § 809.19(12)(f) that the text of the electronic copy of this Response in Opposition to Petition for Review is identical to the text of the paper copy of the response.

Emily M. Feinstein

CERTIFICATE OF SERVICE

I certify that I caused this Response in Opposition to Petition for Review to be placed in a U.S. mailbox on **December 23, 2020**. and sent to counsel at the following addresses:

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