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.

BRIEF IN SUPPORT OF SUMMARY JUDGMENT

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INTRODUCTION

The Kettle Moraine School District (the District) has an unwritten policy requiring school personnel to address and treat children as though they were of the opposite sex without parental consent and even over a parent's objection, violating parents' constitutional right to raise their children. Not only is this policy unconstitutional, but many experts believe that consistent "affirmation" by respected adults that a child is really the opposite sex can have profound long-term effects on the child and even do serious harm. And no professional organization recommends school-facilitated transitions without expert and parent involvement and buy-in. Plaintiffs B.F. and T.F. experienced this policy firsthand. They were forced to withdraw their 12-year-old daughter from the District when it refused to respect their decision about what was best for her. Plaintiffs P.W. and S.W. currently have children in the District and challenge the policy preemptively to protect their children and their parental role, should their children go through something similar.

In their answer, the District concedes that it disregarded B.F.'s and T.F.'s decision about how their daughter should be addressed at school. The District says it does not have a written policy about this—it claims to make these decisions on a case by case basis—but defends the position that it can address minor students as the opposite sex without parental consent. This position, even if unwritten, violates the rights of parents under the Constitution. School districts must defer to parents about decisions involving their own children. This Court should grant summary judgment in Plaintiffs' favor.

BACKGROUND

A. Background on Children and Adolescents Experiencing Gender Incongruence

This case concerns the respective roles of parents and schools when children experience gender incongruence—a sense of alienation from their biological sex and a desire to identify as the opposite sex. Plaintiffs submit expert affidavits from two well-respected experts, Dr. Stephen B. Levine[1] and Dr. Erica E. Anderson,[2] and summarize them here, to provide this Court with background information on this subject. This Court does not need to (nor could it, in any event) resolve any of the many ongoing debates around social transition of minors—even Dr. Levine and Dr. Anderson do not agree about everything. The important point is that the decision about whether a child or adolescent should socially transition to the opposite sex is a significant and controversial decision, with long-term implications. The sole question in this case is who makes that decision; and the clear answer is parents.

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[1] Dr. Stephen Levine is a clinical psychiatrist and professor at Case Western Reserve University who has decades of experience with gender dysphoria; Dr. Levine was the chairman of the Standards of Care Committee that developed the 5th version of the WPATH (World Professional Association for Transgender Health) guidelines; and the court-appointed expert in the first major case in the country to reach a federal court of appeals about surgery for transgender prisoners. Levine Aff. ¶¶ 1–10; *Kosilek v. Spencer*, 774 F.3d 63, 77 (1st Cir. 2014).

[2] Dr. Erica E. Anderson is a transgender clinical psychologist with over 40 years of experience. Between 2019 and 2021, Dr. Anderson served as a board member for WPATH and as the President of USPATH (the United States arm of WPATH). Since 2016, Dr. Anderson's work has focused primarily on children and adolescents dealing with gender-identity-related issues, at a U.C.S.F. clinic and a private practice. Dr. Anderson has seen hundreds of children and adolescents for gender-identity-related issues in that time, many of whom transition, with Dr. Anderson's guidance and support. Anderson Aff. ¶¶ 1–5.

The parties agreed to a schedule for expert affidavits and expert discovery, Dkts. 61, 63, and Plaintiffs sent Defendants their expert reports pursuant to that schedule. Defendants, however, did not send Plaintiffs any expert report in response, nor did they attempt to conduct any discovery of Plaintiffs' experts, and the expert discovery period has now closed. Dkt. 63. Thus, the following background information is undisputed for purposes of summary judgment. Wis. Stat. § 802.08(3); *L.L.N. v. Clauder*, 209 Wis. 2d 674, 684, 563 N.W.2d 434 (1997) ("[E]videntiary facts set forth in the affidavits or other proof are taken as true by a court if not contradicted by opposing affidavits or other proof.").

This brief uses the word "transgender" to refer to individuals who assert a "gender identity" that does not match their biological sex. Levine Aff. ¶ 18; Anderson Aff. ¶ 4. Similarly, "gender incongruence" refers to a person's experience, perception, or desire for a gender identity that differs from their biological sex. Levine Aff. ¶ 23; Anderson Aff. ¶ 9. "Gender dysphoria" refers to psychological distress frequently associated with a mismatch between a person's biological sex and his or her self-perceived or desired gender identity. Levine Aff. ¶¶ 23–27; Anderson Aff. ¶ 9. Gender dysphoria can be a serious condition that requires treatment and support from mental health professionals. Levine Aff. ¶¶ 113, 128–30, 151; Anderson Aff. ¶ 26. "Social transition"—in contrast to medical transition, which includes various medical procedures to appear more like one's asserted or desired gender—refers primarily to name-and-pronoun changes, though it can also include other social changes. Anderson Aff. ¶ 8; Levine Aff. ¶ 12.f.

The origins and causes of transgenderism, gender incongruence, and gender dysphoria are still largely unknown and debated. Levine Aff. ¶¶ 19, 33–35, 76–86, 114–16. A number of recent trends, however, strongly suggest that "social and cultural factors may play a significant role": (1) the "number of children and adolescents asserting a transgender identity has dramatically increased in recent years;" Anderson Aff. ¶¶ 13–15; Levine Aff. ¶¶ 79, 80; (2) there has been a "large change" in the sex-ratio, such that "far more" adolescent girls than boys are asserting transgender identities, Anderson Aff. ¶¶ 16–18; Levine Aff. ¶ 34, 81–82; and (3) there are increasing numbers of "detransitioners" who transitioned but later return to identifying with their biological sex, Anderson Aff. ¶¶ 45–50; Levine Aff. ¶¶ 83–85.

Given the uncertainty surrounding the underlying causes, there is significant disagreement within the mental health community over how to respond when a child or adolescent asserts a transgender identity. Levine Aff. ¶¶ 37–53; Anderson Aff. ¶ 10. Many mental health professionals believe that children experiencing gender incongruence can find comfort with their biological sex and therefore support psychotherapy to help identify and address the underlying causes of the dysphoria. Levine Aff. ¶¶ 40–46. Indeed, the "distinct trend in western Europe is to make psychotherapy, not affirmation, the first approach to Gender Dysphoria in children and adolescents." Levine Aff. ¶ 50. Others believe the best response is to immediately "affirm" a child's perceived or desired gender identity. Levine Aff. ¶¶ 47–51. In between these two approaches is a "watchful waiting" approach that allows the child's gender identity to evolve on its own without any intervention in either direction

(while possibly treating any associated psychological distress, without an emphasis on gender). Levine Aff. ¶¶ 38–39. A related approach is a careful diagnostic and evaluative process before making any changes. Anderson Aff. ¶¶ 11–27.

Unfortunately, "no approach to working with [transgender] children has been adequately, empirically validated," and the degree of scientific knowledge in this area is extremely poor. Levine Aff. ¶¶ 37, 52–53, 114–17 (quoting the American Psychological Association); Anderson Aff. ¶¶ 35–36. While various groups (like WPATH) publish recommendations and guidelines, "there is no consensus or agreed 'standard of care' concerning therapeutic approaches to child or adolescent gender dysphoria." Levine Aff. Section III; Anderson Aff. ¶ 10 (noting that WPATH's recommendations "are not universally agreed upon by professionals in the field").

That said, one fairly well-established data point is that "multiple studies from separate groups and at different times" have reported that the vast majority of children (roughly 80–90%) who experience gender incongruence ultimately find comfort with their biological sex and eventually "desist"—cease experiencing gender dysphoria or asserting or desiring a transgender identity—that is, if they do not transition. Levine Aff. ¶ 87–91. Dr. Stephen B. Levine, for example, has "seen children desist even before puberty in response to thoughtful parental interactions and a few meetings of the child with a therapist." Levine Aff. ¶ 46. So has Dr. Anderson. Anderson Aff. ¶ 20. And T.F.'s and B.F.'s daughter is a case in point. *Infra* Background Part B.

The studies showing high levels of desistence, however, were conducted before the recent trend to immediately socially transition, and some more recent studies show significantly higher persistence rates among those who have transitioned socially, suggesting that transitioning itself "radically changes outcomes, almost eliminating desistance." Levine Aff. ¶¶ 105–109; Anderson Aff. ¶¶ 28–29. In light of that, many well respected experts in the field have expressed concern that socially transitioning may *cause* children or adolescents to persist in transgender identities by reinforcing their belief that they are in the wrong body. Levine Aff. ¶¶ 105–109; Anderson Aff. ¶¶ 30–33.

Another way transitioning may affect persistence is by "erect[ing] psychosocial barriers to desistence"—in other words, it is very difficult, especially for adolescents, to admit they made a mistake. Anderson Aff. ¶¶ 38–41. As the Endocrine Society's guidelines put it, "If children have completely socially transitioned, they may have great difficulty in returning to the original gender role upon entering puberty." Levine Aff. ¶ 108.

Dr. Kenneth Zucker, for example, "a well-known researcher and long-time practitioner in this field," has written that "parents who support, implement, or encourage a gender social transition (and clinicians who recommend one) are implementing a psychosocial treatment that will increase the odds of long-term persistence."[3] *See* Anderson Aff. ¶ 31. The Endocrine Society's guidelines note that

[3] Zucker, K., *The myth of persistence: Response to "A critical commentary on follow-up studies and 'desistance' theories about transgender and gender non-conforming children" by Temple Newhook et al.*, International Journal of Transgenderism 19(2) 231–245 (2018)

social transition "contribute[s] to the likelihood of persistence," and others have found it to be "a unique predictor of persistence." Levine Aff. ¶¶ 106, 108.

The U.K.'s National Health Service is currently reconsidering its model of transgender care,[4] and the doctor in charge of the review, Dr. Hilary Cass, wrote in the interim report last February: "[I]t is important to view [social transition] as an *active intervention because it may have significant effects on the child or young person in terms of their psychological functioning*. There are different views on the benefits versus the harms of early social transition. Whatever position one takes, it is important to acknowledge that *it is not a neutral act*, and better information is needed about outcomes."[5] *See* Anderson Aff. ¶ 33. Based on Dr. Cass's report, "Britain now appears to be changing tack," moving away from the "affirmative approach" and the "hurry to affirm gender identity," instead recognizing that "gender incongruence ... may be a transient phase" for young people, as it was for B.F.'s and T.F.'s daughter.[6]

Dr. Anderson "share[s] the concerns of these researchers and writers that transitioning may affect the likelihood of persistence, especially transitions without a careful assessment by a mental health professional prior to transitioning."

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[4] *See Independent review into gender identity services for children and young people*, NHS England, https://www.england.nhs.uk/commissioning/spec-services/npc-crg/gender-dysphoria-clinical-programme/gender-dysphoria/independent-review-into-gender-identity-services-for-children-and-young-people/.

[5] Cass, H., *Independent review of gender identity services for children and young people: Interim report* (February 2022), https://cass.independent-review.uk/publications/interim-report/.

[6] *Britain changes tack in its treatment of trans-identifying children*, The Economist (Nov. 17, 2022), https://www.economist.com/britain/2022/11/17/britain-changes-tack-in-its-treatment-of-trans-identifying-children.

Anderson Aff. ¶ 34. Likewise, Dr. Levine "agree[s] with Dr. Ken Zucker" (and others) that "social transition in children must be considered 'a form of psychosocial treatment'" that "radically changes outcomes." Levine Aff. ¶ 108, Section V.B.

Even the World Professional Association for Transgender Health ("WPATH")—which falls into the "affirming" camp, *see* Levine Aff. ¶¶ 58, 60 n.4—has acknowledged that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views," that "[f]amilies vary in the extent to which they allow their young children to make a social transition to another gender role," and that there is insufficient evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." World Professional Association for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (SOC7) at 17 (Version 7, 2012), https://www.wpath.org/publications/soc.[7] WPATH encourages health professionals to *defer to parents* "as they work through the options and implications," even "[i]f parents do not allow their young child to make a gender-role transition." *Id*.

There are many long-term (potentially lifelong) consequences if a child's gender incongruence persists as a result of transitioning and adults "affirming" that the child really is the opposite sex. First, and most obvious, is the inherent difficulty living an identity at odds with one's body, which is often associated with psychological

[7] Version 7 of WPATH's "Standards of Care" document was released in 2012 and was the latest version until just last fall. It remains to be seen how its latest version "will be received in the wider mental health community," Anderson Aff. ¶ 10, though aspects of it have "already stirred considerable controversy," Levine Aff. ¶ 69 n.7.

distress. Levine Aff. ¶¶ 143–53; Anderson Aff. ¶ 26. Socially transitioning also sets a child or adolescent on a "conveyor belt" path that "almost inevitably" leads to medical interventions later in life (puberty blockers, cross-sex hormones, various surgeries), Levine Aff. ¶¶ 109–12, 123, 156, 202, many of which have profound and irreversible consequences, Levine Aff. ¶¶ 157–77. *See* Anderson Aff. ¶¶ 51–53.

There is also the risk that the child or adolescent will later "regret gender-affirming decisions made during adolescence" and later "detransition," which many find to be a "difficult[ ]" and "isolating experience."[8] Anderson Aff. ¶¶ 45–50; Levine Aff. ¶ 101. In one recent survey of 237 detransitioners (over 90% of which were natal females), 70% said they realized their "gender dysphoria was related to other issues," half reported that transitioning did not help, and 60% acknowledged "feelings of regret." Anderson Aff. ¶ 47. One poignant example is Chloe Cole, who recently shared her personal experience on Fox News.[9]

Additional risks to a social transition include isolation from peers, fewer potential romantic partners, and other social risks. Levine Aff. ¶¶ 178–82.

In light of these realities—that gender incongruence can be temporary for many young people, that transitioning might contribute to persistence, that there are long-term risks and a potential for regret, and that so much is still unknown—experts

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[8] *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, WPATH, 23 International J. Trans. Health 2022 S1–S258, at S47 (2022), *available at* https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644

[9] Carnahan, Ashley, *Detransitioned teen wants to hold 'gender-affirming' surgeons accountable: 'What happened to me is horrible'*, Fox News (Nov. 11, 2022), https://www.foxnews.com/media/detransitioned-teen-hold-gender-affirming-surgeons-accountable.

recommend a thorough, professional evaluation before undergoing any type of transition, including a social transition. Anderson Aff. ¶¶ 21–27; Levine Aff. ¶¶ 185–97. Professional involvement is important not only for accurate diagnosis, but also to evaluate the child or adolescent for dysphoria or co-morbidities and to provide ongoing psychological support. Anderson Aff. ¶¶ 25–27; Levine Aff. ¶¶ 195.

Notably, no professional organization recommends facilitating the social transition of a minor, solely upon the minor's request, without a careful professional evaluation. Anderson Aff. ¶¶ 54–57; Levine Aff. ¶ 185–187, 200. And no organization recommends that school staff begin treating or addressing a child as the opposite sex, while they are at school, without parental consent and buy-in. Anderson Aff. ¶ 77; Levine Aff. ¶ 200. School staff do not generally have the training and experience, much less the "moral [or] legal authority," to make these decisions, Levine Aff. ¶¶ 203, 205–06, 208. And children and adolescents are not cognitively and emotionally mature enough to weigh the long-term risks and benefits and make this decision on their own. Levine Aff. ¶ 204; Anderson Aff. ¶ 59.

Living a "double life"—one gender role at home and another at school—is also "inherently psychologically unhealthy." Levine Aff. ¶¶ 200–201. And it "drive[s] a wedge between the parent and child," "undermin[ing] the main support structure for a child or adolescent who desperately needs support." Anderson Aff. ¶¶ 74–76.

Parents must be involved for "accurate and thorough diagnosis" of the underlying causes of the child's or adolescent's feelings or desire for a transgender identity, Levine Aff. ¶¶ 188–94; Anderson Aff. ¶¶ 62–67, for effective treatment of

any dysphoria or co-existing conditions, Levine Aff. ¶¶ 195–201; Anderson Aff. ¶¶ 68–70, and, ultimately, to decide whether a social transition is in their child's best interests, Levine Aff. ¶¶ 203–204; Anderson Aff. ¶¶ 71–73. A school-facilitated transition, without parental knowledge or consent, interferes with parents' ability to take a more cautious approach and say "no" to an immediate transition. Anderson Aff. ¶¶ 71–73; Levine Aff. ¶¶ 200–01.

B. The District Concedes That It Disregarded B.F.'s and T.F.'s Decision About What Was Best for Their Daughter

In December 2020, B.F.'s and T.F.'s then 12-year-old daughter began to experience significant anxiety and depression, and also began questioning her gender. T.F. Aff. ¶ 2. Their daughter first expressed her belief that she was transgender to school staff. *Id*. When she told her parents, it came as a significant surprise to them; she had not shown any prior indications of wanting to be a boy. T.F. Aff. ¶ 3. B.F. and T.F. temporarily withdrew her from the Kettle Moraine Middle School to allow her to attend a mental health center where she could process what she was feeling. T.F. Aff. ¶ 4. But instead of helping her work through her questions about her gender, the center quickly "affirmed" that she was really a transgender boy and encouraged her to transition to a male identity. T.F. Aff. ¶ 5.

Later in December, B.F.'s and T.F.'s daughter expressed to her parents and school staff that she wanted to adopt a new male name and use male pronouns when she returned to school. T.F. Aff. ¶ 6. B.F. and T.F. initially agreed to allow their daughter to change her name and pronouns at school, but told her and school staff that they would research the issue and let them know their final decision before their

daughter returned to school. T.F. Aff. ¶ 7. After researching the issue, however, they decided that immediately transitioning would not be in their daughter's best interest, based on their knowledge of her and their research into this issue. T.F. Aff. ¶ 8. They wanted their daughter to take time to explore the cause of her feelings before allowing such a significant change to her identity. T.F. Aff. ¶ 9.

On January 18, two days before their daughter was going to return to school, T.F. emailed the school's guidance counselor, Christina Cowen, indicating that she and her husband B.F. had made a decision regarding their daughter's name and pronouns at school when she returned, and she followed up with a phone call the following morning. T.F. Aff. ¶ 10; Answer ¶ 33.

In the afternoon of January 19, principal Michael Comiskey and Christina Cowen called T.F. T.F. Aff. ¶ 11; Answer ¶ 34. During that phone call, T.F. told them that she and B.F. wanted teachers and staff to refer to their daughter using her legal name and female pronouns when she returned to school. T.F. Aff. ¶ 11; Answer ¶ 34. Principal Comiskey said they would have to check with District administration about how the District would handle this situation, and asked B.F. and T.F. to wait an extra day before sending her back to school. T.F. Aff. ¶ 12; Answer ¶ 34.

The District concedes that, on January 20, principal Comiskey called T.F. to inform her that the Kettle Moraine School District would not follow B.F.'s and T.F.'s decision, but instead, when their daughter returned to school, school staff would refer to her using whatever name and pronouns she wanted while at school, even over her parents' objection. T.F. Aff. ¶ 13; Answer ¶ 35.

In light of this policy, and to avoid consistent affirmation of this new male identity by teachers and staff, B.F. and T.F. felt they had no choice but to immediately withdraw their daughter from the Kettle Moraine Middle School, and they started looking for another school that would respect their decision as parents. T.F. Aff. ¶ 14–15. B.F. and T.F. also cut ties with the mental health center and began searching for therapists who would not rush to "affirm" an alternate gender identity, but would help their daughter process her feelings. T.F. Aff. ¶ 16.

For the next few weeks, B.F.'s and T.F.'s daughter remained at home and did not attend any school. T.F. Aff. ¶ 17. During that time, her demeanor quickly began to change, and about two weeks later, she changed her mind about wanting to transition to a male identity, deciding instead that she wanted to continue using her birth name and female pronouns. T.F. Aff. ¶ 18. She expressed to her mother that "affirmative care really messed me up," explaining that the rush to "affirm" that she was really a boy added to her confusion and fueled anger towards her mother, but after taking more time to process her feelings, she realized her mother had been right to slow down the decision to transition. T.F. Aff. ¶ 19.

Given what had happened, B.F. and T.F. decided to enroll their daughter in a different public school district, rather than send her back to Kettle Moraine Middle School. T.F. Aff. ¶ 20; Answer ¶ 41. But for this significant breach of trust by the District and the District's refusal to honor, or even acknowledge, their parental rights, B.F. and T.F. would have continued sending their daughter to the Kettle Moraine School District. T.F. Aff. ¶ 20.

Staff at the new school district told B.F. and T.F. that they also have the same policy as the Kettle Moraine School District, and would follow the same approach if their daughter ever wanted to transition at school again. T.F. Aff. ¶ 21. The refusal of the District to honor B.F.'s and T.F.'s parental rights, and the trend of other public school districts to do the same thing, would deny B.F. and T.F. and their daughter the right to a free and appropriate public education which is supposed to be available to every family in Wisconsin. Wis. Const. Art. X, § 3. Further, B.F. and T.F. are concerned that, without a judicial decision establishing their constitutional rights as parents, they may be forced to go through this whole experience again. T.F. Aff. ¶ 22.

C. Plaintiffs P.W. and S.W. Are Subject to the Policy

Plaintiffs P.W. and S.W. have two children currently enrolled in the District. S.W. Aff. ¶ 2. As parents of children in the District, P.W. and S.W. and their children are subject to the District's unconstitutional Policy. S.W. Aff. ¶ 2. They are concerned that, if their children ever go through something similar to what B.F's and T.F.'s daughter went through, the District will exclude them from the decision about how their children are addressed at school. S.W. Aff. ¶ 3. P.W. and S.W. do not know what the future holds for their children and whether (or when) their children might begin to struggle with their gender identity. S.W. Aff. ¶ 4. As Plaintiffs' experts explain, and as B.F.'s and T.F.'s daughter's experience illustrates, a child's struggle with gender identity can arise quickly and seemingly "out of the blue" and as a "significant surprise" to parents. Levine Aff. ¶ 196; Anderson Aff. ¶ 11–12.

Moreover, given that the District claims not to have any written policy about this, but makes these decisions on an ad hoc basis, *see infra* Background Part D, and

given that the District does not believe it needs parental consent before addressing a minor student as the opposite sex, Plaintiffs S.W. and P.W. are rightfully concerned that the District will not even *notify* them if one of their children begins to wrestle with gender identity and asks to use a different name and pronouns. S.W. Aff. ¶ 3. Plaintiffs asked in discovery, "If a minor student requests to use a different name and pronouns at school, state whether the School District will notify the student's parents before referring to that student by a new name and pronouns." Berg. Aff. Ex. 1 at 4. The District responded that it "makes decisions based on unique circumstances of each students," *id.*—indicating that it believes *notice* to parents is not even required. As Plaintiffs' experts explain, this issue sometimes surfaces first at school, without parents' awareness. Levine Aff. ¶ 196; Anderson Aff. ¶ 11–12.

Indeed, that is exactly what occurred with B.F.'s and T.F.'s daughter—she first expressed her belief that she was transgender to staff at school. T.F. Aff. ¶ 2; Berg Aff. Ex. 2. Fortunately, T.F.'s daughter realized it would be inappropriate to change her name and pronouns at school without her parents' awareness, Berg Aff. Ex. 2, so she told her mom, which came as a complete surprise to her. T.F. Aff. ¶ 3.

For these reasons, Plaintiffs S.W. and P.W. seek a declaration and injunction now to ensure that the Kettle Moraine School District will respect their role as parents and obtain their consent before treating a child of theirs as the opposite sex while at school. S.W. Aff. ¶ 6.

D. The District's Unwritten Policy

Although the District admits the facts surrounding B.F.'s and T.F.'s daughter, including that the District disregarded their decision about what was best for her,

Answer ¶ 35, the District claims not to have a written policy about this. Answer ¶ 34; Berg Aff. Ex. 1. at 3. Instead, the District says it "relied upon the advice of its counsel as well as policy directives and 'Dear Colleague Letters' from the United States DOE/DOJ," and also on its "understanding of relevant case law and Title IX's non-discrimination requirements." Berg Aff. Ex. 1 at 2, 3. The District asserts that these various things "*required it* to allow a gender dysphoric student to use a preferred nickname and pronouns just like it allows all other students to use a preferred nickname and pronouns." Berg Aff. Ex. 1 at 3. As far as Plaintiffs are aware, there is no case law, Title IX requirement, or "Dear Colleague" letter that requires school districts to treat children as the opposite sex at school, solely upon their request, without parental consent (and the District produced no such document in discovery). Regardless of what the District relied on, parents' constitutional right to raise their children takes precedence.

In conflict with its suggestion that this is "required," the District also stated in discovery that it makes these decisions "on a case by case basis." Berg Aff. Ex. 1 at 4. It does not matter whether the District believes disregarding parents' decision about how their child is addressed is "required" or permitted. The District may not, consistent with parents' constitutional rights, ignore parental decision-making on this issue, either in every case or on a case-by-case basis. Given parents' constitutionally protected decision-making authority over their minor children, school staff *cannot* begin treating minor children as if they are the opposite sex, while they are at school, without first obtaining parental consent.

Whether the District believes that using different names and pronouns for students, solely upon their request and without parental consent, is either "required" or permitted in some circumstances, it is clearly the District's policy, even if unwritten, that parental consent *is not* necessary. Again, the District concedes that it disregarded B.F.'s and T.F.'s decision about this serious issue, Answer ¶ 35, and it defends that decision, rather than admitting it was wrong and changing its policy to *always* require parental consent. Thus, this *is* the District's policy, even if unwritten. For shorthand, this brief uses the phrase "the District's Policy" to refer to the District's view that it *can* address minor students by an opposite-sex name and pronouns, upon request, without parental consent.

ARGUMENT

"Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Papa v. Wisconsin Dep't of Health Servs.*, 2020 WI 66, ¶ 17, 393 Wis. 2d 1, 946 N.W.2d 17; Wis. Stat. § 802.08. Here, the material facts are undisputed: (1) the District refused to honor B.F.'s and T.F.'s parental decision-making regarding their daughter, Answer ¶ 35; and (2) the District admits that its policy is for the District itself to decide whether to defer to parents about how their child will be addressed at school. As shown below, these facts (along with the background facts set forth above), are sufficient to warrant summary judgment in Plaintiffs' favor.

I. Schools Must Defer to Parents About Whether Staff Treat Their Child as the Opposite Sex While at School

Article 1, Section 1 of the Wisconsin Constitution provides that "[a]ll people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness." The Wisconsin Supreme Court has long interpreted Article 1, Section 1 as providing "the same equal protection and due process rights afforded by the Fourteenth Amendment to the United States Constitution." *E.g.*, *Mayo v. Wisconsin Injured Patients & Families Comp. Fund*, 2018 WI 78, ¶ 35, 383 Wis. 2d 1, 914 N.W.2d 678.

A long line of cases from both the Wisconsin Supreme Court and the United States Supreme Court establishes that parents have a constitutional right under both Article 1, Section 1 and the Fourteenth Amendment "to direct the upbringing and education of [their] children." *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925)); *Barstad v. Frazier*, 118 Wis. 2d 549, 567, 348 N.W.2d 479 (1984); *In Interest of D.L.S.*, 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality op.). This is "perhaps the oldest of the fundamental liberty interests recognized by" the courts, *Troxel*, 530 U.S. at 65 (plurality op.), and is "established beyond debate as an enduring American tradition," *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972). Indeed, it is a "basic civil right[ ] of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), "far more precious … than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953).

Likewise, "Wisconsin has traditionally accorded parents the primary role in decisions regarding the education and upbringing of their children," and "has embraced this principle for nearly a century" (as of 1998). *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) (citing *Wis. Indus. Sch. for Girls*, 79 N.W. at 428 (recognizing the "right delegated to parents as the natural guardians of their children")); *see also McGoon v. Irvin*, 1 Pin. 526, 1845 WL 1321, at *4 (Wis. Terr. July 1845) ("By every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children, who are of tender years and helpless."). "That the state must not unnecessarily intrude into the family life has long been recognized." *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 43, 426 N.W.2d 329 (1988).

The Wisconsin Supreme Court recently unanimously reaffirmed parents' rights, holding that any government action that "directly and substantially implicates a fit parent's fundamental liberty interest in the care and upbringing of his or her child" is "subject to strict scrutiny review." *A. A. L.*, 2019 WI 57, ¶ 22. [10]

[10] Although the protection of parental rights under both the Wisconsin and Federal Constitutions has long been settled, as an original matter, Article 1, Section 1 provides an *even stronger* basis for the protection of parental rights than the Fourteenth Amendment. *See A.A.L.*, 2019 WI 57, ¶ 60–61 and n. 16 (Justice R.G. Bradley, concurring, joined by Justice Kelly). Unlike the Fourteenth Amendment, the text of Article 1, Section 1 of the Wisconsin Constitution, since it was adopted in 1848, has provided that Wisconsin citizens "have certain inherent rights." One of those "inherent rights" is parents' authority over their children.

In 1836, the Wisconsin Territory adopted Michigan law, including "all the rights, privileges and immunities heretofore granted and secured to the territory of Michigan." *See* Organic Act of 1836 (Oct. 25, 1836), Section 12. By that time, Michigan had already implicitly recognized the natural, inherent rights of parents over their own children. *See* Laws of the Territory Michigan (1833, printed by Sheldon M'Knight) at 305 (Act of June 26, 1832)

A. Parental Rights Include Decision-Making Authority

This line of cases establishes four important principles with respect to parents' rights. *First,* parents are the primary decision-makers with respect to their minor children—not their school, or the children themselves. *Parham v. J. R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Jackson*, 218 Wis. 2d at 879 ("[P]arents [have] the primary role in decisions regarding the education and upbringing of their children."); *Yoder*,

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(allowing courts to appoint a guardian over minor children "to perform the duties of a parent," but only if the parents were "unfit" by reason of "insanity" or "excessive drinking"); *id*. at 330 (Act of April 23, 1833) (requiring the "consent of [a] parent or guardian" for marriage under 18). That inherent right had also been universally recognized in the common law. *People ex rel. Nickerson v.* _____, 19 Wend. 16, 1837 WL 2850 (N.Y. Sup. Ct. 1837) ("The father is the natural guardian of his infant children, and in the absence of good and sufficient reasons shown to the court, such as ill usage, grossly immoral principles or habits, want of ability, &c., is entitled to their custody, care, and education. *All the authorities concur on this point*.") (emphasis added) (listing cases). The Supreme Court of the Territory of Wisconsin had also recognized parents' inherent duty to their children, which is based on their natural guardianship. *See McGoon v. Irvin*, 1 Pin. 526, 1845 WL 1321, at *4 (Wis. Terr. July 1845) ("By every principle of law upon the subject, recognized and strengthened by our statute, parents are under legal obligation to maintain and support their children, who are of tender years and helpless."). In 1849, shortly after statehood, the Wisconsin Legislature codified and recognized parents' inherent rights in Wisconsin's guardianship statute, providing that "The father of the minor, if living, and in case of his decease, the mother, while she remains unmarried, being themselves respectively competent to transact their own business, and not otherwise unsuitable, shall be entitled to the custody of the person of the minor, and to the care of his education." Wis. Rev. Stat. (1849), Title XXI, Ch. 80, § 5, p. 399.

In 1955, the Wisconsin Legislative Council produced a "Child Welfare Research Report" that included an historical overview of the parent-child relationship, explaining that "[this] relationship is recognized in the law as a status … [and] the rights of the parents are summed up in their right as *natural* guardians of their child." Wisconsin Legislative Council, Research Report on Child Welfare, Vol. 5, Part 2, Wis. Leg. Council Reports, at p. 17 (August, 1955). The report explained that "the most complete rights are those belonging to the parent of the child," and that parents' "natural guardianship" (i.e. inherent) rights include "not only the right to custody, *i.e.*, to the everyday care, education, and discipline of the child, but also *the right to make major decisions* such as consenting to adoption of the child, to marriage, to major surgery." *Id*. pp. 18–19.

406 U.S. at 232. Parental decision-making authority rests on two core presumptions: "that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602, and that parents are "in the best position and under the strongest obligations to give [their] children proper nurture, education, and training" because parents "hav[e] the most effective motives and inclinations" towards their children, *Jackson*, 218 Wis. 2d at 879 (citations omitted); *Parham*, 442 U.S. at 602. As any parent knows, parenting sometimes requires saying "no" to protect a child's best interests.

Second, parental rights reach their peak, and thus receive the greatest constitutional protection, on "matters of the greatest importance." *See C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005) (calling this "the heart of parental decision-making authority"); *Yoder*, 406 U.S. at 233–34. One such area traditionally reserved for parents is medical care, as the United States Supreme Court recognized long ago: "Most children, even in adolescence, simply are not able to make sound judgments concerning many decisions, including their need for medical care or treatment. Parents can and must make those judgments." *Parham*, 442 U.S. at 603. Indeed, the "general rule" in Wisconsin "requir[es] parents to give consent to medical treatment for their children." *See In re Sheila W.*, 2013 WI 63, ¶¶16–24, 348 Wis. 2d 674, 835 N.W.2d 148 (Prosser, J., concurring). Another category of decision at "the heart of parental decision-making authority" are those "rais[ing] profound moral and religious concerns." *Bellotti v. Baird*, 443 U.S. 622, 640 (1979); *C.N.*, 430 F.3d at 184.

Third, a child's disagreement with a parent's decision "does not diminish the parents' authority to decide what is best for the child." *Parham*, 442 U.S. at 603–04. *Parham* illustrates how far this principle goes. That case involved a Georgia statute that allowed parents to voluntarily commit their minor children to a mental hospital (subject to review by medical professionals). *Id.* at 591–92. A committed minor argued that the statute violated his due process rights by failing to provide him with an adversarial hearing, instead giving his parents substantial authority over the commitment decision. *Id.* at 587. The Court rejected the minor's argument, confirming that parents "retain a substantial, if not the dominant, role in the [commitment] decision" because "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Id.* at 602–04. Thus, "[t]he fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority." *Id.*

Fourth, the fact that "the decision of a parent is not agreeable to a child or … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Parham,* 442 U.S. at 603. Likewise, the unfortunate reality that some parents "act[ ] against the interests of their children" does not justify "discard[ing] wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602–03. The "notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children" is "statist" and "repugnant

to American tradition." *Id.* at 603 (emphasis in original). Thus, as long as a parent is fit, "there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel*, 530 U.S. at 68–69 (plurality op.).

In accordance with these principles, courts have recognized that a school violates parents' constitutional rights if it usurps their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), for example, a high school swim coach suspected that a team member was pregnant, and, rather than notifying her parents, discussed the matter with others, eventually pressuring her into taking a pregnancy test. *Id.* at 295–97, 306. The mother sued the coach for a violation of parental rights, arguing that the coach's "failure to notify her" "obstruct[ed] the parental right to choose the proper method of resolution." *Id.* at 306. The court found the mother had "sufficiently alleged a constitutional violation" and condemned the "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Id.* at 306–07.

Three Justices of the Wisconsin Supreme Court, in a case similar to this one against the Madison School District, recently recognized that "allowing a school to reassign a child's gender" "without parental consent," violates parents' constitutional rights. *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶¶ 77–95, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting). "[S]ocial transitioning is a healthcare

choice for parents to make," and putting a school district "in charge of enabling healthcare choices without parental consent," especially on such a "fundamental decision," deprives parents of their constitutionally protected "decision-making [authority] for their children." *Id.* ¶¶ 89, 92, 94. Although this was a dissent, the four Justices in the majority did not comment one way or the other on the merits, but instead remanded to the trial court solely for procedural reasons. *Id.* ¶¶ 30–40. Thus, the dissenting Justices' opinion may eventually become the majority when the case returns, and in the meantime, their opinion is highly persuasive.

A federal district court also recently recognized that a similar policy likely violates parents' constitutional rights and granted a preliminary injunction to allow a teacher to communicate openly with parents. *Ricard v. USD 475 Geary Cnty., KS Sch. Bd.*, No. 5:22-CV-4015, 2022 WL 1471372, at *8 (D. Kan. May 9, 2022). The Court found that parents' right to "raise their children as they see fit" necessarily "includes the right of a parent to have an opinion and to have a say in what a minor child is called and by what pronouns they are referred." *Id.* The Court added, "[i]t is difficult to envision why a school would even claim—much less how a school could establish—a generalized interest in withholding or concealing from the parents of minor children, information fundamental to a child's identity, personhood, and mental and emotional well-being such as their preferred name and pronouns." *Id.*

Yet another federal court recently denied a motion to dismiss a parents' rights claim against a teacher that repeatedly taught her first grade students about her views of gender and gender identity and "encouraged their children 'not to tell their

parents about her instruction.'" *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185, at *3 (W.D. Pa. Oct. 27, 2022). The court recognized that the parents pled a sufficient parents' rights claim, because "[t]eaching a child how to determine one's gender identity at least plausibly is a matter of great importance that goes to the heart of parenting," *id.* at *17, and a school must at least provide "realistic notice and the practical ability for parents to shield their young children from sensitive topics the parents believe to be inappropriate," *id.* at * 20. While the Plaintiffs in this case do not challenge the District's curriculum or teaching around gender identity, the violation here is much more egregious than in *Tatel*—here the District will begin addressing a child as the opposite sex while at school without parental consent and even over their objection.

B. The Policy Violates Parents' Rights in Multiple Ways

The District's Policy violates parents' constitutional rights by taking a major, controversial, psychologically impactful, and potentially life-altering decision, *supra* Background Part A, out of parents' hands and placing it with educators—who generally have no expertise whatsoever in diagnosing and treating gender dysphoria, Levine Aff. ¶¶ 203, 205—and with young children—who lack the "maturity, experience, and capacity for judgment required for making life's difficult decisions," *Parham*, 442 U.S. at 602. The District is effectively making a treatment decision without legal authority and without informed consent from the parents. *See Sheila W.*, 2013 WI 63, ¶¶16–24 (Prosser, J., concurring); Levine Aff. ¶¶ 108, 202–08 (discussing informed consent); Anderson Aff. ¶¶ 58–61, 68–70.

As surveyed above, many experts have emphasized that social transition is an "active intervention" and "a form of psychosocial treatment." Levine Aff. ¶ 108; Anderson Aff. ¶ 33. Even WPATH has acknowledged that "[s]ocial transitions in early childhood" are "controversial" and that "health professionals" have "divergent views," that the "long-term outcomes" are unknown, and recommends deferring to parents about whether to "allow their young children to make a social transition to another gender role." *Supra* p. 9. A school-facilitated social transition "necessarily interferes with the parents' ability to take a cautious approach and pursue an evaluation and assessment," and interferes with parents' "ability to say 'no' to a social transition" or "pursue a treatment approach that does not involve an immediate transition." Anderson Aff. ¶¶ 71–73; Levine Aff. ¶¶ 198–208.

Notably, no professional association endorses school officials facilitating childhood social transitions without parental involvement or a careful assessment by a medical professional. Nor does any suggest that transitioning is right for *every* minor or adolescent who might request it or advocates that schools should disregard parents' decision about what is best for their child. Anderson Aff. ¶¶ 54–57, 77; Levine Aff. ¶¶ 185–87, 200.

Parents also must be involved because each child is different and must be considered individually. As Dr. Levine explains, "[t]here is no single pathway to the development of a trans identity and no reasonably uniform short- or long-term outcome," so it is "not responsible to make a single, categorical statement about the proper treatment." Levine Aff. ¶ 57. And, for a variety of reasons, "social transition is

not always the best option for a child or adolescent." Anderson Aff. Section V. B.F.'s and T.F.'s daughter's experience illustrates the point—she realized, after just a few weeks of being removed from an "affirming" environment, that her mother was right to take a more cautious approach to transition. T.F. Aff. ¶¶ 14–19.

Parents also must be involved for "accurate and thorough diagnosis," Levine Aff. ¶¶ 188–94; Anderson Aff. ¶¶ 62–67, and for "effective psychotherapeutic treatment and support," Levine Aff. ¶¶ 195–201; Anderson Aff. ¶¶ 68–70.

To reiterate, this Court does not need to (and cannot, in any event) resolve the debates in this area. The important point is that, when a child begins to wrestle with his or her gender identity, there is a critical fork in road: Should the child be immediately encouraged down the path of transition? Or could therapy help the child identify the source of the dysphoria and learn to embrace his or her biological sex? The fact that there is a debate and competing alternatives only reinforces why parents must be involved. No one else can provide the child with the professional help the child may need and no one else has the authority under the law to make such a decision on behalf of the child.

The District's Policy to address minor students by opposite-sex names and pronouns, upon request, without parental consent, also directly interferes with the parent-child relationship, "driv[ing] a wedge between the parent and child." Anderson Aff. ¶ 74. "A school-facilitated transition over the objection of parents (or possibly worse, without their knowledge) necessarily creates tension in the parent-child relationship," and "undermines the main support structure for a child or adolescent

who desperately needs support." Anderson Aff. ¶¶ 74, 76. Facilitating a "double life" at school is also "inherently psychologically unhealthy," portraying the child's parents "as 'the enemy' and increas[ing] the anxiety load of the child." Levine Aff. ¶¶ 200–01.

Finally, to the extent that the District will not even *notify* parents before addressing their child as the opposite sex while at school, *supra* p. 16, the District's Policy further violates parents' rights by effectively substituting District staff for parents as the primary source of input for children navigating difficult waters. Parents' rights "presumptively include[ ] counseling [their children] on important decisions." *See H.L. v. Matheson*, 450 U.S. 398, 410 (1981). Parents cannot guide their children through difficult decisions without knowing what their children are facing. That is why state and federal law give parents access to their children's education records. Wis. Stat. § 118.125(2)(a), (b); 20 U.S.C. § 1232g(a)(1)(A).

And the District disregards parents without any finding of parental unfitness—a well-established process in Wisconsin, with statutory clarity, transparency, and procedural safeguards. *E.g.*, Wis. Stat. §§ 48.981(3)(c); 48.13; 48.27; 48.30.

Because the Policy "directly and substantially" interferes with parents' decision-making authority and the parent-child relationship, it is subject to strict scrutiny. *A.A.L.*, 2019 WI 57, ¶¶ 18–22.

C. The District's Policy Fails Strict Scrutiny.

There is no compelling justification for disregarding parents' decision about what is best for their child in this significant and controversial area.

The main justification suggested by the District thus far is that allowing students to change their gender identity at school, without parental consent, is necessary to avoid a claim of "discrimination" against the District. *See supra* p. 17. But, as noted above, Plaintiffs know of no statute, case, rule, or even guidance that would require school districts to disregard parents' decisions, or *even suggesting* that it would be "discriminatory" to obtain parental consent before treating a child as the opposite sex while at school.

Indeed, the idea that obtaining parental consent is somehow "discriminatory" does not even make sense. Plaintiffs are not asking for some students to be treated differently than others—the claim is that all minor students must obtain parent permission before school staff treat them as the opposite sex while they are at school, just as they need parent permission to change their names in school records,[11] to take medication at school,[12] to go on field trips,[13] or to participate in athletics,[14] to give

[11] FERPA regulations require parental consent to change records. *See* 34 CFR §§ 99.20(a); 99.3 (defining "eligible student" as one who has "reached 18 years of age"); Board Policy 2310(E), http://go.boarddocs.com/wi/kmsd/Board.nsf/goto?open&id=853KXS099F4A

[12] Board Policy 2101 ("Written parental consent must be obtained prior to any medication, prescription or non-prescription, being administered to student by school personnel."), http://go.boarddocs.com/wi/kmsd/Board.nsf/goto?open&id=853KXL099EE3; Parent/Guardian Health Procedure Consent Form, https://go.boarddocs.com/wi/kmsd/Board.nsf/legacy-content/853KV90999E6/$FILE/Health%20Procedure%20Consent%20Form.pdf

[13] Board Policy 3308 ("Written parental permission for each participating student shall be required for each field trip"), http://go.boarddocs.com/wi/kmsd/Board.nsf/goto?open&id=853KZ309A215

[14] *See* Kettle Moraine School District, *Co-Curriculur Activity and Athletic Code of Conduct Handbook* at 9–10 (requiring a "permit card properly signed by the parent/guardian"), https://www.kmsd.edu/cms/lib/WI01919005/Centricity/Domain/472/KMAthleticCode%202017-18.pdf

just a few examples. Some parents will say yes and others no, but that does not give the District leeway to override parents in the name of uniformity. *See Parham*, 442 U.S. at 603 ("Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").

The District may also attempt to justify the Policy as deferring to students, but schools are not legally entitled to "defer to students" at the expense of parental authority. *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected … broad parental authority over minor children."); *Jackson*, 218 Wis. 2d at 879 ("[P]arents [have] the primary role in decisions regarding the education and upbringing of their children."). As just noted, schools may not and do not "defer to students" on comparable decisions (name changes in school records, medication at school (even aspirin)) or even much less significant ones (e.g. athletics, field trips); all typically require parental consent. The reason, of course, is that "[m]ost children, even in adolescence, simply are not able to make sound judgments concerning many decisions." *Parham*, 442 U.S. at 603. That rationale has scientific support: Adolescents "are often influenced by factors that are unrelated to their long-term best interests" and lack the "emotional and cognitive maturity" to make difficult, long-term choices. Anderson Aff. ¶ 59; Levine Aff. ¶ 204 ("[C]hildren are held to be cognitively incapable of giving informed consent to life-altering interventions.").

Finally, the District may argue that "affirming" a minor student's assertion of a different gender identity is, in the District's judgment, the "right" response, but that

is not a decision for the District to make. The Wisconsin (and Federal) Constitutions "do[ ] not permit [the government] to infringe on the fundamental right of parents to make child rearing decisions simply because [it] believes a 'better' decision could be made." *A.A.L.*, 2019 WI 57, ¶ 20 (quoting *Troxel*, 503 U.S. at 72–73). Instead, government must apply a "presumption that fit parents act in their children's best interest." *Troxel*, 530 U.S. at 58 (plurality op.); *Doe v. Heck*, 327 F.3d 492, 521 (7th Cir. 2003) (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."). Even if it mattered to the constitutional question (and it does not), many experts believe that saying "no" to an immediate transition and taking a more cautious approach to transitioning can be the appropriate response in some circumstances. Levine Aff. ¶¶ 38–46; Anderson Aff. ¶¶ 71–73.

Nor is the Policy narrowly tailored to any compelling interest. The District's Policy does not contain any of the procedural protections that are constitutionally required to override a parent's decision. 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.). In the visitation context, parents also receive notice, a hearing, and court review. *See A.A.L.*, 2019 WI 57, ¶ 13 (quoting Wis. Stat. § 767.43 (3)).

The District does not require any of these critical procedural protections before overriding a parent's decision; indeed, it claims to make these decisions on an ad hoc basis. *Supra* pp. 17–18. As illustrated by B.F's and T.F.'s experience, that means, in practice, that the District will disregard a parent's decision "without proof that parents are unfit, a hearing, a court order, and without according parents due process." *Doe 1*, 2022 WI 65, ¶ 89 (Roggensack, J., dissenting)). It does not defer in any way to their judgment about what is best for their child. A school district simply does not have power to act as a family court, deciding which parents it will defer to on this critical decision.[15]

CONCLUSION

For all of these reasons, the District's Policy to address minor students as if they are the opposite sex, upon their request, without parental consent, violates parents' constitutional rights to raise their own children. This Court should issue a declaratory judgment that the Policy violates parents' rights and that the District violated B.F.'s and T.F.'s rights as parents when it applied that Policy to their

[15] There is already a system in place in Wisconsin to address those rare situations that require the State to intervene and override parents, namely Wisconsin's Child Protective Services program. *See generally* Wisconsin Department of Children and Families, *Wisconsin Child Protective Services (CPS) Process*. Unlike the District's policy, the CPS process sets a high bar for displacing parents ("abuse or neglect"), *id.* § 48.981(2), and provides robust procedural protections, such as notice and a hearing and, ultimately, court review. *E.g.*, Wis. Stat. §§ 48.981(3)(c); 48.13; 48.27; 48.30.

daughter. It should also issue a permanent injunction preventing District staff from addressing or referring to students using a name or pronouns at odds with their biological sex without parental consent. Finally, the District should award B.F. and T.F. nominal damages for the violation of their constitutional rights as parents.[16]

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[16] Plaintiffs submit that these are all proper remedies in this case, if this Court agrees that the District's Policy and treatment of B.F. and T.F. violates parents' constitutional rights. Plaintiffs have already briefed nominal damages and declaratory relief, Dkt. 37, and declaratory and injunctive relief are the usual remedies in cases challenging unlawful or unconstitutional policies. *See*, *e.g.*, *Teigen v. Wisconsin Elections Comm'n*, 2022 WI 64, ¶ 87, 403 Wis. 2d 607, 976 N.W.2d 519 (affirming declaratory and injunctive relief against an unlawful guidance document); *Vitolo v. Guzman*, 999 F.3d 353, 360 (6th Cir. 2021) ("[I]t is always in the public interest to prevent violation of a party's constitutional rights."); Wright & Miller, 11A Fed. Prac. & Proc. §2948.1 (3d. ed.) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary."); *Doe I*, 2022 WI 65, ¶¶ 93–95 (Roggensack, J., dissenting) (making similar points). If the District objects to any particular remedy, however, Plaintiffs will address their arguments in their response and/or reply.

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*Pro Hac Vice applications granted.

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