STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 4

B.F., T.F., P.W. and S.W.,

Plaintiffs,

v. Case No. 21-CV-1650

KETTLE MORAINE SCHOOL DISTRICT,

Defendant.

PLAINTIFFS' RESPONSE BRIEF TO DEFENDANT'S SUMMARY JUDGMENT BRIEF

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INTRODUCTION

The District does not dispute that it disregarded B.F.'s and T.F.'s decision about what was best for their daughter, and it defends the position that it may treat children as the opposite sex without parental consent, proving that this is its policy, even if unwritten. Indeed, it boldly asserts, at one point, that "the District's decision must be respected." Def. Br. 23. That the District believes this was its decision to make is exactly the problem. Parents are the primary decision-makers with respect to their own children; school staff may not assume that role for themselves. The District's arguments in defense of its actions and policy are all meritless. This Court should grant summary judgment for Plaintiffs, not the District.

ARGUMENT

I. Parents Have a Well-Established and Clearly Defined Right to Make Decisions Regarding Their Own Children.

The District's lead argument, at least according to the heading in their brief, is that Plaintiffs "have not identified a carefully defined fundamental right." Def. Br. 10–16. Yet just a couple pages into that section, the District concedes that parents do have "a fundamental right to make decisions concerning the care, custody, and control of their children." *Id*. at 12. The District argues that Plaintiffs must be more specific, because, according to the District, this articulation of the right is too "broad" and "generalized"—even though that phrasing is exactly how the United States Supreme Court and Wisconsin Supreme Court have articulated the right. *E.g.*, *Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 24, 387 Wis. 2d 1, 927 N.W.2d 486 ("a fit parent's fundamental liberty interest to make decisions regarding the care, custody, and

control of his or her child"); *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality op.) ("fundamental right to make decisions concerning the rearing of her two daughters").

In reality, it is the District that defines the right too broadly, not Plaintiffs. After accusing Plaintiffs of failing to carefully define the right, the District then pivots and devotes the rest of this section to arguing that "there is simply no fundamental right for a parent to control every aspect of a child's education at a public school or to direct how a public school teaches their child." Def. Br. 12. That is not and has never been Plaintiffs' position. In other words, despite the heading, the District's real argument is to respond to a straw man.

As Plaintiffs explain in their brief, the District's Policy violates their right to *make decisions* about their own children, and courts have repeatedly defined the right in terms of parental decision-making authority. Pls. Br. 21–26; *e.g.*, *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) ("parents [have] the primary role in decisions regarding the education and upbringing of their children"). Plaintiffs do not seek to "control every aspect of a child's education" or "direct how a public school teaches their child," but they do expect that, when there is a decision to be made about their own minor children—like whether they will be treated as the opposite sex—schools must defer to them about that decision.

None of the cases the District cites involved an infringement on parents' core decision-making role. They are almost all challenges to school curriculum, and thus have no bearing here. *Larson v. Burmaster*, for example, the only Wisconsin case they cite, involved a father's claim that his son's school violated his rights as a parent by

"assigning summer homework." 2006 WI App 142, ¶ 1, 295 Wis. 2d 333, 720 N.W. 134. The Wisconsin Court of Appeals rightfully held that there is no fundamental right to a "homework-free summer" because "[d]ecisions as to what the curriculum offers or requires are uniquely committed to the discretion of local school authorities." *Id*. ¶¶ 41–42. There is however, a "fundamental right of parents to make child rearing decisions." *A.A.L.*, 2019 WI 57, ¶ 20 (quoting *Troxel*, 530 U.S. at 72–73 (plurality op.)); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children.").

The federal cases are similar: *Leebaert* involved a challenge to a health class, 332 F.3d 134 (2d Cir. 2003); *Parker*, to certain books, 514 F.3d 87 (1st Cir. 2008); *Fields*, to a survey, 427 F.3d 1197 (9th Cir. 2005), *Brown*, to an assembly program, 68 F.3d 525 (1st Cir. 1995); and *Blau* and *Littlefield*, to school dress codes, 401 F.3d 381 (6th Cir. 2005); 268 F.3d 275 (5th Cir. 2001). None of these involved a school district making a significant and controversial health-related decision for a particular child over the parents' objection. One case the District cites even draws this distinction, emphasizing that a survey is not "of comparable gravity" to "depriv[ing] [parents] of their right to make decisions concerning their child"—exactly what is at stake here. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184–185 (3d Cir. 2005).

The few non-curriculum-related cases Defendants cite are equally irrelevant. *Barr*, the Ninth Circuit bathroom-policy case, 949 F.3d 1210 (9th Cir. 2020), involved how schools treat *other* children; here the District disregards parental decisions about *their own* children. *Thomas* (an unpublished case) involved conversations with a

school counselor that were "academic in nature." 258 Fed. Appx. at 54. These cases do not involve anything remotely comparable to facilitating what many experts view as "experimental therapies" on children. Levine Aff. ¶¶ 113–33.

As explained in Plaintiff's summary judgment brief, many experts believe that addressing a child as if he or she is the opposite sex is an "active intervention" and "a form of psychosocial treatment" that can have profound, long-term effects on the child, and may even do significant harm. Pls. Br. 7–11. Many experts also believe that children should *not* immediately transition. *Id.* None of that is in dispute here. This is exactly the kind of decision that parents have a right to make for their children. *Parham*, 442 U.S. at 603 ("Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments.").

II. "Shocking the Conscience" is Not Part of the Legal Test in This Case, But Regardless, a School District Disregarding Parents' Decision About What Is Best for Their Child *Does* Shock the Conscience.

The District argues that, to state a parents' rights claim, Plaintiffs must prove that the District's actions "shock the conscience." Def. Br. 22–27. That is not a part of the legal test in this case, but even if it were, the District's actions here *do* shock the conscience.

As a preliminary matter, the "shocks the conscience" language comes mostly from federal cases raising claims under the Fourteenth Amendment (or state cases considering § 1983 claims). This is a state case under Wisconsin's Constitution. Although, as Plaintiffs pointed out, the Wisconsin Supreme Court has generally interpreted Article 1, § 1 to cover the same rights as the Fourteenth Amendment, it

is not necessarily identical, *see A. A. L.*, 2019 WI 57, ¶¶ 60–61 and n.16 (Bradley, J., concurring), so cases from the Wisconsin Supreme Court are what matter most here, and the District has cited no case where the Court has ever applied a "shocks the conscience" test in the context of a parents' rights claim (nor have most federal cases, for that matter, as discussed below). Rather, in its most recent parents' rights case, the Court unanimously held that the test is whether the challenged government action "directly and substantially" interferes with "the fundamental right of parents to make child rearing decisions." *A. A. L.*, 2019 WI 57, ¶¶ 18, 20, 22.

Even setting that preliminary point aside, the "shocks the conscience" language found in some substantive due process cases is not an overarching requirement for any claim under the Fourteenth Amendment, but rather an alternative test when the conduct is alleged to be so arbitrary or unreasonable as to violate due process. Both the Wisconsin Supreme Court, and the United States Supreme Court, have said this: "[The Fourteenth Amendment] protects against governmental action that *either* 'shocks the conscience ... *or* interferes with rights implicit in the concept of ordered liberty.'" *Blake v. Jossart*, 2016 WI 57, ¶ 47, 370 Wis. 2d 1, 884 N.W.2d 484[1]; *United States v. Salerno*, 481 U.S. 739, 746 (1987) ("So-called 'substantive due process' prevents the government from engaging in conduct

[1] *Blake* was quoting *In re Termination of Parental Rts. to Diana P.*, 2005 WI 32, ¶ 19, 279 Wis. 2d 169, 694 N.W.2d 344, which in turn was quoting *State v. Jorgensen*, 2003 WI 105, ¶ 33, 264 Wis. 2d 157, 667 N.W.2d 318, which in turn was quoting *State v. Smart*, 2002 WI App 240, ¶ 11, 257 Wis. 2d 713, 652 N.W.2d 429, which in turn was quoting *In re Joseph E.G.*, 2001 WI App 29, ¶ 13, 240 Wis. 2d 481, 623 N.W.2d 137, which in turn was quoting *Salerno*.

that 'shocks the conscience,' or interferes with rights 'implicit in the concept of ordered liberty.'"). Indeed, the main Wisconsin case the District cites, *Black v. City of Milwaukee*, not only says this too, 2016 WI 47, ¶ 43, 369 Wis. 2d 272, 882 N.W.2d 333, but also separately analyzed each alternative, *id.* ¶¶ 44–46, 47–50 (first analyzing "whether the city's actions shock the conscience" and then separately whether they "deprived [plaintiff] of a fundamental right or liberty.").

The shocks-the-conscience test was first articulated, and is most often applied, in police brutality cases, where it is hard to define the boundaries of any fundamental right due to the variety of ways government actors can behave arbitrarily or oppressively. *Rochin v. California*, 342 U.S. 165, 169 (1952). As the United States Supreme Court later explained, the test applies to cases where the claim is that government action is so "arbitrary" or such an "abuse of power" as to "offend due process." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998) (discussing the contexts in which this standard is used).[2]

[2] The First Circuit (from which the District cites multiple cases) appears to have interpreted *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), as imposing a threshold "shocks-the-conscience" test for *all* substantive due process claims involving executive action. *See, e.g.*, *DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005). The Seventh Circuit, by contrast, has interpreted *Lewis* more narrowly. *Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) ("The circumstances in *Lewis*, a high-speed chase where government officials had to make split-second decisions, has no resemblance to the situation in this case. And the Court made clear that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims."). In any event, as explained below, the "shock-the-conscience" test has not been applied to parents' rights claims, even post-*Lewis*.

Parental rights cases, by contrast, implicate a fundamental right that has long been recognized by the Courts, Pls. Br. 19–21 and n.10—which the District does not dispute—and none of the parental rights cases from the United States Supreme Court or Wisconsin Supreme Court have ever applied a shocks-the-conscience test in this context, including the most recent ones at each court. *Troxel*, 530 U.S. 57 (2000); *A.A.L.*, 2019 WI 57. Nor have most of the federal cases in lower federal courts, even those post-*Lewis* involving executive action (*see supra* n.2). *E.g.*, *Doe v. Heck*, 327 F.3d 492, 517–26 (7th Cir. 2003); *Brokaw v. Mercer Cnty.*, 235 F.3d 1000, 1017–19 (7th Cir. 2000); *Gruenke v. Seip*, 225 F.3d 290, 303–07 (3d Cir. 2000); *see also C.N.*, 430 F.3d 159, 182–85.

Only one of the cases cited by the District involved a parental rights claim, *Siefert v. Hamilton Cnty.*, 951 F.3d 753, 765 (6th Cir. 2020), and the court there noted there was conflicting Sixth Circuit precedent about whether the "shock[s]-the-conscience" test would apply, *id.* at 765, and one judge dissented on this basis, *id.* 768–69 (Donald, J., dissenting). The rest of the cases cited by the District all involve alleged harm from police, negligence or deliberate indifference claims, or other claims of arbitrary conduct by government actors.[3]

[3] *E.g.*, *Cnty. of Sacramento v. Lewis*, 523 U.S. 833 (1998) (police chase); *Nelson v. City of Chicago*, 992 F.3d 599 (7th Cir. 2021) (police dispatcher allegedly failed to send backup); *Belcher v. Norton*, 497 F.3d 742 (7th Cir. 2007) (police seizure of car); *Christensen v. Cnty. of Boone, IL*, 483 F.3d 454 (7th Cir. 2007) (stalking and harassment by police officer); *Hunter v. Chippewa Cnty. Dep't of Hum. Servs.*, 589 F. Supp. 3d 969 (W.D. Wis. 2022) (child death in foster care setting); *Harron v. Town of Franklin*, 660 F.3d 531 (1st Cir. 2011) (denial of liquor license); *Hasenfus v. LaJeunesse*, 175 F.3d 68 (1st Cir. 1999) (failure to prevent a suicide attempt at school).

Even if "shocking the conscience" is part of the test, the District's actions and Policy here *do* shock the conscience. The District's view is that it gets to make significant and consequential health-related decisions about what is best for minor children, rather than their parents, and the District makes this argument even though the District needs parental permission to change a student's name in school records, to take medication at school, to go on field trips, or to participate in athletics, to give just a few examples. Pls. Br. 30–31.

So the District's position is that it cannot change a student's name on its official records, or give a student an aspirin if the child has a headache, or take a student to a museum, or allow the student to play on the baseball team, without parental consent, but it can change the child's name everywhere at school except on the official record, address a child as if he or she is the opposite sex and facilitate an immediate gender transition, all without parental consent. Moreover, the District asserts that position even though the activities for which it acknowledges it needs parental consent are benign, while assisting a child in a gender transition is "a form of psychosocial treatment" that can have profound, long-term effects on the child, and may even do significant harm. Pls. Br. 7–11. That position does shock the conscience.

As the Supreme Court has emphasized, the idea that government actors can override parents solely because they believe they know better is "statist" and "repugnant to American tradition," *Parham*, 442 U.S. at 603—i.e., conscience-shocking. If school districts can disregard parents' decisions about this serious issue, parents will have no other option than to withdraw their children from public school

to protect them and preserve their parental role, exactly like Plaintiffs B.F. and T.F. were forced to do.

III. None of the District's Justifications Support Usurping Parents.

The District offers various justifications for its Policy, but none are sufficient to override parents' constitutional rights.

First, the District argues that it has a "legitimate interests" in "providing a supportive environment for transgender students." Def. Br. 17–20. That is of course true at a high level, but the District does not explain how that justifies overriding parental decisions about what is best for their children. It clearly does not, under well-established precedents. *E.g.*, *A.A.L.*, 2019 WI 57, ¶ 37 ("A circuit court should not substitute its judgment for the judgment of a fit parent even if it disagrees with the parent's decision."); *Troxel*, 530 U.S. at 69 (plurality op.) ("The problem here is [ ] that the Washington Superior Court … gave no special weight at all to Granville's determination of her daughters' best interests."). There are all sorts of things schools can do to support transgender students—Plaintiffs do not dispute that—but usurping parental authority is not one of them.

The District briefly asserts that it has an "interest in protecting students," which, again, is true at a high level, but this does not support overriding parents, for multiple reasons. First, the state "has no interest in protecting children *from their parents* unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Brokaw*, 235 F.3d at 1019 (emphasis added). In other words, the District cannot *assume* that parents will do harm. Doing so directly violates the "presumption that

fit parents act in their children's best interest." *Troxel*, 530 U.S. at 58 (plurality op.); *see also Doe v. Heck*, 327 F.3d at 521 (finding a violation of parents' rights where state actors "not only failed to presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite.").

Second, the District's Policy to treat children as the opposite sex without parental consent, whether applied in every situation or ad hoc on "a case by case basis," Pls. Br. 17–18, does not provide either the process, or the high substantive threshold, that courts have held is necessary to override parents. In *A.A.L.*, the Wisconsin Supreme Court addressed the "standard of proof required for a grandparent to overcome the presumption that a fit parent's visitation decision is in the child's best interest," and held that the parents' decision may be supplanted only with "clear and convincing evidence that the [parents'] decision is not in the child's best interest." 2019 WI 57, ¶¶ 1, 37. The Court explained that this "elevated standard of proof is necessary to protect the rights of parents" and to prevent lower courts from "substitut[ing] its judgment for the judgment of a fit parent." *Id.* ¶¶ 35, 37; *see also Troxel*, 530 U.S. at 69 (plurality op.). And parents receive "notice" and a "hearing," as required by procedural due process. *See A.A.L.*, 2019 WI 57, ¶13 (quoting Wis. Stat. § 767.43(3)). The District did not, and does not claim to, provide any of this.

The District then switches gears in an attempt to show that "affirming" a child's self-assertion of an opposite-sex gender identity is the "right" decision, in every situation. Def. Br. 19. In other words, the District believes it can override parents because it would make a better decision. This argument proves the constitutional

violation. *E.g.*, *A.A.L.*, 2019 WI 57, ¶ 37 ("A circuit court should not substitute its judgment for the judgment of a fit parent even if it disagrees with the parent's decision."). School districts do not get to decide, without regard to the parents, whether social transitioning is the best choice for their minor child.

To the extent it matters (and it should not), the District's factual premises for this argument—none of which it supports with evidence, by the way—are wrong. Many experts believe that transitioning is *not* the best approach for many kids struggling with this. Pls. Br. 3–12; Levine Aff. ¶ 57; Anderson Aff. Section V. This is both undisputed and undisputable, given that there are experts in this case saying that. The District also asserts that gender identity is "immutable," "not a choice," and "established between the ages of three and four years old"—citing, not any experts or evidence, but a few judges in the Fourth Circuit. Def. Br. 19. Yet the undisputed expert affidavits in this case disprove that assertion, explaining that a child's experience of gender dysphoria or desire for a different gender identity not only can change, but *does change* for the vast majority of children who struggle with this, (citing numerous studies). Pls. Br. 6–7. Indeed, B.F.'s and T.F.'s daughter is an example. The District also asserts, citing nothing, that social transition "is not mental health treatment," but Plaintiffs submitted affidavits from two well-respected experts in the field, and quoted many more, who disagree. Pls. Br. 7–9.

Finally, the District argues that its Policy is necessary to "comply[ ] with state and federal law by not discriminating against transgender students." Def. Br. 20–22. Plaintiffs already addressed the "discrimination" red herring in their opening brief,

and will not repeat those arguments, but make a few additional points. First, the two main cases it cites, *Whitaker* and *Grimm*, involved situations where the parents were on board with a transition; neither case addressed, or even considered, whether schools can disregard the parents' decision. 858 F.3d at 1040; 972 F.3d at 600.

The District also briefly invokes a 2016 "Dear Colleague Letter" from the Department of Justice and Department of Education, as though this shows that disregarding parents is necessary to avoid a discrimination claim under Title IX. Never mind that: (1) a "Dear Colleague Letter" is not the law; (2) a federal district court in 2016 held that this very letter *violated* the law and enjoined it nationwide, *Texas v. United States*, 201 F. Supp. 3d 810, 831 (N.D. Tex. 2016); and (3) the letter was later rescinded.[4] Even putting all that aside, the letter itself does not assert, or even suggest, that a school district may ignore parents' decision about how their child should be addressed. If anything, it indicates that schools should defer to parents: "The Departments interpret Title IX to require that when a student *or the student's parent or guardian, as appropriate*, notifies the school administration that the student will assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with the student's gender identity."[5]

Likewise, the Biden Administration's more recent "notice of interpretation" is not the law, was enjoined by a federal court within a month of its issuance, *Tennessee*

[4] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf

[5] *See* page 2 of the letter at https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

v. United States Dep't of Educ., No. 3:21-CV-308, 2022 WL 2791450 (E.D. Tenn. July 15, 2022), and, in any event, does not address whether schools should defer to or disregard parents about this.

Finally, truly grasping at straws, the District vaguely references local, non-discrimination ordinances in other jurisdictions, like New York City. Def. Br. 22. What this has to do with the Wisconsin and United States Constitutions, or even Title IX, the District does not explain. Nor does it actually point to any ordinance anywhere that requires schools to disregard parents.

IV. This Court Already Rejected the District's Standing Argument; the Lack of a Written Policy Does Not Change Anything.

Finally, the District attempts to re-litigate their standing and ripeness arguments (as to Plaintiffs P.W. and S.W.) from their motion to dismiss, which this Court already rejected. Dkt. 57. The District argues that, because there is no *written* policy, this somehow changes the Court's analysis. Def. Br. 27–31. It does not.

As Plaintiffs explain in their summary judgment brief, whether written down or not, it is clearly the District's position that parental consent is not required before the District may begin treating a minor child as the opposite sex while at school. Pls. Br. 17–18. The District's discovery responses indicate as much, *id.*, and, if there were any doubt, it continues to argue to this Court that it can "allow a student to choose their name and pronouns without regard to the parent's preference." Def. Br. 7; *id.* at 17–20 (arguing that "[t]he District has many legitimate interests in honoring A.F.'s request to use a nickname and chosen pronouns."). Thus, this is the District's Policy.

Plaintiffs will not repeat all the arguments they made in their briefing on the motion to dismiss, Dkt. 37:17–22, but, to the extent this Court is inclined to reconsider standing and ripeness, will respond with a few points. As Plaintiffs explained before, Wisconsin Courts have repeatedly recognized that parties can sue preemptively for declaratory and injunctive relief to prevent a threatened violation of their rights. *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626; *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 43, 309 Wis. 2d 365, 749 N.W.2d 211; *Fabick v. Evers*, 2021 WI 28, ¶ 11 n.5, 396 Wis. 2d 231, 956 N.W.2d 856 ("a century's worth of precedent makes clear that *threatened*, as well as actual, pecuniary loss can be sufficient to confer standing."). Given that the Declaratory Judgment Act "is *primarily* anticipatory or preventative in nature," *Lister v. Bd. of Regents of Univ. of Wisconsin Sys.*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976), the Wisconsin Supreme Court has held that it "*would defeat the purpose of [that] statute*" to require those threatened by an illegal policy to wait until they are harmed by it, or even to wait until the harm is "imminent." *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 46, 244 Wis. 2d 333, 627 N.W.2d 866.

The District relies largely on federal cases, even though our Supreme Court has long recognized that standing in Wisconsin courts is a much lower bar than in federal courts. *E.g.*, *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855; *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 17–19, 402 Wis. 2d 587, 977 N.W.2d 342; *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶¶ 15–16, 403 Wis. 2d 607, 976 N.W.2d 519 (plurality op.). Even a "trifling interest" may

suffice. *McConkey*, 2010 WI 57, ¶ 15. So can an injury "which is remote in time or which will only occur as an end result of a sequence of events set in motion by the agency action challenged, [ ] be a sufficiently direct result of the agency's decision to serve as a basis for standing." *Friends of Black River Forest*, 2022 WI 52, ¶ 21.

While it is true that courts do not resolve "hypothetical" or "abstract" disputes, Def. Br. 28–29, the Wisconsin Supreme Court has repeatedly emphasized, in the same breath, that ripeness is different for declaratory judgment actions: "Courts resolve concrete cases, not abstract or hypothetical cases. *That being said*, 'the ripeness required in declaratory judgment actions is different from the ripeness required in other actions' because declaratory judgments are prospective remedies. A plaintiff need not prove an injury has already occurred." *Papa v. Wisconsin Dep't of Health Servs.*, 2020 WI 66, ¶ 30, 393 Wis. 2d 1, 946 N.W.2d 17 (citations omitted, emphasis added); *Olson*, 2008 WI 51, ¶ 43; *Putnam*, 2002 WI 108, ¶ 44; *Milwaukee Dist. Council 48*, 244 Wis. 2d 333, ¶ 41. What matters for purposes of declaratory judgment actions is whether the facts are "sufficiently developed to allow a conclusive adjudication," *id.*, rather than being "too shifting and nebulous," *see Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 697, 470 N.W.2d 290 (1991). But this does not require "all adjudicatory facts [to] be resolved." *Papa*, 2020 WI 66, ¶ 30; *Olson*, 2008 WI 51, ¶ 43; *Putnam*, 2002 WI 108, ¶ 44.

When a policy or practice is challenged, the relevant "facts" depend on the nature of that policy or practice and the claim made against it. In *Milwaukee District Council 48*, for example, a union challenged the "decision-making process in which

an employee is discharged and then denied benefits," and the Court held that "[t]he controversy [was] ripe" because the *challenged aspect* of the decision-making process was not in dispute. 2001 WI 65, ¶¶ 43–44. Similarly, in *Coyne v. Walker*, the Court held that a challenge to a statute was ripe because "[t]he germane facts, namely, the constitutional provision and the text of the statutes, are already before us." 2016 WI 38, ¶ 29, 368 Wis. 2d 444, 879 N.W.2d 520, *overruled on other grounds by Koschkee v. Taylor*, 2019 WI 76, ¶ 29, 387 Wis. 2d 552, 929 N.W.2d 600. As the Court put it in *Putnam*, "the intent, capacity, and power to perform[ ] create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen." 2002 WI 108, ¶ 46.

In the same way, there is no dispute here that the District's position is that parental consent is not required before treating a minor child as the opposite sex while at school, whereas Plaintiffs' position is that it is required. The legal question is thus quite simple: either parental consent is required, or it is not. This is a binary question; the answer is yes or no. The only "adjudicatory fact" necessary is that the District's view, as it argues for in their brief, is that it can "allow a student to choose their name and pronouns without regard to the parent's preference," Def. Br. 7.

Plaintiffs P.W.'s and S.W.'s standing and ripeness is even stronger than in many of the cases above, given the serious issues involved. As their undisputed expert affidavits explain, a child's struggle with gender identity can arise quickly and seemingly out of the blue to parents, Levine Aff. ¶ 196; Anderson Aff. ¶ 11–12, as it did for B.F.'s and T.F.'s daughter, leaving insufficient time for a court to resolve the

significant constitutional issues at stake in time to prevent harm. Indeed, when the District informed B.F. and T.F. that it would not respect their decision, they had to decide, in a day or two, whether to withdraw their daughter from school, or continue to entrust her to adults "affirming" that she was really a boy, which they believed would harm her. T.F. Aff. ¶¶ 10–14. Plaintiffs' undisputed expert evidence also establishes that many experts believe such daily "affirmation" can do substantial harm to a minor child. Pls. Br. 6–11. Thus, as long as the District's policy remains in place, there is at all times a substantial and imminent risk of harm to Plaintiffs P.W. and S.W. and their children, which is more than sufficient for standing in Wisconsin.

Not only that, the District's discovery responses also indicate that it does not even believe *notice* is required. Plaintiffs submitted undisputed expert testimony that a child's struggle with their gender identity can surface first at school, unbeknownst to parents—as it initially did with B.F.'s and T.F.'s daughter. Pls. Br. 16–17. Given that they may not even know when the harm is occurring, Plaintiffs P.W. and S.W. must sue preemptively to ensure that they are included and deferred to.

CONCLUSION

This Court should deny Defendants' motion for summary judgment and grant Plaintiffs' motion.

Dated: March 13, 2023.

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