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CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

BY THE COURT:

DATE SIGNED: November 23, 2022

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

JANE DOE 4,

Plaintiff,

vs. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, et al.,

Intervenors.

DECISION AND ORDER

INTRODUCTION

The sole issue in this case is whether a parent has standing to challenge a school district policy which *could* affect their child in a way that *could* cause harm. Jane Doe 4 ("Jane Doe") is one such parent. She does not predict or anticipate she will be harmed, but she nevertheless seeks a declaratory judgment that a transgender student policy of the Madison Metropolitan School District ("the District") violates her constitutional right to parent. Because she presents no evidence that she predicts, anticipates, or will actually suffer any individual harm, Jane Doe has no standing

and her Complaint must be dismissed.

Standing is "an answer to the very first question that is sometimes rudely asked when one person complains of another's actions: 'What's it to you?'" Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983). Properly applied, the standing doctrine is a "vital check on unbounded judicial power" which ensures judges do not take the law into our hands, but instead honor our "limited and modest role in constitutional governance." *Teigen v. WEC*, 2022 WI 64, ¶160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., op.).[1]

In an action for a declaratory judgment, courts analyze standing as one element of "justiciability." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n,* 2011 WI 36, ¶47, 333 Wis. 2d 402, 797 N.W.2d 789 (standing and justiciability are "overlapping concepts."). To show that a dispute is justiciable, a plaintiff must do more than show that harm *could* occur—with no exceptions, the Wisconsin Supreme Court has always defined a declaratory remedy as "primarily anticipatory or preventative in nature." *Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982); *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 308, 240 N.W.2d 610 (1976); *Fire Ins. Exchange v. Basten*, 202 Wis. 2d 74, 85, 549 N.W.2d 690 (1996); *PRN Associates LLC v. DOA*, 2009 WI 53, ¶53, 317 Wis. 2d 656, 766 N.W.2d 559. A harm is anticipatory "if imminence and practical certainty of act or event exist." *WASP v. WERC*, 2018 WI 17, ¶17 n.13, 380 Wis. 2d 1, 907 N.W.2d 425. To illustrate the importance of the gulf between a harm that is "anticipatory" and a harm that "could happen," one need only imagine all of the people who *could* be harmed by the District's

[1] The decision of the court in *Teigen* is fragmented into three different explanations of standing, none joined by a majority of justices. Below, I apply Wisconsin's rules for interpreting plurality opinions to conclude that Justice Hagedorn's opinion is binding precedent on the limited issue of standing. I cite each of the remaining *Teigen* opinions for persuasive value, only.

policies, for example:

- every other parent of a child enrolled in the District, and;
- every nearby parent whose children may transfer to the District, and;
- every expecting or new parent whose children may someday enroll in the District, and;
- everyone else, anywhere, who could move, adopt, or otherwise be directly or indirectly affected by the District's policies.

Jane Doe's claim must be dismissed because she fails to show why she anticipates that the District's policies will cause even a trifling individual injury. To ignore her lack of standing—that is, to ignore my limited and modest role in constitutional governance—and tell Wisconsin parents their rights would be to declare "that the judges know what is good for the people better than the people themselves." Scalia, *supra* at 897. To quote three of our justices: "No one man should have all that power." *Teigen*, 2022 WI 64, ¶142 (R.G. Bradley, J., second op.)[2] (quoting Kanye West).

In sum, I dismiss Jane Doe's complaint for lack of standing. If Jane Doe wants different rules in her school district, "the main remedy is to vote and persuade elected officials to enact different laws." *Id*. ¶151 (Hagedorn, J., op.).

I. BACKGROUND

A. Facts.

The Madison Metropolitan School District is a school district organized under chapters 115 through 121 of the Wisconsin Statutes. School districts are "the territorial unit for school administration." Wis. Stat. § 115.01(3). The District is governed by a school board. Wis. Stat. §§ 115.001(7) and 118.001. The members of that school board are "elected at large by a plurality vote

[2] Justice R.G. Bradley authored two opinions in *Teigen.* Neither of these opinions enjoys the assent of a majority of justices on any issue relating to standing except that Richard Teigen had it. To prevent confusion, I refer to these two opinions based on their position in the published reporter: I refer to what is sometimes labelled Justice R.G. Bradley's "lead," "majority," or "lead/maj." opinion as her "first op." and what is sometimes labelled her concurrence as her "second op."

of the electors of the school district." Wis. Stat. § 120.06(2)(a). In this way, our state legislature empowers the residents of each district to democratically choose from among themselves who should be held accountable for the policy decisions in their local schools.

In 2018, the District created a guidance document titled "Guidance & Policies to Support Transgender, Non-binary & Gender-Expansive Students" (the "Trans Policy").[3] Kestin Aff., dkt. 230, ¶4. The purpose of guidance documents, or the contents of the Trans Policy, or its author's stated purposes will not be material to this decision, except to say that the Trans Policy exists and Jane Doe alleges it could cause her harm. But to provide some brief context, the Trans Policy purports to give District staff "policies and practices to support transgender, non-binary, and gender-expansive students." Berg Aff. Ex. 1, dkt. 10:8 (a copy of the Trans Policy). To these ends, the Trans Policy summarizes relevant legal requirements, provides educational resources, and recommends best practices. *See id.* at 20 ("we strongly recommend the completion of a gender support plan."); *See also* Kestin Aff., dkt. 230 (the policy author's summary).

Jane Doe is a parent of a child enrolled in the District. Although the record contains evidence describing Jane Doe and her child in greater detail, almost all of that evidence remains sealed. *See e.g.* Joint Stipulated Protective Order (July 28, 2022), dkt. 197; Order to Seal (Sep. 21, 2022), dkt. 238. Jane Doe's personal information will not be cited in this decision unless she herself relies on it to meet her burden to establish standing.

Because there are few public and material facts to discuss, it may be more helpful to discuss what facts are *not* in the record. The record contains no evidence of any of the following:

1. No evidence that the Trans Policy has applied, or does apply, to Jane Doe's child.

[3] As is evident from its name, this policy applies to more than just transgender students. I abbreviate to "Trans Policy" for brevity and because of the specific nature of Jane Doe's alleged harm.

Jane Doe "didn't see any cause to believe that my [child] was transgender …" Jane Doe Sealed Depo., dkt. 231, p. 207.

Other evidence on this point would divulge identifying information about Jane Doe and her child. *See id.* pp. 206-208. Suffice it to say that Jane Doe does not claim the Trans Policy currently harms her.

2. No evidence that the Trans Policy, applied to other persons, could harm Jane Doe.

Jane Doe agrees application of the Trans Policy to others "does not interfere with [her] right to make healthcare decisions for [her] child." *Id.* p. 205.

Jane Doe agrees she is not harmed if her child spends time with "any … classmates regardless of who they are …" *Id.* p. 219.

Jane Doe agrees she is not harmed if the District teaches "tolerance of another student's decisions as to any gender identity or transgender issues that the student may have …" *Id.* p. 228

3. No evidence that Jane Doe anticipates the Trans Policy will apply to her child.

According to Jane Doe, her child has:

- Never brought up his or her own gender identity;
- Never talked about classmates who have explored their gender identity;
- Never talked about non-traditional pronouns;
- Never talked about using a different name;
- Never given Jane Doe "any reason to believe that [the child] is questioning [his or her] gender identity."

Id. pp. 81-83.

When asked whether she had discussed gender identity with her child, Jane Doe replied: "I don't think [the child]'s real interested in the topic. … [The child] doesn't really seem like [he or she is] interested in saying much about it or that it's had much impact." *Id.* pp. 80-81

Most important of all, Jane Doe was asked: "Do you have any reason to believe that your [child] has an interest in exploring their gender identity?" *Id.* p. 84.

Jane Doe answered "no." *Id.*

Despite Jane Doe's testimony, in which she did not cite any evidence or provide any reason why she anticipates harm to her child, there is statistical evidence that human beings, as a group,

do explore their gender identity. *See e.g.* Dr. Levine Aff. dkt. 30.

B. Procedural posture.

1. John and Jane Does 1-8 and the initial appeal.

On February 18, 2020, fourteen anonymous plaintiffs identified only as John and/or Jane Does 1-8 commenced this action seeking declaratory and injunctive relief. First Compl., dkt. 1:3. The circumstances of that early litigation are not material to the present decision, except to say that I ordered a limited disclosure of the anonymous plaintiffs' identity to the District's counsel, and then I stayed the action pending the anonymous plaintiffs' appeal. On July 8, 2022, the Wisconsin Supreme Court affirmed these decisions. *Doe 1 v. Madison Metro. Sch. Dist.*, 2022 WI 65, ¶28, 403 Wis. 2d 369, 976 N.W.2d ("the circuit court's decision to allow the parents to proceed pseudonymously, but not to prevent opposing attorneys from knowing their identity, was well within the circuit court's discretion."). The supreme court remanded the matter "for further adjudication of the parents' claims." *Id.* ¶2.

On remand to the circuit court, "Jane Doe 4 is the only remaining plaintiff." Luke Berg Letter to the Court (Aug. 11, 2022), dkt. 218. Each of the thirteen other plaintiffs has moved to voluntarily dismiss their claims rather than comply with the Wisconsin Supreme Court's order to identify themselves to the party against whom they brought this lawsuit. Jane Doe has now amended her complaint and provided confidential information about her identity. Jane Doe seeks to enjoin the District from applying the Trans Policy. Sealed Amend. Compl., dkt. 205.

2. The District properly raises Jane Doe's standing.

The procedural course of this case is long but not complex. I can summarize it in three sentences:

- Jane Doe asks the Court for an injunction.

- A party seeking an injunction must show a "reasonable probability of ultimate success on the merits." *Werner v. A.L. Grootemaat & Sons, Inc.*, 80 Wis.2d 513, 520, 259 N.W.2d 310 (1977) (footnotes omitted).

- But a party with no standing cannot succeed. *Teigen*, 2022 WI 64, ¶160 (Hagedorn, J., op.).

Thus, Jane Doe's standing is a necessary predicate to the injunctive relief she seeks, regardless of whether the District has moved for any dispositive relief on similar grounds. Based on the individual facts of this case, I have begun with the question of standing because "courts should not devote time or resource to adjudicating disputes only to ultimately conclude a party is not entitled to any relief." *Teigen*, 2022 WI 64, ¶18 (R.G. Bradley, J., first op.).

3. The parties submit argument and evidence on standing.

The District says Jane Doe's claims are not justiciable because she does not have standing. District Resp. Br., dkt. 232:23-25. This argument, on remand, is consistent with the District's previous motion to dismiss for lack of standing. However, I denied the District's earlier motion to dismiss because I inferred from the original complaint that the plaintiffs had some reason to anticipate the need for preventative relief. Tr. of May 26, 2020 Hr'g, dkt. 95:41 ("plaintiffs have stated a claim …"). I had to draw this inference because "[w]hen we review a motion to dismiss, factual allegations in the complaint are accepted as true …" *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶18, 356 Wis. 2d 665, 849 N.W.2d 693; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice …"). Although Jane Doe has pointed to this past motion to foreclose any present consideration of standing, she does not develop this argument beyond a single unsupported sentence in a footnote. *See* Luke Berg Letter to the Court (Oct. 4, 2022), dkt. 259, fn. 1. In any event, the argument is not persuasive. Whether Jane Doe and thirteen other

plaintiffs adequately alleged standing in their pleadings is not material to the question of whether Jane Doe shows a reasonable probability of supporting those allegations with any evidence. Standing is "an indispensable part of the plaintiff's case" that "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation …" *Lujan,* 504 U.S. at 561.

Because standing is integral to her claim for an injunction, Jane Doe's vague protests that I have accelerated a decision on the issue of standing or otherwise denied her some measure of process are without merit. But even if the Court had accelerated a decision on standing, this would have been entirely proper because "trial courts need to be given broad discretion in how to handle their calendars and in how to properly address individual issues reflected in individual cases." *Hefty v. Strickhouser,* 2008 WI 96, ¶85, 312 Wis. 2d 530, 752 N.W.2d 820 (Ziegler, J., dissenting); *See Puchner v. Hepperla,* 2001 WI App 50, ¶7, 241 Wis. 2d 545, 625 N.W.2d 609.

To allow Jane Doe the best possible opportunity to show she has a probability of success, and even though the parties specifically and exhaustively addressed standing in their original briefs (*See* Jane Doe Reply Br., dkt. 253:20-24 "Plaintiff Has Standing …"), I granted Jane Doe's request to also file supplemental briefs on the limited issue of standing. Both parties have now done so. Jane Doe Supp. Br., dkt. 290; District Supp. Br., dkt. 292. Both parties have also filed statements on the facts they consider material to standing. It is undisputed that Jane Doe has testified she has no reason to anticipate any harm. Jane Doe Statement on Undisputed Facts, dkt. 307:8 ("the contents of [Jane Doe's] answers are not in dispute."); *See* District Statement on Undisputed Facts, dkt. 306.

Upon consideration of all of the argument and evidence of record, I now turn to the question of Jane Doe's standing to seek a declaratory judgment.

II. LEGAL STANDARD FOR A DECLARATORY JUDGMENT

"It is not a sufficient ground for declaratory relief that the parties have a difference of opinion …" *Lister v. Bd. of Regents,* 72 Wis. 2d 282, 308, 240 N.W.2d 610 (1976). A declaratory judgment may only settle "a justiciable controversy," or a controversy which satisfies these four elements:

> (1) A controversy in which a claim of right is asserted against one who has an interest in contesting it.
>
> (2) The controversy must be between persons whose interests are adverse.
>
> (3) The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.
>
> (4) The issue involved in the controversy must be ripe for judicial determination.

Loy v. Bunderson, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982) (citation omitted). All four elements must be satisfied. *Fabick v. Evers,* 2021 WI 28, ¶9, 396 Wis. 2d 231, 956 N.W.2d 856 (citing *Milwaukee Dist. Council 48 v. Milwaukee Cnty.,* 2001 WI 65, ¶37, 244 Wis. 2d 333, 627 N.W.2d 866); *State ex rel. La Follette v. Dammann,* 220 Wis. 17, 22, 264 N.W. 627 (1936) ("[Despite] the striking economical and social justice which will accrue from this remedy … there must exist a justiciable controversy …").

If a justiciable controversy exists, then a declaratory judgment may "afford relief from uncertainty and insecurity with respect to rights …" Wis. Stat. § 806.04(12).

III. DISCUSSION

Having set forth the four-element test for a justiciable controversy, I turn next to Jane Doe's argument and evidence to decide whether she satisfies each of those elements. However, because this case ends with justiciability and not any other issue, I first emphasize what I do *not* decide.

A. The Court decides neither the rights of other parents nor the extraordinary importance of Jane Doe's claims.

I do not decide whether the Trans Policy is, as Jane Doe alleges, an unconstitutional intrusion on the rights of the general public, nor do I decide whether some other plaintiff might have standing to seek such a declaration. I do not decide these broad questions because "the essence of the determination of standing is … a *personal* interest in the controversy." *Foley-Ciccantelli*, 2011 WI 36, ¶5 (emphasis added). In other words, I must decide Jane Doe's personal interest, but I must not decide any other person's interest because "[i]f it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __, 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring) (emphasis in original). Therefore, I have searched the record to decide whether Jane Doe has standing, but I do not decide whether some other plaintiffs may have standing to challenge the Trans Policy or whether their challenge might succeed.

I also do not decide, but will assume, the crucial and urgent importance of Jane Doe's claims. There is no doubt that "[f]or hundreds of years, parents' right to direct the upbringing and education of their children has been a fundamental and protected right …" *Doe 1 v. MMSD*, 2022 WI 65, ¶77, 403 Wis. 2d 369, 976 N.W.2d 584 (Roggensack, J., dissenting). While I assume Jane Doe's claims are extraordinarily important, this cannot alter the standing analysis because "extraordinary conditions do not create or enlarge constitutional power."[4] *Fabick*, 2021 WI 28, ¶50 (R.G. Bradley, J., concurring) (alteration and citation omitted). Indeed, "[f]ear never overrides the Constitution. Not even in times of public emergencies …" *Id.* ¶85. Even assuming Jane Doe

[4] I emphasize that standing in Wisconsin is a matter of judicial policy and not, as in federal courts, a matter of constitutional jurisdiction. However, standing still "must stem from our constitutional role." *Teigen*, 2022 WI 64, ¶160 (Hagedorn, J., op.).

accurately describes the Trans Policy as an immoral license for deception, our constitution does not vest circuit judges with moral authority—nor should it: "Our obligation is to follow the law, which may mean the policy result is undesirable or unpopular." *Teigen,* 2022 WI 64, ¶151 (Hagedorn, J. op.); Oliver Wendell Holmes, *The Path of the Law,* 10 HARV. L. REV. 457, 460 (1897) ("nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law."). Accordingly, I may assume Jane Doe's claims are important, and I may also assume the Trans Policy is unfair, but I will not allow "notions of 'equity' and 'unfairness' to trump the law." *Teigen*, 2022 WI 64, ¶125 (R.G. Bradley, J., second op.).

B. Jane Doe satisfies the first two elements of a justiciable controversy.

Returning to the limited matters that this Court will decide, Jane Doe satisfies the first two elements of a justiciable controversy. These elements require that "a claim of right is asserted against one who has an interest in contesting it" and that claim is "between persons whose interests are adverse." *Loy,* 107 Wis. 2d at 409. Jane Doe claims a constitutional right to "direct the upbringing of [her] children." Amend. Compl. ¶1. She also alleges that the District's interests are adverse. *Id.* ("[the] District has violated this important right by adopting a policy …"). Evidence supports these allegations. *See generally* Jane Doe Sealed Depo., dkt. 231.

C. The third and fourth elements of a justiciable controversy may be framed as a question of standing.

The third and fourth elements of a justiciable controversy require, respectively, "a legally protectible interest" and that "[t]he issue involved in the controversy must be ripe for judicial determination." *Loy*, 107 Wis. 2d at 409. In declaratory actions, these elements of justiciability are "overlapping concepts" with standing. *Foley-Ciccantelli,* 2011 WI 36, ¶47, 333 Wis. 2d 402, 797

N.W.2d 789.

Because these concepts overlap, I will frame the remaining elements of justiciability as a question of whether Jane Doe has standing. *See id.* ¶58 (framing justiciability as a question of standing); *Teigen*, 2022 WI 64, ¶159 (Hagedorn, J., op.) (same); *Tooley v. O'Connell,* 77 Wis. 2d 422, 438, 253 N.W.2d 335 (1977) (same); *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228, 332 N.W.2d 782 (1983) (same). To do so, I begin by summarizing the policy reasons why a plaintiff's individualized harm is a necessary predicate to judicial relief, even when lawyers have capably presented an important legal question. I then turn to our supreme court's most recent understanding of that policy in *Teigen* and its labyrinthine opinions. I also consider federal cases specifically interpreting the issue of standing to enforce parents' constitutional rights. With those authorities in hand, I conclude by examining, and rejecting, Jane Doe's arguments for whether she meets her burden to prove standing.

1. In Wisconsin, standing is a matter of sound judicial policy.

Wisconsin's test for standing asks three questions:

> (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy);
>
> (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and
>
> (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged

Foley-Ciccantelli, 2011 WI 36, ¶40 (footnotes omitted); *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992) (applying similar elements in federal courts).[5]

[5] Justice Scalia explains federal courts' three part test as follows:

Focusing on the third element of this test, Wisconsin courts have described standing as a matter "of sound judicial policy." *McConkey v. Van Hollen*, 2010 WI 57, ¶15, 326 Wis. 2d 1, 783 N.W.2d 855. Federal courts, too, consider "prudential considerations that are part of judicial self-government," but must additionally consider "the case-or-controversy requirement of Article III." *Lujan*, 504 U.S. at 559 (1992). So while the reasons for standing in state and federal courts slightly differ, both rely on the same test and apply the same principle that "[s]tanding must ultimately rest on a showing, or at least an allegation, of direct injury or a real and immediate threat of direct injury." *Fox v. DHSS*, 112 Wis. 2d 514, 529, 334 N.W.2d 532 (1983).

Because one element of Wisconsin's test for standing is a matter of sound judicial policy, I begin with a summary of the fundamental policy reasons for the doctrine of standing as expressed by a leading jurist on the topic:

> [T]he law of standing roughly restricts courts to their traditional undemocratic role of protecting individuals and minorities against impositions of the majority, and excludes them from the even more undemocratic role of prescribing how the other two branches should function in order to serve the interest *of the majority itself.*

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 894 (1983) (emphasis in original). This fundamentally restrictive policy demands a plaintiff do more than show a "generalized" harm:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical,
>
> Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.
>
> Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (formatting supplied, internal citations, quotations, alterations, and ellipses omitted); *accord FEC v. Cruz*, 596 U.S. __, 142 S. Ct. 1638, 1646 (2022).

> The plaintiff may *care* more about [the harm]; he may be a more ardent proponent of constitutional regularity or of the necessity of the governmental act that has been wrongfully omitted. But that does not establish that he has been harmed distinctively—only that he assesses the harm as more grave, which is a fair subject for democratic debate in which he may persuade the rest of us.
>
> Since our readiness to be persuaded is no less than his own (we are harmed just as much) there is no reason to remove the matter from the political process and place it in the courts. Unless the plaintiff can show some respect in which he is harmed *more* than the rest of us … he has not established any basis for concern that the majority is suppressing or ignoring the rights of a minority that wants protection, and thus has not established the prerequisite for judicial intervention.

Id. at 894-95 (emphasis in original). Two important points flow this policy: first, a plaintiff cannot claim an "individualized" harm if everyone else is harmed in the same way:

> [T]he courts should bear in mind the *object* of the exercise, and should not be inclined to assume … a 'minority group' so broad that it embraces virtually the entire population.

Id. at 896 (emphasis in original). And second, if the public—as opposed to an individual—is harmed, then judges must decline to provide relief because "*there is no reason to believe they will be any good at it*":

> But that is the ultimate question: Even if the doctrine of standing was once meant to restrict judges "solely, to decide on the rights of individuals," what is wrong with having them protect the rights of the majority as well? They've done so well at the one, why not promote them to the other? The answer is that there is no reason to believe they will be any good at it. In fact, they have in a way been specifically *designed* to be bad at it—selected from the aristocracy of the highly educated, instructed to be governed by a body of knowledge that values abstract principle above concrete result, and (just in case any connection with the man in the street might subsist) removed from all accountability to the electorate. That is just perfect for a body that is supposed to protect the individual against the people; it is just terrible (unless you are a monarchist) for a group that is supposed to decide what is good for the people. Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class. …

> It may well be, of course, that the judges know what is good for the people better than the people themselves; or that democracy simply does not permit the *genuine* desires of the people to be given effect; but those are not the premises under which our system operates.

Id. at 896-97 (emphasis in original, footnote omitted) (citing *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 170 (1803).).

Recently, our supreme court discussed Wisconsin's policy for standing in *Teigen v. WEC,* 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519. In a series of five fragmented opinions that expressed no majority rationale for the petitioner's standing to seek a declaratory judgment, the justices could agree only that standing in Wisconsin depends on sound judicial policy. *See Teigen,* 403 Wis. 2d at 615 (explaining the justices' participation); *Id.* ¶14 (R.G. Bradley, J., first op.); *Id.* ¶160 (Hagedorn, J., op.); *Id.* ¶215 (A.W. Bradley, J., op.). I turn, now, to each of the justices' opinions on what that sound judicial policy should be.

2. Sound judicial policy according to Chief Justice Ziegler, Justice R.G. Bradley, and Justice Roggensack.

Three justices—Chief Justice Ziegler plus Justices Roggensack and R.G. Bradley—believed that Wisconsin's sound judicial policy on standing is "limited only by prudential considerations." *Id.* ¶16 (R.G. Bradley, J., first op.). These three justices continued to explain that "we typically require plaintiffs to possess some personal stake in the case …" although these justices did not explain what they meant by "typically." *Id.* ¶17 (R.G. Bradley, J., first op.) (citing *Moedern v. McGinnis,* 70 Wis. 2d 1056, 1064, 236 N.W.2d 240 (1975).). To be clear, the Wisconsin Supreme Court has never found standing for a party which failed to show any personal stake in a controversy. In *Moedern,* all seven Wisconsin Supreme Court justices unanimously held that "the gist of the requirements relating to standing … is to assure that the party seeking relief

has alleged such a personal stake." *Moedern*, 70 Wis. 2d at 1064.

These three justices also sought to add two new elements to Wisconsin's test for standing. The first of these new elements would measure judicial efficiency, although it is not clear how. *Teigen*, 2022 WI 64, ¶18 (R.G. Bradley, J., first op.) ("In resolving standing challenges, Wisconsin courts may also consider judicial efficiency."). These justices' second new element for standing would fulfill a perceived obligation that they "owe the public an answer to the important questions of law …" *Id.* ¶31 (R.G. Bradley, J., first op.).[6] In support of both of these novel elements for standing, the only legal authority these justices cite is *McConkey*, a decision in which Justice

[6] These justices cite two sources for their perceived obligation to answer the public's questions.

The first is a dissenting opinion in *Kleefisch v. WEC*, No. 2021AP1976-OA, unpublished order (Wis. Feb. 4, 2022) (Roggensack, J., dissenting.). This unpublished opinion is so arcane that it remains hidden from both the public and circuit judges alike. *See* www.wicourts.gov/opinions/sopinion.htm, last visited Nov. 15, 2022 ("Sorry, no records found.").

The second authority these justices cite in support of the perceived obligation to answer the public's questions is *McConkey*, apparently for its description of the Wisconsin Supreme Court as a "law development court." 2010 WI 57, ¶18. But no one has ever described "law development" to mean discarding the separation of powers. Instead, "law development" means "determining on common-law principles what the law should be in view of the statutory and decisional law of the state and in view of the general trend of the law." *State ex rel. La Crosse Tribune v. Cir. Ct. for La Crosse Cnty.*, 115 Wis. 2d 220, 229-30, 340 N.W.2d 460 (1983); *Cook v. Cook*, 208 Wis. 2d 166, ¶¶50-53, 560 N.W.2d 246 (1997).

Put another way, these justices' perceived obligation to answer the public's questions has no home in Wisconsin law. There's no reason why it should—since before Wisconsin was a state, constitutional scholars have explained why courts should not assume the obligation of public advisor, even for important and well-briefed questions:

> [I]f the purpose of standing is 'to assure that concrete adverseness which sharpens the presentation of issues,' the doctrine is remarkably ill designed for its end. …
>
> The degree to which the courts become converted into political forums depends not merely upon what issues they are permitted to address, but also upon when and at whose instance they are permitted to address them. As De Tocqueville observed:
>
> > It will be seen … that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.

Scalia, *supra* at 892 (quoting 1 A. De Tocqueville, *Democracy in America* 102 (T. Bradley ed. 1945).).

Gableman found standing under the usual test ("McConkey has at least a trifling interest in his voting rights…") but then disregarded standing altogether, finding that the present matter was "fit for adjudication" because of the "unique circumstances of this case …" *McConkey,* 2010 WI 57, ¶¶17-18 (citing *State ex rel. Hudd v. Timme,* 54 Wis. 318, 332-33, 11 N.W. 785 (1882).).

Applying their chosen test for standing, these justices concluded that all Wisconsin voters had standing to seek relief for all violations of election law. Specifically, these justices found "an injury in fact to [voters'] right to vote …" when elections are not "administered properly under the law." *Teigen,* 2022 WI 64, ¶21 (R.G. Bradley, J., first op.). But as the remaining justices pointed out, "[w]ithout tethering the analysis to an on-point text, this analysis is unpersuasive …" *Id.* ¶167 (Hagedorn, J., op.).[7]

3. Sound judicial policy according to Justice A.W. Bradley, Justice Dallet, and Justice Karofsky.

Another three justices—Justices A.W. Bradley, Dallet, and Karofsky—rejected this vision of sound judicial policy and dissented from the specific holding that one of the *Teigen* petitioners had standing. The dissent criticized the lead[8] opinion's invention of novel elements for standing as having "expand[ed] the doctrine of standing beyond recognition." *Id.* ¶208 (A.W. Bradley, J., op.). To summarize, these justices believed that "[c]ourts are not the proper forum to air generalized grievances about the administration of a governmental agency." *Id.* (citing *Cornwell Personnel Assocs., Ltd. v. DILHR,* 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979) and *Lujan,*

[7] It is generally important for judges to base their decisions on existing law. "As one cynic has said, with five votes anything is possible. But when one does not have a solid textual anchor or an established social norm from which to derive the general rule, its pronouncement appears uncomfortably like legislation." Antonin Scalia, *The Rule of Law as a Law of Rules,* 56 U. CHI. L. REV. 1175, 1184-85 (1989).

[8] To clarify, Justice A.W. Bradley's opinion abbreviates Justice R.G. Bradley's first opinion as the "majority/lead op.," regardless of whether a majority of justices joined any specific part. *See e.g. Teigen,* 2022 WI 64, ¶211 (labelling ¶14, a part joined only by three justices, as the "majority/lead op.").

504 U.S. at 573-74.).

4. Sound judicial policy according to Justice Hagedorn.

The seventh justice—Justice Hagedorn—agreed that Teigen had standing so he joined in the mandate of the lead opinion. *Id.* ¶149 (Hagedorn, J., op.). However, like the dissenting justices, Justice Hagedorn rejected the lead opinion's novel elements for standing and also rejected their broad conclusion that all voters, as a group, had standing. *Id.* ("While I agree that Teigen may bring this claim, I do so on different grounds than those proffered …"). Justice Hagedorn refused to join in any other justices' explanation for *why* the individual petitioners had standing, and instead explained his rationale for standing as one that "must stem from our constitutional role." *Id.* ¶160 (Hagedorn, J., op.). According to Justice Hagedorn, that "limited and modest role" demands that courts "bring[] our judgment to bear only when necessary …" *Id.*

At oral arguments in this case, Jane Doe argued that "Justice Hagedorn's opinion, concurrence, that only he joined is not the state of Wisconsin law on standing, respectfully." Tr. of Oct. 19, 2022 Hr'g, dkt. 288:38. Jane Doe's attorney then declined to discuss Justice Hagedorn's articulation of standing further, except to say that "I just think that case is not a comparable analogy to this one …" *Id.* at 39. Jane Doe's supplemental brief on standing repeats this vague characterization in a footnote. Dkt. 290:4 fn. 2.

Jane Doe fails to recognize that "[r]ules have been developed instructing federal and state courts how to interpret and apply plurality decisions." *State v. Deadwiller*, 2013 WI 75, ¶53, 350 Wis. 2d 138, 834 N.W.2d 362 (Abrahamson, J., concurring). Wisconsin applies these rules. *Id.* ¶55 (collecting cases). Under these rules, Justice Hagedorn's opinion is the binding precedent of the Wisconsin Supreme Court even though no other justice assented to his opinion. To summarize, this is because:

> When a fragmented [c]ourt decides a case and no single rationale explaining the result enjoys the assent of [four] Justices, the holding of the [c]ourt may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. This rule is applicable only when at least two rationales for the majority disposition fit or nest into each other like Russian dolls. If no theoretical overlap exists between the rationales employed by the plurality and the concurrence, the only binding aspect of the fragmented decision is its specific result. A fractured opinion mandates a specific result when the parties are in a substantially identical position.

Deadwiller, 2013 WI 75, ¶30 (majority op.) (internal citations, quotations, and ellipses omitted) (citing *Marks v. United States*, 430 U.S. 188, 193 (1977).). Put another way, this rule applies "when one opinion can be meaningfully regarded as 'narrower' than another—only when one opinion is a logical subset of other, broader opinions, and can represent a common denominator of the Court's reasoning." *Id.* ¶56 (Abrahamson, J., concurring) (citations and quotations omitted).

The application of these rules to *Teigen* flows from the basic math that a majority of justices agreed that at least one petitioner had standing: both the three-justice lead opinion and Justice Hagedorn's narrow concurrence agreed on that point. Justice Hagedorn's concurrence fits or nests into the plurality "like Russian dolls" because the broad plurality opinion—"[all] Wisconsin voters have standing," *Teigen*, 2022 WI 65, ¶14 (R.G. Bradley, J., first op.)—encapsulates the narrower opinion that "[only] Teigen may bring this claim …" *Id.* ¶149 (Hagedorn, J., op.). And even if the breadth of Justice Hagedorn's opinion is not clear from the text, both he and the plurality explicitly tell us that it is more narrow:

- "Justice Brian Hagedorn now criticizes this court's well-established consideration of judicial policy …" *Teigen,* 2022 WI 64, ¶16 n. 7 (R.G. Bradley, J., first op.).
- "Some of my colleagues have begun to describe standing in far looser terms. … I disagree." *Id.* ¶160 (Hagedorn, J., op.).

In sum, applying Wisconsin's rules for interpreting plurality decisions, Justice Hagedorn's concurrence must be interpreted as a precedential, binding opinion on the sound judicial policy

underlying standing.

5. Sound judicial policy according to binding precedent of the Wisconsin Supreme Court.

Having determined that Justice Hagedorn's opinion on standing is precedent, I turn to that opinion. Circuit judges may not disregard the precedent of the Wisconsin Supreme Court. *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997). Here, in full, is the most recent and comprehensive explanation of Wisconsin's sound judicial policy on standing:

> Standing is the foundational principle that those who seek to invoke the court's power to remedy a wrong must face a harm which can be remedied by the exercise of judicial power. *Krier v. Vilione*, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517. Some of my colleagues have begun to describe standing in far looser terms. It is a really nice thing to have in a case, they seem to say, but not important at the end of the day. I disagree. We have said standing is not jurisdictional in the same sense as in federal courts and that its parameters are a matter of sound judicial policy. But as Justice Prosser put it, "Judicial policy is not, and has not been, carte blanche for the courts of Wisconsin to weigh in on issues whenever the respective members of the bench find it desirable." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶131, 333 Wis. 2d 402, 797 N.W.2d 789 (Prosser, J., concurring). The judiciary does not serve as a roving legal advisor, answering any questions about the law that may arise. The power we have is "judicial." Wis. Const. art. VII, § 2. The judicial power is the power decide disputes between parties about the law where there is harm to a party that can be remedied through the judicial process. *Gabler v. Crime Victims Rights Bd.*, 2017 WI 67, ¶37, 376 Wis. 2d 147, 897 N.W.2d 384. In this sense, the judicial policy buttressing our standing doctrine must stem from our constitutional role. Standing is not a historical relic that should be dispensed with in an age of judicial supremacy. It serves as a vital check on unbounded judicial power. A judiciary that understands its limited and modest role in constitutional governance will take it seriously. Doing so brings our judgment to bear when necessary to resolve legal disputes between parties, but allows many legal debates to take place where the constitution places them: in the court of public opinion and by and between the other branches of government.

Teigen v. WEC, 2022 WI 64, ¶160, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., op.). While Justice Hagedorn's opinion then proceeded to tailor an application of this policy only "to challenges under Wis. Stat. § 227.40(1) …" the policy itself remains the binding precedent I must

consider under Wisconsin's test for standing. *See id.* ¶167 n.8 (Hagedorn, J., op.).

6. Wisconsin courts also consider federal precedent on standing when the alleged harm is to a federal right.

Although *Teigen* authoritatively expresses Wisconsin's sound judicial policy on standing, there remains one final source of authority to consider. Jane Doe's claims arise under her state and federal constitutional rights. In these types of cases, Wisconsin courts "frequently rely on language from federal cases governing standing in constitutional challenges." *Foley-Ciccantelli,* 2011 WI 36, ¶46 (collecting cases in a footnote).

Federal courts addressing similar constitutional challenges have held that "parental rights are not absolute in the public school context …" *Littlefield v. Forney Independent Sch. Dist*., 268 F.3d 275, 291 (5th Cir. 2001) (collecting cases). According to these federal courts, parents have standing only to "challenge unconstitutional actions in the public schools that directly affect the students." *Id.* at 283 n. 7 (emphasis added) (citing *Sch. Dist. of Abington T'ship v. Schempp*, 374 U.S. 203, 224 (1963).).

Two United States Supreme Court cases on Bibles in schools illustrate the principles of standing and how a parent satisfies those principles. In 1952, the Court affirmed that parents needed standing to challenge the mandatory reading of Bible passages in a public school. *Doremus v. Bd. of Educ. of Borough of Hawthorne,* 342 U.S. 429 (1952). At this time, it was readily apparent to the justices that the mandatory reading of religious texts in a public school offended basic constitutional rights. *See e.g. Everson v. Bd. of Educ. of Ewing T'ship.,* 330 U.S. 1, 18 (1947) ("The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."). But, as will be apparent, standing does not go hand-in-hand with a constitutional wrong.

In *Doremus,* the first of the two Bible cases I will compare, parents had no standing to challenge Bible readings in public schools because they failed to prove any adverse effect therefrom. As the Court saw it, the plaintiffs "neither conceded nor proved that the brief interruption" of the Bible readings caused any harm. *Doremus,* 342 U.S. at 431. The *Doremus* plaintiffs had simply "assume[d] the role of actors so that there may be a suit":

> In support of the parent-and-school-child relationship, the complaint alleged that appellant Klein was parent of a seventeen-year-old pupil in Hawthorne High School, where Bible reading was practiced pursuant to the Act. That is all. There is no assertion that she was injured or even offended thereby or that she was compelled to accept, approve or confess agreement with any dogma or creed or even to listen when the Scriptures were read.
>
> …
>
> Apparently the sole purpose and the only function of plaintiffs is that they shall assume the role of actors so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute.

Id. at 431. Eleven years after *Doremus,* the Court revisited "the same substantive issues" in *Schempp,* 374 U.S. at 224 n. 9. This time, the Supreme Court found a parent had standing to challenge a public school's Bible readings. *Id.* at 205. The only difference between the two obvious constitutional violations was that in the latter case the parents actually proved a harm:

> It appears from the record that … recitation of the Lord's Prayer w[as] conducted by the home-room teacher, who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This was followed by a standing recitation of the Lord's Prayer … by the class in unison …
>
> At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible 'which were contrary to the religious beliefs which they held and to their familial teaching.'

Id. at 207-208 (footnote omitted). In other words, Edward Schempp had standing where Donald Doremus did not, in spite of the fact that both parents complained of the very same unconstitutional

Bible readings, because only Edward Schempp could show that the practice caused him an individual harm. This is but one example of the standing principles courts apply, even when confronted with a clear legal question of great public importance.[9]

D. Jane Doe fails to satisfy the third and fourth elements of a justiciable controversy, or in other words, standing.

Firmly grounded in the policy and precedent on standing in the State of Wisconsin, I next address Jane Doe's arguments for why she has standing. A plaintiff bears the burden of proving standing. *Krier v. Vilione,* 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517; *Lujan,* 504 U.S. at 561 ("each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof …"). The first element of the test for standing asks "whether the party whose standing is challenged has a personal interest in the controversy …" *Foley-Ciccantelli,* 2011 WI 36, ¶40.

1. Jane Doe fails to show that gender identity is like insect attack.

Jane Doe's first argument for why she has a personal interest in the Trans Policy relies on an analogy to a hypothetical policy for treating bee stings.[10] Jane Doe Supp. Br., dkt. 290:3. The argument goes something like this:

(1) Parents anticipate bees will sting their children because, presumably, aggressive bees

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[9] *Doremus* and *Schempp* are different from the present case in at least two ways, although neither difference is material to policy reasons for standing.

First, these were federal cases and so, absent standing, necessarily required dismissal under Article III. The fact that Wisconsin courts do not share the same jurisdictional issue does not render the Court's *policy* discussion irrelevant.

Second, these cases arose under the Establishment Clause, not under a generalized constitutional right to parent. *See Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 621-622 (2007) (Scalia, J., concurring) (summarizing *Doremus*). But regardless of the theory under which a plaintiff brings her claim, the applicable principle remains the same: "generalized grievances affecting the public at large have their remedy in the political process." *Id.*

[10] Jane Doe used, but did not further explain, the same "bee sting policy" at oral argument and in her earlier papers, too. *See* Tr. of Oct. 13, 2022 Hr'g, dkt. 288:44.

live near schools, and;

(2) these anticipated stings will trigger a school district's hypothetical bee sting policy, and;

(3) that policy instructs teachers to secretly administer experimental medical treatments, contrary to a constitutional right to parent, and;

(4) therefore, parents have standing to challenge a bee sting policy in the same way they have standing to challenge the Trans Policy.

Putting aside the fact that the argument is logically unsound,[11] the argument is unpersuasive because bee stings are not a good comparison to gender identity. The analogy goes immediately awry because even assuming parents anticipate bee stings, Jane Doe fails to produce any analogous evidence on which she anticipates her child will ever get "stung" by the Trans Policy. In fact, Jane Doe's testimony is that she has no reason to anticipate a harm. Jane Doe Sealed Depo., dkt. 231:84. So, if this was a bee sting case, then wouldn't Jane Doe's testimony be that "her child has never discussed bees" and she has "no reason anticipate any bee sting will happen?" Why, then, would she have standing? Of course, any number of imaginable harms *could* happen, to use her words, "out of the blue," but what *could* happen is not material to the question of standing under Wisconsin law. *See* Jane Doe Supp. Br., dkt. 290:5. As I have emphasized repeatedly, declaratory judgments address "concrete" cases to provide remedies that are "primarily anticipatory or preventative in nature." *Papa v. DHS*, 2020 WI 66, ¶30, 393 Wis. 2d 1, 946 N.W.2d

[11] Logic is not necessary for legal argument. *See* Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 833-35 (1988). However, given that Jane Doe has chosen to rely on an argument she has invented out of whole cloth, it is alarming that she must rely on a logically unsound one.

- The bee sting argument is logically *invalid* because Jane Doe's conclusion does not follow from her premises: bees don't necessarily sting children and stung children don't necessarily tell teachers.

- The argument is logically *incorrect* because even if it were valid, we know that the conclusion is still untrue. Not all parents are harmed when schools make medical decisions for them and, indeed, the evidence in this case—*plus the 93% reduction in the number of parent-plaintiffs*—suggests that most of the District's parents are not individually harmed by the Trans Policy.

17; *Loy*, 107 Wis. 2d at 409.

2. Jane Doe's cited cases do not support her argument for a radical departure from Wisconsin's law on standing.

Moving on from the bee sting analogy, Jane Doe boldly asserts that "the District's policy directly threatens to harm Plaintiff's child." Jane Doe Supp. Br., dkt. 290:4. Although Jane Doe follows up with citations to evidence and argument that suggests the Trans Policy could be unlawful, if used or threatened against a certain sort of child, this evidence remains wholly untethered from the issue of whether Jane Doe herself has that sort of child. Nevertheless, I turn to Jane Doe's cited cases, each of which may be distinguished from the case at hand.

a. *Milwaukee District Council 48.*

In support of her argument that she has a personal interest in the Trans Policy because a harm *could* occur, Jane Doe first cites *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, 244 Wis. 2d 333, 627 N.W.2d 866. That opinion begins with a caveat that "[b]ecause the record before this court is sparse, we proceed with some reluctance, limiting our holding to acknowledged facts." *Id.* ¶4. The opinion then concludes with a caveat that "[o]ur holding today is confined to procedural rights." *Id.* ¶64. Jane Doe ignores these bookend warnings and relies on this case as an illustration of "how ripeness should be applied in declaratory judgment actions." Jane Doe Supp. Br., dkt. 290:8. A circuit court cannot also ignore the Wisconsin Supreme Court's express instructions about the limited scope of its holding. *Cook*, 208 Wis. 2d 166. So, for completeness only, I will join Jane Doe's assumption that this case has something meaningful to say about standing to seek a declaratory judgment.

Milwaukee County denied pensions to its employees without a due process hearing if they were "terminated for 'fault or delinquency.'" *Milwaukee Dist. Council 48*, 2001 WI 65, ¶3. In

response, a union of "more than 6,000 county employees" sued. *Id.* ¶20. The court held, subject to the limitations described above, that this union had standing for at least two reasons. First, because the union "ha[d] a tangible interest in knowing what the law is and what rights its members have, so that it can do its duty." *Id.* ¶38 (footnote omitted). And second, even though the union did not point to any individual member at risk of being fired for "fault or delinquency," because evidence showed that several union members had recently been denied their pension under the County's allegedly unconstitutional policy. *Id.* ¶21. To elaborate further, and consistent with the principles of standing in declaratory judgments, the union's standing in *Milwaukee Dist. Council 48* was a product of both the union's unique "tangible interest in knowing what the law is" and its anticipation of future harm. That anticipation was reasonably based on concrete and particularized evidence of past harm.

But there is no similar evidence on which to anticipate any individual harm in this case. Jane Doe neither has a tangible interest in knowing the law, nor does she have any evidence of past individual harm from which to anticipate a future individual harm. At best, Jane Doe points only to the fact that the Trans Policy has *applied* to a few students. Resp. to Jane Doe's Interrogatory No. 2, dkt. 254:17 (in the previous four years, the District has created twenty-three gender support plans). This evidence only further proves that application of the Trans Policy is not remotely like the denial of a pension: it is a harm to take a person's pension but it is not necessarily a harm to "create a gender support plan." If it was a harm, then the parents who can actually anticipate, or have actually suffered, that harm may be entitled to relief. Jane Doe is not one of those parents. This is just another way of saying that not all constitutional violations cause harm to all people. The Bibles-in-schools cases illustrate this point well: it is no harm for a parent when—contrary to the First Amendment—religious texts are read in public school, unless the

parent proves "she was injured or even offended thereby …" *Doremus*, 342 U.S. at 431. In the same way, Jane Doe must still suffer or anticipate an injury even when a school district drafts a transgender policy that *could* be used to harm her.

b. *Norquist, Putnam, Fiedler, Fabick, and Vill. of Elk Grove.*

Jane Doe next cites a series of cases on which she relies, at most, for a single sentence quotation. None of these cases support the proposition that Jane Doe has a personal interest in the Trans Policy because an injury *could* occur.

The first of this series is *Norquist v. Zeuske*, 211 Wis. 2d 241, 564 N.W.2d 748 (1997), a declaratory action challenging newly-enacted rules for assessing the value of agricultural land. Jorgensen, one of several landowning petitioners, argued that the new rules violated the Wisconsin Constitution's requirement that agricultural land be valued uniformly. *See* Wis. Const., art. VIII, § 1. To prove standing, Jorgensen explained precisely how he anticipated a direct financial harm as a result of those rules, based on tax assessments that would be certain to occur:

> This possibility of higher taxes derives from the fact that Jorgensen owns agricultural land which is subject to the market value freeze created by [the new rules.] … [T]he market value of some agricultural land will inevitably decrease resulting in an assessment that is relatively higher under the freeze for those land owners.

Norquist, 211 Wis. 2d 241, ¶11. In other words, Jorgensen's harm was based on three facts: (1) the value of his land would freeze under the new rules, (2) the value of other land would not freeze, and (3) like any other marketable property, land values will either inevitably rise or "will inevitably decrease." This would inevitably result in an unconstitutional non-uniform valuation of agricultural land, and it would inevitably harm Jorgensen because of an increased tax burden.

The only reason Jane Doe cites this case is because, in the following paragraph, the Wisconsin Supreme Court summarized Jorgensen's harm by saying "property values *may*

decrease…" *Id.* ¶12 (Jane Doe adds this emphasis). Word searches do not substitute for legal argument. If Jane Doe means to suggest—immediately after providing a paragraph-long explanation of the harm caused by freezing some tax assessments—that the court meant to dramatically redefine Jorgensen's harm as something that "may" occur, then what a waste of ink. Why didn't Justice Wilcox just declare in the opening sentence of his opinion that tax assessors "may" assess the wrong value and then grant the petitioners their relief? Indeed, the concrete character of the alleged harm was so apparent to the *Norquist* court that they concluded there was no threatened or anticipated harm at all, but rather an "actual injury." *Id.* ("Jorgensen has satisfied both the actual injury and logical nexus requirements, we conclude that he has standing …").[12]

The second case in Jane Doe's series of isolated quotations is *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship.,* 2002 WI 108, 255 Wis. 2d 447, 649 N.W.2d 626. Jane Doe cites this case for its holding, which she interprets to be "cable customers had standing to challenge a late-fee provision even though 'the late-payment fees might never be imposed …'" Jane Doe Supp. Br., dkt. 290:6 (quoting *Putnam,* 2002 WI 108, ¶45.). Jane Doe sorely misunderstands this case. The *Putnam* court actually found that "Time Warner's imposition of a $5.00 fee for late payment is an imminent and practical certainty." *Id.* ¶46. The basis for finding "an imminent and practical certainty" was the combination of two facts: (1) "10 to 15 percent of … customers pay the late fee each month," and (2) there was "no evidence that this trend will not continue." *Id.*

Assuming that Jane Doe means to import *Putnam*'s use of statistics to describe her alleged harm, this argument is unavailing for at least two reasons. First, *Putnam* was a class action that referred only to many customers' standing. Whether, had they sued individually, those customers

[12] The test for standing used in *Norquist* has long since been abrogated. *See Foley-Ciccantelli,* 2011 WI 36, ¶39 ("[Older] [c]ases have used a variety of tests to determine whether the party challenged has standing. … [T]he terminology for the test for standing or the application of the test is not consistent.").

also would have had standing was neither decided nor discussed. The second reason *Putnam* is not a useful comparison is because the statistics at use in *Putnam* describe the rate at which a late fee would be charged to a plaintiff class of customers. This is mathematically equivalent to the rate at which Time Warner caused plaintiffs harm. Simply put, as in *Milwaukee Dist. Counil 48*, fees equal harm. On the other hand, the statistics in this record do *not* describe the rate at which the District will cause harm. The evidence in this record describes only the rate of ("nearly 2%")[13] and difficulty detecting ("out of the blue") gender identity issues among human beings. Jane Doe PFUF, dkt. 307:3. Jane Doe fails to link this statistical evidence on gender identity to the harm itself, which is the District's application of its unconstitutional Trans Policy.

Jane Doe next cites *State ex rel. Parker v. Fiedler,* 180 Wis. 2d 438, 509 N.W.2d 440 (Ct. App. 1993), *reversed on other grounds sub nom. State ex rel. Parker v. Sullivan,* 184 Wis. 2d 668, 517 N.W.2d 449 (1994). According to Jane Doe, this case held:

> [A] neighbor to a halfway house had standing to challenge the early release of a parolee even though "one cannot say for certain that [the parolee] will harm either the individual relators or others in the community."

Jane Doe Supp. Br., dkt. 290:6 (citing *Parker,* 180 Wis. 2d at 453). This, again, badly misrepresents the court's holding. The neighbor in *Parker* had standing not in spite of any uncertainty, but rather because the court found "the record is uncontradicted that [a parolee's] mere presence in the community has adversely affected their sense of safety and security …" *Parker,* 180 Wis. 2d at 453. The community's actual harm to their sense of safety—not an anticipated harm of any new crimes, although perhaps the community anticipated that as well—was understandable given the identity of the parolee in question: "an unrepentant, apparently homicidal pedophile'

[13] These facts are disputed and ultimately immaterial to standing. I cite Jane Doe's interpretation of the evidence only because I have already assumed she accurately describes her alleged harm. *See* Part III.A, *supra.*

whose 'perverted lust perhaps unsated and certainly untreated for over a decade behind bars' makes him extremely dangerous." *Id.* at 445. Based on the record in that case, the *Parker* court held that "it is not 'conjectural'" for the neighbors to complain that parolees "present a substantial threat to the community." *Id.*

But why does the harm posed by a homicidal pedophile matter to Jane Doe? She does not even attempt to explain why a harm which at least four parties anticipated[14] is somehow like that threatened by the Trans Policy. The evidence here is that the Trans Policy has neither caused actual harm to Jane Doe nor given Jane Doe any reason to anticipate harm. To repeat, the Trans Policy *could* harm Jane Doe if her child experiences gender identity issues, although I emphasize that Jane Doe did not give any reason why she anticipates this will occur. The *Parker* relators, on the other hand, suffered actual harm to their sense of safety and they also anticipated harm for two distinct reasons. First, they anticipated harm based on the obvious threat posed by an "unrepentant, apparently homicidal pedophile," and second, they anticipated harm because of the specific nature of that parolee's release from prison. *Parker*, 180 Wis. 2d 453 ("by definition those who have not been deemed fit for discretionary parole, present a substantial threat to the community.")

The third case Jane Doe cites is *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856. Jane Doe does not explain this citation except to highlight that it contains this phrase: "threatened, as well as actual, pecuniary loss can be sufficient to confer standing." *Id.* ¶11 n.5. Jane Doe does not claim she has standing as a taxpayer in the way described in *Fabick*, but in any event, a more complete recitation of the footnote Jane Doe cites would include that: "*The imminent*

[14] Jane Doe's brief discusses only the anticipated harm of "a neighbor," but this case actually found standing for each of the State's four relators based on both actual and anticipated harms. Elnora Parker had standing because she lived near the halfway house and its resident "homicidal pedophile." *Parker*, 180 Wis. 2d at 452. Carol Arendt had standing because her child attended a school near the halfway house. *Id.* The third and fourth relators had standing because they held particular government offices. *Id.* at 455.

threat of unreimbursed costs, past and future, is sufficient to confer taxpayer standing …" *Id.* (emphasis added). Here, again, Jane Doe does not meet her burden to show any threat, let alone an imminent one.

The fourth and final case in Jane Doe's series of one-off quotations is *Vill. of Elk Grove Vill. v. Evans*, 997 F.2d 328 (7th Cir. 1993). This case has limited persuasive value because Judge Posner dismissed the action as moot and did not actually decide standing. *Id.* at 332. Even so, the case is easily distinguishable because the plaintiff in that case produced evidence of an anticipated harm—the plaintiff village:

> [S]ubmitted an affidavit which explains that Elk Grove is flood-prone … and that the construction of the radio tower, by plopping down a huge slab of concrete near the creek and thus limiting the creek's drainage area, will increase the risk of flooding.

Id. Here, once again, Jane Doe submits no evidence explaining why she anticipates harm in the way a flood-prone village anticipates floods. Indeed, Judge Posner emphasized that *Elk Grove Village* "is not a case in which a citizen … is trying to maintain a suit in respect of a diffuse and impalpable deprivation …" *Id.* at 329.

Finally, at oral argument, Jane Doe directed the Court to another circuit court's decision on another parent's challenge to another school district's policies. Tr. of Oct. 19, 2022 Hr'g, dkt. 288:59. In her supplemental brief, filed two weeks later, Jane Doe did not cite this decision or develop any argument why it should have persuasive value here.

In sum, Jane Doe fails to satisfy the first element of standing "a personal interest in the controversy." *Foley-Ciccantelli,* 2011 WI 36, ¶40. I need not advance to the remaining two elements.

E. Conclusion.

I dismiss Jane Doe's claims because she has no standing. That I reach this conclusion by deciding Jane Doe's probability of success on the merits of her claim, and not upon some other motion, is ultimately immaterial: "Those who seek to invoke the court's power to remedy a wrong must face a harm …" *Teigen*, 2022 WI 64, ¶160 (Hagedorn, J., op.). In this case, Jane Doe's testimony is that she does not face, and has no reason to anticipate that she will face, any harm. So, although I do not doubt her genuine motive and keen interest in this case, Jane Doe arrives before this Court like an "actor[] so that there may be a suit which will invoke a court ruling upon the constitutionality of the statute." *Doremus*, 342 U.S. at 431.

Perhaps the Trans Policy is the wrong response to statistics that show gender identity issues arise among the general population "out of the blue." I began this decision by assuming as much. I have assumed that Jane Doe accurately describes the Trans Policy as a "grand social experiment" to "treat[] little boys as if they're girls and little girls as if they're boys." Oral Argument at 58:26, *Jane Doe 1 v. MMSD*, No. 2020AP1032, *available at* mms://sc-media.wicourts.gov/sc-media/2020AP1032.wma. Perhaps, as a result of this experiment, many parents will be able to anticipate that they or their children will be harmed.

But none of those individuals ask this Court for relief. Their harm, real or imagined, is not a beacon for activist judges to provide a kind of relief that they have "been specifically *designed* to be bad at it …" Scalia, *supra* at 896 (emphasis in original). Jane Doe's threshold failure to prove standing bars this Court from considering whether she may be entitled to relief. To do so anyways would be an "abominable example of judges who reject the meaning of the Constitution as enacted and wish to substitute another meaning that they contend is superior." *In the Interest of C.G.*, 2022 WI 60, ¶91, 403 Wis. 2d 229, 976 N.W.2d 318 (quotations and citations omitted). It would "rob the People of the most important liberty … the freedom to govern themselves." *Id.* ¶89 (quoting

Obergefell v. Hodges, 576 U.S. 644, 714 (Scalia, J., dissenting).).

That is not to say that Jane Doe's claims are not important—they just are equally important to every other member of the public who also disapproves of their local school board.[15] That our constitution does not allow this Court to take a side may leave the parties unsatisfied. Unfortunately for them, judges "are not here to do freewheeling constitutional theory." *Wisconsin Legislature v. Palm*, 2020 WI 42, ¶168, 391 Wis. 2d 497, 942 N.W.2d 900 (Hagedorn, J., dissenting). "We are not here to decide every interesting legal question." *Id.* Fortunately, however, the parties are not without recourse: elections for the Madison Metropolitan School Board will be held April 4, 2023.

ORDER

For the above reasons, Jane Doe fails to show that she has standing and her claims are dismissed.

This is a final order for purpose of appeal.

[15]*See e.g.* MARK TWAIN, FOLLOWING THE EQUATOR (1897), *available at* https://www.gutenberg.org/files/2895/2895-h/2895-h.htm. ("In the first place God made idiots. This was for practice. Then He made School Boards.")