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COURT OF APPEALS

No. 2020AP1032

In the Wisconsin Court of Appeals

DISTRICT IV

JOHN DOE 1, JANE DOE 1, JANE DOE 3, JANE DOE 4, JOHN DOE 5, JANE DOE 5, JOHN DOE 6, JANE DOE 6, JOHN DOE 8, and JANE DOE 8,
PLAINTIFFS-APPELLANTS,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
DEFENDANT-RESPONDENT,

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL, and GENDER SEXUALITY ALLIANCE OF ROBERT M. LAFOLLETTE HIGH SCHOOL,
INTERVENORS-DEFENDANTS-RESPONDENTS.

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

OPENING BRIEF AND APPENDIX OF PLAINTIFFS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

ISSUES PRESENTED

1. Are Plaintiffs entitled to proceed anonymously in this matter?

The circuit court answered, no.

2. Is a denial of a request to proceed anonymously immediately appealable as of right?

The circuit court did not answer this question.

INTRODUCTION

Anonymous litigation has become an accepted method of proceeding in appropriate cases, both in Wisconsin and around the country, and this case fits squarely into a category of cases well recognized to warrant anonymity. The Plaintiffs here are parents of minor children in the Madison School District and challenge the District's Policy enabling children of *any age* to socially transition to a different gender identity at school without parental notice or consent, as a violation of parents' constitutional rights. Courts everywhere recognize that parent challenges to controversial school policies tend to arouse strong reactions in the community and therefore create a serious risk that the plaintiffs or their minor children will suffer retaliation, harassment, or even physical violence. Plaintiffs demonstrated that risk here, submitting, along with other evidence, many threatening and harassing responses to the filing of this lawsuit. Because cases like this turn on a purely legal question of whether a policy is constitutional, courts regularly determine that plaintiffs' identities are irrelevant to the outcome.

The circuit court found that Plaintiffs "would likely be subject to threats and intimidation" if their identities become known, App. 124, but concluded it lacked legal authority to grant Plaintiffs' request, declining to adopt or apply the balancing test federal courts uniformly apply to anonymity requests, App. 126. The circuit court offered instead to enter a protective order, but the order contemplated by the circuit

court would expose Plaintiffs' identities (and their children's) to an extremely large group of people, creating a significant risk that their names will be leaked, even inadvertently, causing harm that cannot be undone. That risk is entirely unnecessary and avoidable, given that Plaintiffs' identities are irrelevant to their claims, as they purposefully framed them. And the risks to Plaintiffs and their children were magnified by the circuit court's decision to allow non-parties to intervene and their lawyers (and staff, paralegals, etc.) to also learn Plaintiffs' names, over Plaintiffs' objection.

Because the court did not apply the balancing test, it failed to evaluate Plaintiffs' argument that their identities are irrelevant, a key factor courts normally consider, instead deferring to the District's and the Intervenors' (collectively "Defendants") unexplained assertions to the contrary. Yet Defendants have not given a single reason why they need to know Plaintiffs' names. Plaintiffs, for their part, have: (1) offered to disclose their identities to the circuit court, (2) repeatedly offered to provide any information about themselves that Defendants want (short of their identities), and (3) proposed options for discovery (though none is necessary) that would preserve their anonymity.

The circuit court erred by concluding that it lacked authority to grant Plaintiffs' request for anonymity, it erred by declining to adopt or apply the established balancing test for such requests, and, most importantly, it erred by failing to assess whether Plaintiffs' identities are in any way relevant

to this case (they are not). This Court should reverse and allow Plaintiffs to proceed anonymously.

ORAL ARGUMENT AND PUBLICATION

Given the important issues in this case, and the fact that Wisconsin appellate courts have not published a decision addressing when and how plaintiffs may proceed anonymously, the decision in this case warrants publication.

Plaintiffs also request oral argument. While the briefs are likely to present the issues, because they are novel (at least under Wisconsin law), this Court would likely benefit from oral argument to fully develop the arguments and to answer any questions the Court may have.

STATEMENT OF THE CASE

A. The District's Policy and Plaintiffs' Claims

The Madison Metropolitan School District (the "District") has adopted a Policy that enables children of *any age* to transition to a different gender identity at school, by adopting a new name and pronouns and having all staff treat them as though they were the opposite sex, without parental notice or consent. R. 1 ¶¶ 40–43; R. 2:20; R. 27:8–9.[1] The Policy then prohibits staff from communicating with parents about this major change without the child's consent. R. 1 ¶ 43; R. 2:11, 13. Worse yet, the policy directs staff to actively

[1] This and all other record citations refer to the court-stamped page numbers, rather than page numbers at the bottom of a document.

deceive parents, even to the point of violating record-keeping laws. R. 1 ¶¶ 44–51; R. 2:18; R. 27:23–24.

Transitioning to a different gender identity during childhood is a major and controversial decision, the long-term effects of which are still unknown and debated. R. 1 ¶¶ 15–30; R. 27:3–7, 32–40. Many psychiatric professionals experienced in these issues believe that transitioning at a young age may have long-lasting effects and even do serious harm. *See* R. 28 ¶ 69 (expert affidavit of Dr. Stephen Levine) ("[T]herapy for young children that encourages transition … is an experimental procedure that has a high likelihood of changing the life path of the child, with highly unpredictable effects on mental and physical health, suicidality, and life expectancy."); R. 1 ¶¶ 15–30; R. 27:4–7.

Plaintiffs, a group of 14 parents[2] with children in District schools, challenged the District's policy so that, if their children begin to deal with gender-identity issues, they will not be excluded from this life-changing decision. Plaintiffs alleged that the Policy violates parents' "fundamental right to direct the upbringing of [one's] child" under both Article 1, § 1 and Article 1, § 18 of the Wisconsin Constitution. *See Matter of Visitation of A. A. L.*, 2019 WI 57, ¶ 16, 387 Wis. 2d 1, 927 N.W.2d 486; R. 1 ¶¶ 70–97.

[2] Four of the original fourteen parents have since dismissed their claims for reasons that are not relevant to this appeal.

Plaintiffs filed their complaint on February 18, 2020, and simultaneously filed a motion to proceed anonymously, using pseudonyms. R. 1–2, 4–5. The following day Plaintiffs filed a motion for a preliminary injunction supported by, among other things, a lengthy expert affidavit. R. 26–28.

Importantly for purposes of this appeal, Plaintiffs challenged the District's Policy on its face and intentionally (in light of their anonymity request) did not put at issue any reasonably disputable facts unique to them. Instead, Plaintiffs claims' are premised on the fact that they have no way to know in advance whether their children will struggle with their gender identity or, if this becomes an issue, when it will come up. R. 1 ¶ 67; *see* R. 27:37 (citing expert affidavit). Moreover, given the District's Policy of secrecy from parents, Plaintiffs have no choice but to challenge the Policy preemptively to ensure that they will not be excluded from decisions regarding their children's gender identity at school and to avoid potentially life-long harms to their children and their family from a secret transition at school. R. 1 ¶¶ 68–69; *see* R. 27:32–40. In their preliminary injunction brief, Plaintiffs supported their legal arguments with an expert affidavit, an affidavit from another parent who experienced this first-hand (and who was not anonymous), and various publicly accessible documents and studies. *See* R. 27:15–42.

Plaintiffs filed short affidavits with their names redacted to establish two (and only two) basic things: that they are in fact parents of children in the District (for

standing) and, for some of the Plaintiffs, that they have religious objections to the Policy. R. 10–23.[3]

B. The Basis for Plaintiffs' Anonymity Request

Plaintiffs' anonymity motion provided substantial legal and factual support for their request to proceed using pseudonyms. Plaintiffs identified two sources of state-law authority by which the circuit court could grant their request: Wisconsin Statute § 801.21 ("Motions to Seal") and courts' "inherent power" to restrict "access to judicial records when the administration of justice requires it." *State ex rel. Bilder v. Delavan Twp.*, 112 Wis. 2d 539, 556, 334 N.W.2d 252 (1983); R. 5:2.

Plaintiffs noted that, consistent with this authority, a number of Wisconsin cases have allowed plaintiffs to sue anonymously, R. 5:3 (listing Wisconsin cases); *infra* pp. 18–19. Plaintiffs also cited U.S. Supreme Court precedent and cases from nearly every federal circuit recognizing that plaintiffs may sue using pseudonyms in appropriate cases, even though there is no specific federal rule of procedure addressing this. *E.g.*, *Doe v. Bolton*, 410 U.S. 179, 187 (1973); R. 5:4 (listing cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits); *infra* pp. 20–21.

[3] *See infra* n. 18 for a discussion of why Plaintiffs' religious beliefs are not reasonably disputable.

Plaintiffs then explained that, while there is no published Wisconsin opinion discussing when and how plaintiffs may sue anonymously, the federal cases have uniformly adopted "a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure," R. 5:5 (discussing factors); *infra* pp. 21–22, a test that is equivalent to the test Wisconsin courts apply to related issues.

Applying this balancing test, Plaintiffs then presented four well-recognized justifications for their request to proceed using pseudonyms. First, this case directly implicates Plaintiffs' minor children, which courts around the country have found to be a "particularly compelling" ground for anonymity. *E.g.*, *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721–24 (7th Cir. 2011); R. 5:7–8. Plaintiffs highlighted that Wisconsin statutes likewise reflect a concern for protecting minors' identities. R. 5:3–4 (discussing various Wisconsin statutes).

Second, the controversial issue in this case—parent involvement in gender identity transitions by their minor children—creates a serious risk of retaliation or harassment against Plaintiffs or their children, which courts have also recognized is "a compelling ground for allowing a party to litigate anonymously." *E.g.*, *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) (listing cases); R. 5:8–13. Plaintiffs provided substantial factual evidence of a serious risk of retaliation against them or their minor children if their

identities become publicly known, including many hateful and threatening comments made in response to this lawsuit, R. 5:12–13; R. 45:20–24, *infra* pp. 28–32, affidavit testimony from an attorney who was fired from a job and has been threatened with violence for her advocacy on related issues, R. 9 ¶¶ 1–12, *infra* pp. 32–33, and a variety of other examples of people who have been harassed, threatened, or retaliated against for taking similar positions, R. 5:9–12, *infra* pp. 33–35.

Third, this case raises the "highly sensitive" and "personal" question of whether a child with gender dysphoria should transition, which would be a private, family matter but for the District's policy, another recognized ground for anonymity. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (abortion); R. 5:13–14.

And fourth, some of the Plaintiffs raised claims based upon their religious beliefs, which are a "quintessentially private matter" that justifies anonymity. *E.g.*, *Doe v. Stegall*, 653 F.2d 180, 186 (5th Cir. 1981); R. 5:14.

Plaintiffs then discussed cases from the Fifth, Sixth, Seventh, and Ninth Circuits, as well as various district courts, allowing parents to proceed anonymously in nearly identical circumstances to this case: constitutional challenges, brought by parents, to a controversial school policy. R. 5:7–8; *infra* Part I.B; *e.g.*, *Elmbrook Sch. Dist.*, 658 F.3d 710.

After demonstrating their need for anonymity, Plaintiffs then explained why anonymity would not harm

either the District or the public interest. First, and most importantly for purposes of this appeal, Plaintiffs emphasized that the claim they brought—a facial challenge to the District's policy—does not depend on any facts unique to them or their children, so anonymity will not prejudice the District's defense of its policy in any way. R. 5:16; *Elmbrook Sch. Dist.*, 658 F.3d at 724. Second, because this case raises an important and "purely legal" question, the public interest is actually *best served* by allowing Plaintiffs to raise this issue anonymously, without "fear of [ ] reprisals." R 5:15; *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1072–73 and n.15 (9th Cir. 2000). Finally, challenges to government action, and especially to a government policy, involve no reputational injury to the defendant (the government), and therefore there is no "fairness" concern, present in some lawsuits involving private defendants, that the "accusers" must identify themselves. R. 5:15–16; *S. Methodist Univ. Ass'n of Women Law Students v. Wynne* & *Jaffe,* 599 F.2d 707, 713 (5th Cir. 1979).

Although Plaintiffs' identities are completely irrelevant to the claims they raised, Plaintiffs nevertheless offered to provide the District with any additional information about themselves that the District wanted. Plaintiffs gave a few examples for how they might accomplish this, while preserving their anonymity: by stipulating to facts about themselves or through "limited discovery," "such as written interrogatories." R. 5:16 n.6.

C. Procedural Background

Defendant Madison Metropolitan School District filed a motion to dismiss and opposed Plaintiffs' anonymity motion, asserting that it needed to know Plaintiffs' identities to conduct discovery, R. 42:21–22, although the District never sent the Plaintiffs any discovery or requested any information about the Plaintiffs in the four months that this case was pending in the circuit court prior to the filing of this appeal. And, as Plaintiffs pointed out in the circuit court, the District never identified "*a single fact* about the Plaintiffs that it needs, or even might need, to defend this lawsuit," nor did the District explain what discovery it wanted or why that could not "be accomplished through other means," while preserving Plaintiffs' anonymity. R. 45:26–27.

Shortly thereafter, three high school student groups, represented by Quarles & Brady and the ACLU, moved to intervene in support of the District's policy and joined the District's opposition to Plaintiffs' request to proceed anonymously. R. 50–52. Plaintiffs offered to stipulate to the intervention if Intervenors would agree that Plaintiffs remain anonymous as to them, but Intervenors rejected that offer, R. 62:2 n. 1, while simultaneously shielding the identities of their members who have transitioned at school without their parents' knowledge or consent, *e.g.*, R. 53 ¶ 13. Plaintiffs then filed a short response that they did not oppose Intervenors' motion to intervene *if* their anonymity request was granted, but they strenuously opposed disclosing their identities to

additional parties and lawyers, and opposed intervention if such disclosure would be the result. R. 62.

The circuit court heard arguments on Plaintiffs' motion to proceed anonymously, the District's motion to dismiss, and Intervenors' motion to intervene on May 26, 2020. App. 103–186 (R. 93).

During the hearing, the circuit court asked whether Plaintiffs would oppose disclosing their identities to the court and to the lawyers in the case under a protective order. App. 113–114. Plaintiffs explained that they were ready and willing to disclose their identities to the court, but that they opposed disclosure to the parties or their lawyers because the risk of retaliation against them was "serious" and "every additional person who knows [their] identities increases the risk that their identities will be leaked, even inadvertently." App. 114. Plaintiffs again emphasized that their identities are irrelevant to this case because the "[t]he only question is whether the [District's] policy is constitutional." App. 107, 115. As to the legal authority for their request, Plaintiffs noted that multiple of the federal cases they cited allowed parents to remain anonymous even as to opposing counsel and that another judge in Dane County had recently allowed a plaintiff to proceed anonymously to opposing counsel, Order Granting Petitioner's Motion to Proceed Anonymously, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Dane County Cir. Ct., Feb. 21, 2020, Judge Anderson presiding). *See* App. 113–20.

Plaintiffs also again emphasized that they were willing to stipulate to or provide the Defendants with any information about themselves without disclosing their identities, and would "make every effort to give the district whatever they need," and yet the Defendants had been unable to "come up with any specific reason to know [their] identities." App. 107, 114–15, 119–20; R. 45:26–27. Plaintiffs also explained that, if their anonymity actually became a problem during discovery, the circuit court could "revisit" the issue. App. 107, 120, 123.

The circuit court asked the District's counsel whether "it is true" that Plaintiffs' identities are "unnecessary for purposes of this litigation?" App. 122. The District's counsel responded, "we respectfully disagree," but without explaining. When the circuit court pressed for an explanation, counsel had no response other than vague generalities: "[W]e would need to understand the factual circumstances of those individuals"; "[S]pecific individualized facts … do matter." App. 122. But the District's counsel did not specify a single fact on the record to support Defendants' argument that Plaintiffs' identities are relevant to the merits of this dispute.

At the end of the hearing, the circuit court agreed that Plaintiffs "ha[d] made [a] demonstrable factual showing that, as a factual matter, would their names be disclosed, they would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly functioning of the court case." App. 124. The circuit court also agreed that disclosure to more people would create additional

risk of a leak and thus more potential for harm to Plaintiffs or their children, App. 126 ("I don't dismiss … your concern over the more people that know, the greater risk. That's true.").

However, the court concluded that it did not have the legal authority to grant Plaintiffs' anonymity request: "In the end, I'm bound by Wisconsin law. … There is no precedent for what the plaintiff is asking for in the current published appellate case law." App. 124. The circuit court also dismissed the federal case law Plaintiffs had cited: "I am not comfortable transporting into Wisconsin jurisprudence … the practice of the federal courts in similar circumstances." App. 125.

Because the court declined to import "the practice of the federal courts in similar circumstances," App. 125, it never applied the balancing test that federal courts uniformly employ for anonymity requests, nor did it walk through the factors federal courts (and Plaintiffs) identified as relevant to such requests, App. 123–27.

Most critically, the court never seriously wrestled with whether Plaintiffs' identities are actually relevant to the claims Plaintiffs brought, one of the key factors federal courts consider. Instead, the court deferred to Defendants' un-explained assertion that they need to know Plaintiffs' identities: "I don't know, [counsel], whether you're right or not. I'm not sure that their identity is completely immaterial to everything that follows in this case or not. It may be so. But at this point in this juncture it's not for me to say as to how I

would control what the lawyers do in defending the policy." App. 126–27.

In the end, the circuit court ordered the Plaintiffs to disclose their identities to the court and to the lawyers for both the District and the Intervenors subject to a protective order. App. 126–27. Plaintiffs had argued, in the alternative, that they should, at the very least, not have to disclose their identities to the lawyers for the Intervenors, but the circuit court rejected this argument too. App. 145, 153–58.

On June 3, the circuit court signed a written order denying Plaintiffs' request to proceed anonymously and requiring Plaintiffs to disclose their identities by June 9. App. 101–102 (R. 74). The circuit court later orally extended Plaintiffs' deadline to disclose their identities until June 12. App. 230.

The circuit court initially allowed Plaintiffs to draft the protective order, App. 126, and Plaintiffs did so, R. 79, but Defendants pushed for a much less restrictive order than Plaintiffs proposed, so the circuit court scheduled a hearing for June 8 to discuss the terms of a protective order, App. 187–252 (R. 94). During that hearing, the circuit court agreed with Defendants that access to Plaintiffs' identities would not be limited to the lawyers who appeared for the Defendants (at that point eight lawyers), but that any employee of the three law firms in the case (Boardman & Clark, Quarles & Brady, and the ACLU), including associates, paralegals, secretaries, interns, etc., could learn Plaintiffs' identities. App. 210–16.

The circuit court also indicated that it was inclined to model the protective order after a template used by the United States District Court for the Eastern District of Wisconsin, App. 224–25, which further allows disclosure to court reporters, consultants, investigators, experts, and deposition and trial witnesses, *see* United States District Court for the Eastern District of Wisconsin Local Rules, Appendix (Feb. 1, 2010) (provisions for "Attorney's Eyes Only" information).[4] And, given the disagreement over the terms of the protective order, the circuit court decided to instead allow *Defendants* to draft the order. App. 224–25. The parties continued to negotiate over the terms, but, as of the deadline to disclose on June 12, no agreement had been reached and no protective order was in place.

On June 12, Plaintiffs filed an appeal as of right, along with a motion for a stay pending appeal, R. 83, 84, which the circuit court ultimately granted, R. 91. At a hearing on Plaintiffs' stay motion, the parties disputed whether Plaintiffs' preliminary injunction motion could proceed notwithstanding Plaintiffs' appeal,[5] and the relevance of Plaintiffs' identities came up once again. R. 95:14–22. Plaintiffs explained that their preliminary injunction motion

[4] https://www.wied.uscourts.gov/sites/wied/files/documents/Local%20Rules%202010-0201-%20Amended%202019-0903.4.pdf

[5] Although Plaintiffs filed a preliminary injunction motion the day after they filed their complaint in February, the circuit court (erroneously, in Plaintiffs' view) declined to consider that motion until after resolution of the Defendants' motion to dismiss.

(like their entire case), mainly depends on one fact about them—that their "children might begin to deal with [gender dysphoria]." R. 95:22. This fact is indisputable, Plaintiffs emphasized, "in the same way it's not disputable that plaintiffs' children might get injured on the playground or might get stung by a bee or might get COVID-19." R. 95:17. Defendants "may think that's not sufficient" for standing or an injunction but "they don't need to know who the plaintiffs are to make that argument." R. 95:17. Nevertheless, the court decided to stay the entire case, including Plaintiffs' outstanding temporary injunction motion. R. 95:26–30.

D. Subsequent Proceedings

Later that same day, Plaintiffs filed a motion for an injunction pending appeal. R. 89, 90. The circuit court set a briefing schedule, and on August 6, Defendants filed a 35-page response, along with their own expert affidavit to rebut Plaintiffs' expert. Dkts. 140, 141.[6] In addition to defending the Policy on the merits, Defendants argued that Plaintiffs lack standing, that Plaintiffs' claims are not ripe, and that the harms Plaintiffs allege are insufficient for an injunction. Dkt. 140:17–21. Those issues are not (yet) before this Court, but this response proves Plaintiffs' point that Defendants can

[6] These filings are not part of the record in this appeal. However, this Court may take judicial notice of subsequent filings in the circuit court. *State ex rel. Marberry v. Macht*, 2003 WI 79, ¶ 6 n.2, 262 Wis. 2d 720, 665 N.W.2d 155.

fully and adequately defend the Policy without knowing Plaintiffs' identities.

STANDARD OF REVIEW

Whether the circuit court had authority to grant Plaintiffs' anonymity request, whether to adopt the federal balancing test, and whether a denial of a request to proceed anonymously is immediately appealable as of right are all legal questions subject to de novo review. *See State v. Henley*, 2010 WI 97, ¶ 29, 328 Wis. 2d 544, 787 N.W.2d 350. The application of the balancing test is also reviewed de novo. *See Democratic Party v. DOJ*, 2016 WI 100, ¶ 9, 372 Wis. 2d 460, 888 N.W.2d 584.

ARGUMENT

I. Substantial Legal Authority Supports Plaintiffs' Anonymity Request

While Wisconsin courts have regularly allowed plaintiffs to sue using pseudonyms, no published opinion to date has discussed when and how plaintiffs may do so. *See*, *e.g.*, *Doe 56 v. Mayo Clinic Health Sys.–Eau Claire Clinic, Inc.*, 2016 WI 48, 369 Wis. 2d 351, 880 N.W.2d 681; *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Directors*, 227 Wis. 2d 779, ¶ 3, 596 N.W.2d 403 (1999) (the plaintiffs included James Roe 1-5 and Jane Roe 1-2); *Doe v. Archdiocese of Milwaukee*, 211 Wis. 2d 312, 565 N.W.2d 94 (1997); *Doe by Doe v. Roe*, 151 Wis. 2d 366, 444 N.W.2d 437 (Ct. App. 1989); Order Granting Petitioner's Motion to Proceed Anonymously,

Doe v. Madison Metropolitan School District, No. 19-cv-3166 (Feb. 20, 2020, Judge Anderson Presiding).

There are at least two sources of authority by which Wisconsin courts can allow plaintiffs to sue using a pseudonym. First, Wisconsin Statute § 801.21 gives circuit courts broad authority to seal or redact any "portion of a document" or "item[ ] of information" whenever there are "sufficient grounds" to do so, and those "grounds" can come from "constitutional, statutory, [or] common law." Wis. Stat. § 801.21(1), (4). And second, the Wisconsin Supreme Court has held that circuit courts have "inherent power" to restrict "access to judicial records when the administration of justice requires it." *Bilder*, 112 Wis. 2d at 556.

Although no published Wisconsin appellate opinion has yet established a test for when a lawsuit may be filed anonymously, federal courts frequently consider anonymity requests and have uniformly adopted "a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure," *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (surveying caselaw); *Elmbrook Sch. Dist.*, 658 F.3d at 722. This test is equivalent to the balancing test this Court applied to one application of a court's "inherent power" under *Bilder* to restrict access to judicial records. *See Krier v. EOG Envtl., Inc.*, 2005 WI App 256, ¶ 23, 288 Wis. 2d 623, 707 N.W.2d 915 ("balance the factors favoring secrecy against the … presumption of access."). Multiple federal courts have also

considered, and granted, anonymity requests in nearly identical circumstances to this case. And federal courts have allowed plaintiffs to remain anonymous even to opposing counsel. This federal case law provides a useful "common law" framework, Wis. Stat. § 801.21(4), so this Court should follow this well-traveled path.

A. This Court Should Adopt the Balancing Test Federal Courts Uniformly Apply

Although the federal rules of civil procedure do not provide an explicit mechanism for suing using a pseudonym, nearly every federal circuit has recognized that plaintiffs may sue anonymously in appropriate circumstances. *See*, *e.g.*, *Sealed Plaintiff*, 537 F.3d at 188–91 (2d Cir. 2008); *Doe v. Colautti*, 592 F.2d 704, 705 (3d Cir. 1979); *James v. Jacobson*, 6 F.3d 233, 238–43 (4th Cir. 1993); *Stegall*, 653 F.2d at 184–86 (5th Cir. 1981); *Doe v. Porter*, 370 F.3d 558, 560–61 (6th Cir. 2004); *Elmbrook Sch. Dist.*, 658 F.3d at 721–24 (7th Cir. 2011)[7]; *Advanced Textile Corp.*, 214 F.3d at 1067–69 (9th Cir. 2000); *Coe v. U.S. Dist. Court for Dist. of Colorado*, 676 F.2d 411, 415–18 (10th Cir. 1982); *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684–87 (11th Cir. 2001); *see also In re Sealed Case*, 931 F.3d 92, 96–97 (D.C. Cir. 2019); *see generally*, Donald P. Balla, *John Doe Is Alive and Well:*

[7] The Seventh Circuit later granted rehearing en banc and vacated the panel's opinion in this case, but then "adopt[ed] the panel's original analysis on the issue[ ] of … anonymity." *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 842–43 (7th Cir. 2012).

Designing Pseudonym Use in American Courts, 63 Ark. L. Rev. 691 (2010); 67A C.J.S. Parties § 174.

The United States Supreme Court has also endorsed the practice, most famously in *Roe v. Wade*, 410 U.S. at 124 (1973) and *Doe v. Bolton*, 410 U.S. at 187 ("Our decision in *Roe v. Wade*, establishes that, despite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state."), but also in a challenge brought by parents against a school district, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 294 and n.1 (2000) (parent challenge to student-led prayer before football games). *See also Plyler v. Doe*, 457 U.S. 202 (1982); *Poe v. Ullman*, 367 U.S. 497, 498 n. 1 (1961).

These cases identify a variety of factors to consider in deciding whether "the plaintiff's need for anonymity" outweighs the "countervailing interests in full disclosure," *Sealed Plaintiff*, 537 F.3d at 189, including: (1) whether the case involves minor children or the parents of minor children, *Elmbrook Sch. Dist.*, 658 F.3d at 724; *Stegall*, 653 F.2d at 186; (2) whether "the litigation involves matters that are highly sensitive and of a personal nature," such as controversial medical issues, *Sealed Plaintiff*, 537 F.3d at 190 (citation omitted); *Jacobson*, 6 F.3d at 238; *e.g. Aware Woman Center*, 253 F.3d at 685 (abortion); *Roe v. Wade*, 410 U.S. 113 (same); *Ullman*, 367 U.S. 497 (birth control); (3) whether the case "implicate[s] deeply held beliefs [that] provoke intense emotional responses," such as "[l]awsuits involving religion," *Elmbrook Sch. Dist.*, 658 F.3d at 723; *Stegall*, 653 F.2d at 186;

(4) whether there is a "danger of retaliation" due to the sensitive issues raised in a lawsuit, *Elmbrook Sch. Dist.*, 658 F.3d at 723; *Stegall*, 653 F.2d at 186; *Sealed Plaintiff*, 537 F.3d at 190; (5) whether the lawsuit "challeng[es] the actions of the government," *Sealed Plaintiff*, 537 F.3d at 190; *Jacobson*, 6 F.3d at 238; (6) whether "because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities," *Sealed Plaintiff*, 537 F.3d at 190 (citation omitted), and (7) whether "the defendant is prejudiced by allowing the plaintiff to press his claims anonymously," *Sealed Plaintiff*, 537 F.3d at 190; *Elmbrook Sch. Dist.*, 658 F.3d at 724.

Although Plaintiffs cited all this authority, the circuit court nevertheless concluded that it did not have legal authority to grant Plaintiffs' request, App. 124 ("I'm bound by Wisconsin law. … There is no precedent for what the plaintiff is asking for in [Wisconsin] case law"), and declined to import or apply "the practice of federal courts in similar circumstances," App. 125. This Court should make clear that plaintiffs in Wisconsin courts may proceed anonymously under the right circumstances, that the federal balancing test—weighing the need for anonymity against the countervailing interests, guided by the factors above (and others)—is the proper framework for analyzing such requests, and, as explained further below, that Plaintiffs here are entitled to proceed anonymously under this test.

B. Parent Challenges to Controversial School Policies are Widely Recognized as Warranting Anonymity

Courts around the country have applied this balancing test and found that parents should be permitted to anonymously challenge controversial school district policies.

In *Doe v. Elmbrook School District*, for example, the Seventh Circuit held that a group of parents and students could bring an anonymous First Amendment challenge to a school district's practice of holding high school graduations at a church. 658 F.3d at 717, 721–24. Because "[l]awsuits involving religion can implicate deeply held beliefs and provoke intense emotional responses," the Court found a significant risk of retaliation if the Plaintiffs were identified. *Id*. at 723–24. And this risk was "particularly compelling" given that the case involved children and was "intimately tied to District schools." *Id*. at 724. The parents were also entitled to anonymity because identifying them "would expose the identities of their children." *Id*. Finally, given that the case involved the pure legal issue of whether the policy was constitutional, the Court found no "adverse effect on the District or on its ability to defend itself." *Id*.

Similarly, in *Doe v. Stegall*, the Fifth Circuit allowed a mother and her children to anonymously challenge "the constitutionality of prayer and Bible reading exercises in Mississippi public schools." 653 F.2d at 181. "[R]eligion is perhaps the quintessentially private matter," the Court

explained, and the plaintiffs, "by filing suit, [had] made revelations about their personal beliefs and practices," risking "retaliation against [them] for filing this lawsuit." *Id.* at 186. The Court found "especially persuasive" that the case involved children. *Id.*

Likewise, the Sixth Circuit let parents anonymously challenge their school district's Bible education program because the lawsuit "challeng[ed] a government activity," "force[d] Plaintiffs to reveal their beliefs about a particularly sensitive topic that could subject them to considerable harassment," and was "brought on behalf of very young children." *Porter*, 370 F.3d at 560.

Finally, the Ninth Circuit permitted a parent to anonymously challenge a school district policy allowing graduation speakers to "inject prayers and religious songs into the graduation program" because the parent "feared retaliation by the community" for raising the sensitive First Amendment claim. *Doe v. Madison Sch. Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998), *vacated on other grounds*, 177 F.3d 789 (9th Cir.1999) (en banc); *see Advanced Textile Corp.*, 214 F.3d at 1067 (citing *Madison School District* affirmatively).

Multiple district courts have allowed parents to bring similar challenges anonymously. *E.g.*, *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667, 670–71 (E.D. Ky. 2000) (allowing parents to anonymously challenge a school district's practice of "hanging the Ten Commandments in classrooms");

Freedom From Religion Found., Inc. v. Emanuel Cty. Sch. Sys., 109 F. Supp. 3d 1353, 1355 (S.D. Ga. 2015) (allowing parents to anonymously challenge "prayer in a public school classroom.").

The facts here are on all fours with these cases: this lawsuit involves a constitutional challenge to a school district policy, including a claim under Wisconsin's version of the First Amendment, brought by parents, on behalf of themselves and their minor children, raising a sensitive and controversial issue that evokes strong reactions and creates a substantial risk of harassment or retaliation against Plaintiffs or their children.

C. Courts Regularly Allow Plaintiffs to Remain Anonymous Even to Opposing Counsel

Courts in multiple of these cases, as well as many other cases filed using pseudonyms, have allowed Plaintiffs to remain anonymous even to opposing counsel.

In *Doe v. Madison School District No. 321*, for example, the court "met in chambers with [the plaintiff], without defense counsel present, to determine whether she ha[d] standing." 147 F.3d at 834 n.1. Similarly, in *Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093, 1094 (E.D. Mo. 2006), an anonymous challenge to Bible distribution in a school, the court allowed the plaintiff to submit her true name to the court ex parte. *See* Docket Entry March 15, 2006, Case No. 4:06-cv-392. And a judge in Dane County recently allowed an open-records plaintiff request to remain anonymous to

opposing counsel. Order Granting Petitioner's Motion to Proceed Anonymously, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Dane County Cir. Ct., Feb. 21, 2020, Judge Anderson presiding); *see* App. 116. Plaintiffs have offered to disclose their names to the circuit court from the beginning of the case. R. 45:26; App. 113.

In *Doe v. Elmbrook School District*, plaintiffs proposed the condition that *if* their anonymity "cause[d] difficulty in discovery … the parties shall confer in good faith on the terms of an appropriate protective order." *See* Proposed Anonymity Order, Dkt. 19-4, *Doe v. Elmbrook Sch. Dist.*, No. 2:09-cv-409 (E.D. Wis. May 12, 2009). The court granted their motion to proceed anonymously without any conditions and without requiring plaintiffs to immediately disclose their identities to the defendants. *See* Order Granting Motion to Proceed Anonymously, Dkt. 34, *Doe v. Elmbrook Sch. Dist.*, No. 2:09-cv-409 (E.D. Wis. May 29, 2009). Plaintiffs offered this approach as well—that they remain anonymous until an issue arises—in the unlikely event that some discovery issue cannot be resolved while preserving their anonymity. R. 45:26–27; *see infra* p. 39 (discussing discovery).

The plaintiff in *Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667, filed a complaint using a pseudonym and an anonymized affidavit, as Plaintiffs did here. *Id.* at 669. The defendants opposed the request and "moved to strike the affidavit of Sarah Doe based on the anonymity." But the Court allowed the plaintiff to proceed, finding that "[t]he anonymity

of the plaintiffs will not adversely affect the defendants" because "the plaintiffs seek only an injunction, not individual damages." *Id*. at 670–71. The same is true here.

The U.S. Supreme Court has allowed plaintiffs to remain anonymous *even to the court*. Most famously, the plaintiffs in both *Roe v. Wade* and *Doe v. Bolton* used pseudonyms, and the Court indicated that it did not know their true identities. *See* 410 U.S. at 187 ("[D]espite her pseudonym, we may accept as true, for this case, Mary Doe's existence and her pregnant state on April 16, 1970."); 410 U.S. at 120 n.4.

Other cases allowing plaintiffs to remain anonymous to opposing counsel and/or to the court include: *Ullman*, 367 U.S. 497 (challenge to ban on contraceptives) (nature of anonymity discussed in *Buxton v. Ullman*, 156 A.2d 508, 514–15 (Conn. 1959)); *Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (parent challenge to school policy of conducting random searches of students' persons and belongings) (*see* Second Am. Compl., Dkt. 21, No. 4:99-cv-386 (E.D. Ark. Apr. 19, 2000) (no indication defendants or court given plaintiff's identity)); *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1245 (D.D.C. 1981) (noting defendants had not "made a showing of necessity" to learn plaintiff's identity); *Moe v. Dinkins*, 533 F. Supp. 623, 627 (S.D.N.Y. 1981) (noting that the complaint and sealed affidavits were sufficient to establish standing); *Roe v. Ingraham*, 364 F. Supp. 536, 541 n. 7 (S.D.N.Y. 1973) (finding sufficient that "Plaintiffs'

attorneys have represented to the court" that plaintiffs were real individuals); *Doe v. Lavine*, 347 F. Supp. 357, 358 (S.D.N.Y. 1972); *Doe v. Shapiro*, 302 F. Supp. 761, 762 (D. Conn. 1969); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 294 and n.1 (noting that "many District officials" had attempted to "to ferret out the identities of the Plaintiffs").

II. Plaintiffs Have Ample Grounds for Anonymity; and Defendants Cannot Justify Their Opposition

A. Plaintiffs and Their Children Face a Serious Risk of Retaliation or Harassment

Plaintiffs provided substantial evidence of a serious risk of retaliation or harassment against them or their minor children if their identities become known, and courts have repeatedly found this to be "a compelling ground for allowing a party to litigate anonymously." *Doe v. City of Chicago*, 360 F.3d at 669; *Elmbrook Sch. Dist.*, 658 F.3d at 723; *Stegall*, 653 F.2d at 186; *Sealed Plaintiff*, 537 F.3d at 190. The circuit court "agree[d] with the plaintiff[s]" that they "would likely be subject to threats and intimidation," if their names become known. App. 124. And the Defendants have never submitted any evidence to the contrary, nor could they because Plaintiffs' evidence was overwhelming.

Plaintiffs and their counsel received many harassing calls, emails, and comments, some threatening, in response to this lawsuit. A day after it was filed, Scott Gordon, editor of

Tone Madison,[8] tweeted, "Where do WILL staff eat, stay, etc. when they're in town to work on their lawsuit in Dane County Court? I want to know who's doing business with a malicious, transphobic organization." R. 46, Ex. 1. Someone named "Belinda Davenport" commented about this case, "History shows you can push a[n] oppressed group ever so far that they will have no recourse but resort to violence to solve the problem. … The time will come to drop the protest signs and pick up the gun or even the WMD. Street gangs and assassins would be the only way to stop the bigots." R. 46, Ex. 13 at 5–6. Scot Ross, who has since been appointed to the Wisconsin Ethics Commission,[9] tweeted, "Transphobes are going to transphobe. Dear god, the Republican Party is an overflowing hate-filled cesspool of white guys who can only sprout erections by bullying and shaming children." R. 46, Ex. 2.

Multiple articles by local papers have accused Plaintiffs of being "transphobic" or "bigots." *See* Alice Herman, *The Wisconsin Institute for Law and Liberty litigates for hate*,

[8] https://www.tonemadison.com/

[9] *See* Mitchell Schmidt, *Former One Wisconsin Now executive director Scot Ross to join state ethics commission*, Wisconsin State Journal (Apr. 24, 2020), https://madison.com/wsj/news/local/govt-and-politics/former-one-wisconsin-now-executive-director-scot-ross-to-join-state-ethics-commission/article_89cb610e-1725-5529-9d18-dd53197fc4cd.html.

Tone Madison (Mar. 3, 2020)[10]; Alan Talaga, *Trust the students*, Isthmus (Feb. 27, 2020).[11]

Plaintiffs' counsel have also directly received harassing calls and emails. On February 20, someone sent a message through counsels' online form stating, "Your [sic] going after children. … I hope your secrets come out before your [sic] ready." R. 46, Ex. 12. And Plaintiffs' counsel received a voicemail stating, "You guys really have nothing better to do than harass kids? You guys suck." R. 46 ¶ 2.

Other harassing comments or tweets include:

- "It takes being a Christian to be this disgusting, immoral and nasty to kids trying to get an education[.]" R. 46, Ex. 19.
- "These parents are cowards, every single one of them. … This is the pinnacle of disgrace. These parents deserve every single bad name hurled at them." R. 46, Ex. 15 at 2.
- "Of course these Nazis are nameless and anonymous cuz they're cowards and fear being called out for being Nazis," R. 46, Ex. 4.
- "If that bigoted lawsuit goes through, as soon as any transgender child or teen in that school district commits suicide, charge each and everyone of those parents and

[10] https://www.tonemadison.com/articles/the-wisconsin-institute-for-law-and-liberty-litigates-for-hate

[11] https://isthmus.com/opinion/opinion/lawsuit-challenging-trans-policy-in-madison-schools/

their lawyers with manslaughter, and apply it as a hate-crime. They are directly culpable." R. 46, Ex. 13 at 9.

- "This is how trans people get murdered, by the blood-drenched hate structure created by these @wisgop sacks of fucking shit." *See* R. 8, Ex. 8.
- "F*ck WI for Law & Liberty." R. 8, Ex. 11.
- "Who funds these fuckers?" R. 8, Ex. 11.
- "Being religious bigots or Transphobic isn't protected under the constitution." R. 8, Ex. 10.
- "A group of 15 bigots." R. 8, Ex. 9.
- "REPORTED. For being transphobic and targeting a protected group of people," R. 46, Ex. 5.
- "Unnamed parents?? Cowards." R. 46, Ex. 6.
- "Sounds pretty transphobic," R. 46, Ex. 7.
- "In other news, @WILawLiberty continues to be the trashiest of trash," R. 46, Ex. 8.
- "This is just needlessly cruel," R. 46, Ex. 9.
- "What dicks, honestly it's none of their business any fuckin way," R. 46, Ex. 10.
- "Makes the UK look like trans utopia. I don't get how the us can be so biggoted," R. 46, Ex. 11.
- "Those adults need to be committed to a mental institution." R. 46, Ex. 13 at 9.
- "Pull your kids, home school your hatred into them, and leave the rest of us alone," R. 46, Ex. 13 at 5.

- "With the 'religious' right, the cruelty is the point." R. 46, Ex. 14 at 8.
- "What's with the right wing nuts' obsessive transphobia? Are they that insecure about their own sexual identity? On a mission from God? Trying to promote more of Trump's puss-grabbing version of heterosexual itsy?" R. 46, Ex. 15 at 3.
- "Gross. Get a real job, parents, and let your kids live their lives." R. 46, Ex. 15 at 4.
- "These unnamed ie 'cowardly' so-called Christians want their kids to be able to bully transgendered kids." R. 46, Ex. 16.
- "Fuck WILL, Seriously." R. 46, Ex. 17.
- "Religious freedom means we can abuse our children, parent group claims." R. 46, Ex. 18.
- "They filed and publicized an anti-LGBT culture war lawsuit," R. 46, Ex. 3.

Plaintiffs also submitted the affidavit testimony of Kara Dansky, an attorney who was fired from a job and has been threatened with violence for her advocacy on related issues. R.9 ¶¶ 1–12. Dansky serves on the board of a feminist organization that argues publicly that "gender identity" is a false concept, and she was fired from a contract job as a direct result of her statements about gender identity, even though the contract was totally unrelated to her advocacy. R.9 ¶¶ 1, 3–4, 6–7. The organization she is a part of has also received threats of violence at their events and protests requiring

police intervention. R.9 ¶ 8; *see* Eileen Hamm, *Women's Liberation Front holds sold-out event at Seattle Public Library despite bomb threat, interruptions, arrests*, Feminist Current (Feb. 3, 2020).[12] And other members of her organization have lost jobs, been kicked out of businesses, and received death and rape threats for their public statements that "gender identity" does not trump biological sex. R.9 ¶¶ 9–12.

There are many other well-documented examples of people who have been harassed, threatened, or retaliated against for taking similar positions. Plaintiffs provide just a few here; more can be found in Plaintiffs' filings below. R. 5:9–12; R. 45:20.

- Feminist singer-songwriter Thistle Pettersen, a Madisonian, recently published a lengthy piece explaining how, as a result of her speech on related issues, she has been "ostracized in [her] community, forced out of [her] job, and banned from playing music at various venues in [Madison]." Thistle Pettersen, *How I Became the Most Hated Folk Singer in Madison*, Uncommon Ground (Nov. 10, 2019).[13]
- Dr. Kenneth Zucker, one of the leading experts in the world on gender dysphoria, was "unceremoniously

[12] https://www.feministcurrent.com/2020/02/03/womens-liberation-front-holds-sold-out-event-at-seattle-public-library-despite-bomb-threat-interruptions-arrests/ (video of protests)

[13] https://uncommongroundmedia.com/thistle-pettersen-how-i-became-the-most-hated-folk-singer-in-madison/

fired" from a clinic he led for multiple decades after a "sustained campaign" against him and his view that a child's beliefs about his or her gender identity should not be immediately "affirmed." Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016),[14] R. 8:2–29. Dr. Zucker was eventually vindicated, with the Center issuing a public apology and offering a settlement of over half a million dollars, but only after almost two years of litigation. *CAMH reaches settlement with former head of gender identity clinic*, CBC News (Oct. 7, 2018).[15]

- A group of 54 academics from around the world who have criticized various transgender-related policies recently issued a public letter to express "concern[s] about the suppression of proper academic analysis and discussion of the social phenomenon of transgenderism." According to the letter, these academics have "experienced campus protests, calls for dismissal in the press, harassment, foiled plots to bring about dismissal, no-platforming, and attempts to censor academic research and publications." *Academics are*

[14] https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html

[15] https://www.cbc.ca/news/canada/toronto/camh-settlement-former-head-gender-identity-clinic-1.4854015

being harassed over their research into transgender issues, The Guardian (Oct. 16, 2018).[16]

- The editor of a recent collection of essays about transgender children has written that, after publication, she experienced "ferocious attempts to silence [her]self and [her] co-editor [ ], including sustained attacks on our careers, livelihoods and reputations the likes of which we have never previously experienced in our long academic careers." Heather Brunskell-Evans, *Inventing Transgender Children and Young People* (Oct. 12, 2019).[17]

The point of these anecdotes is to show that, because the issues raised in this case are so highly controversial, they often arouse fierce emotion, creating a significant risk of harassment or retaliation.

This risk weighs even more heavily here given that this case implicates Plaintiffs' minor children. If Plaintiffs' identities become known, it will necessarily "expose the identities of their children," *Elmbrook Sch. Dist.*, 658 F.3d at 724, and the harassment juveniles can inflict on one another can be especially cruel. Courts have repeatedly found that protecting minor children is a "particularly compelling," *Elmbrook Sch. Dist.*, 658 F.3d at 724, and "especially

[16] https://www.theguardian.com/society/2018/oct/16/academics-are-being-harassed-over-their-research-into-transgender-issues

[17] http://www.heather-brunskell-evans.co.uk/body-politics/inventing-transgender-children-and-young-people-2/.

persuasive," *Stegall*, 653 F.2d at 181, reason for anonymity. *See also Doe v. Vill. of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016); *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997). Like these federal cases, Wisconsin Statutes also reflect the importance of protecting the identities of "juveniles and parents of juveniles" in sensitive cases, *e.g.* Wis. Stat. §§ 809.19(2)(a); 48.93(1d); 48.396(2)(a); 767.853; 938.396(2)(a); *see also* Wis. Stat. § 118.125(2) (confidentiality of students' education records).

The circuit court understood and even agreed with Plaintiffs that they and their minor children face a serious risk of harassment or retaliation if their identities become known, but still decided that Plaintiffs could not proceed anonymously. This was error.

B. Plaintiffs' Identities Are Entirely Irrelevant

As Plaintiffs have argued from the beginning, their identities are not relevant in any way to the claims they raise. Dkt. 9:14–16; 50:23–26; App. 107, 115, 119–20, 121. As the "master[s] of the[ir] complaint," *see Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987), Plaintiffs intentionally brought claims that do not depend on any disputable facts about them. Plaintiffs challenge the District's Policy on its face, advancing only the purely legal question of whether a school district may constitutionally exclude parents from the important and highly controversial decision about whether a child of theirs will socially transition to the opposite gender. Plaintiffs "do not

allege that their children are materially different from other children in the District or that the Plaintiffs are materially different from other parents." Dkt. 9:15. They do not seek damages or any remedy that would apply only to them, but simply a declaration that the Policy violates parents' rights and an injunction requiring the District to defer to parents on this major issue. R. 1:20–21; *see Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d at 670–71.

Plaintiffs must have standing, of course, but Plaintiffs alleged only two indisputable facts to support their standing to bring their claims: (1) that they are parents of children in District schools and (2) that their children may begin to deal with gender-identity issues and seek to transition. R. 1, ¶¶ 2–9, 67–69. Plaintiffs explained early on that they are willing to base their entire argument for standing and for an injunction on those two facts about them. R. 92:31. Otherwise, Plaintiffs' arguments depend entirely on the law, the Policy, an expert affidavit, and publicly available documents and studies. *See* R. 27:13–40.

To establish that they are parents of children in the District, Plaintiffs submitted short, anonymized affidavits. R. 10–23. That fact is not reasonably subject to dispute, and Defendants have not indicated that they intend to dispute it. But even if Defendants take issue with whether Plaintiffs are real people with real children in District schools, Plaintiffs offered to submit their true names to the circuit court or meet

with the circuit court in chambers, as other courts have done. R. 45:26; *Madison School District No. 321*, 147 F.3d at 834 n.1.

The second relevant fact, that Plaintiffs' children may in the future begin to struggle with gender-identity issues, is beyond dispute, in the same way it cannot be disputed "that plaintiffs' children might get injured on the playground or might get stung by a bee or might get COVID-19." R. 95:17. And, moreover, Plaintiffs supported both this fact and their discussion of related issues (how likely this is to occur, whether parents would have warning, etc.) *entirely* with Dr. Levine's affidavit, the affidavit of another parent whose child went through this (not anonymous), and various documents and studies. *See* R. 27:32–40.[18]

Plaintiffs' anonymity has not prevented Defendants from arguing that these facts are insufficient for standing or for an injunction. *See Dinkins*, 533 F. Supp. at 627 (rejecting a challenge to anonymity to "verify standing," because "standing

[18] Some of the Plaintiffs also raised a claim under Article 1, section 18 of the Wisconsin Constitution, and therefore explained how their religious beliefs are implicated by the Policy. *E.g.*, R. 10 ¶¶ 15–19. But this claim is equally a challenge to the Policy on its face, and mirrors Plaintiffs' Article 1, section 1 claim: that parents have a right to make major decisions for their minor children in light of their religious beliefs. R. 1 ¶¶ 94–97; 27:28–32. Plaintiffs' religious beliefs themselves are not reasonably disputable, especially given similar public statements from prominent religious leaders and organizations, like the Catholic Church. R. 27 at 30 n.19. Regardless, Defendants have not indicated any intention to challenge these Plaintiffs' religious beliefs. Finally, the fact that the District's Policy has "force[d] Plaintiffs to reveal their beliefs about a particularly sensitive topic" cuts *in favor* of anonymity, not against it. *Porter*, 370 F.3d at 560; *Stegall*, 653 F.2d at 181; *Elmbrook Sch. Dist.*, 658 F.3d at 723–24.

depends on what the complaint alleges."). The District filed a motion to dismiss making that exact argument (and lost). *See* R. 36, 42, 71. And Defendants pressed this argument again when responding to Plaintiffs' motion for an injunction pending appeal. Dkt. 140:17–21; *supra* pp. 17–18. These filings prove that Defendants can fully defend the Policy without knowing who Plaintiffs are.

Defendants have repeatedly asserted that they need Plaintiffs' true names to conduct discovery, but there is nothing to discover that is relevant to a facial, constitutional challenge to the terms of the District's Policy, the only claims Plaintiffs brought. Defendants have had multiple opportunities to identify something—anything—that might be discoverable and relevant about the Plaintiffs, but they have not been able to come up with a single thing. *See supra* pp. 10–11, 13; *Campbell*, 515 F. Supp. at 1245 (rejecting a challenge to anonymity because defendants failed to "ma[ke] a showing of necessity" to learn plaintiff's identity). Plaintiffs have also offered, repeatedly, to stipulate to any facts about themselves or provide Defendants with any information they want, R. 5:16 and n.6; R. 45:26–27; R. 92:30–31; App. 107, 114–15, 119–20, and yet Defendants have not asked for anything or made any attempt to work with Plaintiffs on this.

Even if there were some discovery that might be relevant to defending against Plaintiffs' claims, Defendants can conduct discovery without learning who the Plaintiffs are. Plaintiffs can respond to interrogatories and produce documents through

their counsel (with their and their children's names redacted), and they can even participate in depositions (over the phone or Zoom, for example), while preserving their anonymity. R. 5:16 and n.6; R. 45:26–27. Defendants have never explained why the alternatives Plaintiffs have offered would be inadequate, nor have they specified what type of discovery they want. Finally, even if, by some small chance, Plaintiffs' anonymity presents some obstacle to discovery that cannot be resolved in some way, the court can "revisit" the issue. App. 107, 120, 123.

Because the circuit court both declined to adopt and failed to apply the balancing test federal courts use for anonymity requests, App. 126, the circuit court never truly grappled with whether Plaintiffs' identities are relevant, despite Plaintiffs' insistence that they are not. Instead, the court simply deferred to the Defendants' un-explained assertion that Plaintiffs' identities are relevant. App. 126–127 ("I'm not sure that [Plaintiffs'] identit[ies] [are] completely immaterial … at this point in this juncture it's not for me to say."). That alone was reversible error given that two key factors in favor of anonymity are the "purely legal" nature of a case and the absence of prejudice to the defendant. *Advanced Textile Corp.*, 214 F.3d at 1072–73 and n.15; *Sealed Plaintiff*, 537 F.3d at 190; *Elmbrook Sch. Dist.*, 658 F.3d at 724. This Court should make clear that Plaintiffs' identities are irrelevant to this case and allow them to proceed anonymously.

C. Disclosure Under a Protective Order Exposes Plaintiffs and Their Children to the Risk of a Leak, an Avoidable Risk Given that Plaintiffs' Identities are Irrelevant

While a protective order provides some protection, "every additional person who knows Plaintiffs' identities increases the risk that their identities will be leaked, even inadvertently," App. 114, as the circuit court acknowledged, App. 126 ("I don't dismiss … your concern over the more people that know, the greater risk. That's true."). If that happens, there will almost certainly be no reasonable way for Plaintiffs to get to the bottom of how their identities were leaked. And even if they could identify the source of the leak, Plaintiffs will have no practical remedy; public exposure of their names cannot be undone, and they and their children would then face potentially serious harassment or retaliation. *Supra* Part II.A.

The protective order contemplated by the circuit court, which is still not in place, would expose Plaintiffs' identities to an unreasonably large group of people. The circuit court held that any employee of the three law firms in the case (Boardman & Clark, Quarles & Brady, and the ACLU), including associates, paralegals, secretaries, interns, etc., could learn Plaintiffs' identities. App. 210–16. This pool of people with access to Plaintiffs' identities numbers well over a thousand, if not in the thousands: Boardman & Clark lists

67 attorneys on their website,[19] Quarles & Brady has about 500 attorneys,[20] and the ACLU has "nearly 300 staff attorneys, [and] thousands of volunteer attorneys,"[21] *plus* all the non-lawyer support staff at all three firms. Even more, the Eastern District's template protective order, which the circuit court held would be the starting point, App. 224–25, allows disclosure to court reporters, consultants, investigators, experts, and deposition and trial witnesses. *Supra* p. 16.

One need not search long to find examples of sensitive information subject to protective orders leaking to the public. A few examples include: *Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49; *Eli Lilly & Co. v. Gottstein*, 61 F.3d 186 (2d Cir. 2010); *E.A. Renfroe & Co. v. Moran*, 508 F. Supp. 2d 986 (N.D. Ala. 2007); *State ex rel. Wyatt, Tarrant & Combs v. Williams*, 892 S.W.2d 584 (Ky. 1995); *U.S. v. Simon*, 664 F. Supp. 780 (S.D.N.Y. 1987).

Perhaps closest to home, the *John Doe II* investigation received international attention when approximately 1,600 documents were leaked to the Guardian newspaper, which then reported on them. Brad Schimel, *Final Report of the Attorney General Concerning Violations of the John Doe Secrecy Orders*, Wisconsin Department of Justice, 2 (Dec. 5,

[19] https://www.boardmanclark.com/our-people?type=attorneys

[20] https://www.quarles.com/about-quarles-brady/

[21] https://www.aclu.org/about/aclu-history

2017).[22] Then–Attorney General Brad Schimel found that the leak came from a member of the core prosecution team, *id*. at 30, but despite a lengthy investigation, concluded that "identifying the leaker or leakers [was] simply not possible," *id*. at 85.

In another case, a manufacturer of the prescription drug Zyprexa sought a permanent injunction to stop the dissemination of confidential documents leaked to a New York Times reporter following pretrial discovery. *Eli Lilly & Co.*, 617 F.3d at 189. An expert witness who was a signatory to the protective order distributed documents to another attorney, who then sent the documents to the press. *Id*. at 189. The court found a clear violation of the protective order, but the press coverage continued; as one commentator put it, the "bell can't be unrung." William G. Childs, *When the Bell Can't Be Unrung: Document Leaks and Protective Orders in Mass Tort Litigation*, 27 Rev. Litig. 565, 587 (2008).

In yet another infamous case, a paralegal secretly copied and leaked documents, believing the documents showed the company had lied about its knowledge of the addictiveness of nicotine. *Wyatt, Tarrant & Combs*, 892 S.W.2d at 585. The document leak led to congressional hearings in Washington, D.C. Myron Levin, *Merrell Williams? Tobacco Firm Wishes It Never Heard Of Him –*

[22] http://www.thewheelerreport.com/wheeler_docs/files/1206johndoe_01.pdf

Former Legal Staffer Sued Over Leak Of Files On Nicotine, Seattle Times (May 17, 1994).[23]

Even cases like this one have led to attempted leaks of protected information. In *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), parents were permitted to anonymously challenge a high school's practice of reading Christian prayers over the loud speaker before football games. "Many [District] officials apparently neither agreed with nor particularly respected" the anonymity order and either "overtly or covertly [attempted] to ferret out the identities of the Plaintiffs." *Id.* at 294 n.1; *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 809 n.1 (5th Cir. 1999).

To be clear, Plaintiffs do not mean to suggest, and have no reason to believe, that Defendants' counsel will intentionally violate a protective order, but these examples illustrate that a leak (which could even be inadvertent) is only one step away, and the harm cannot be undone. These examples also show that contentious, high-profile cases like this provide a strong temptation for a leak.

Requiring Plaintiffs to disclose their names to the *Intervenors*' lawyers (and associates, paralegals, secretaries, interns, etc.) is especially unreasonable. One of the primary requirements for intervention is the absence of "prejudice" to the original parties. Wis. Stat. § 803.09(2). Allowing

[23] https://archive.seattletimes.com/archive/?date=19940517&slug=1910965

Intervenors to intervene while simultaneously requiring Plaintiffs to disclose their identities to them, over Plaintiffs objection, R. 62; App. 153–55, significantly increased their exposure; indeed, three times as many lawyers have already appeared for Intervenors than for the District.

Given that Plaintiffs' identities are completely irrelevant to the constitutionality of the District's Policy, the only issue raised in this case, *supra* Part II.B, there is no reason whatsoever to subject Plaintiffs and their children to the risk of a leak (or fear of a leak), and the corresponding increased risk of retaliation against them or their children. Subjecting Plaintiffs and their minor children to these additional risks was error.

III. A Denial of a Request to Proceed Anonymously Is Immediately Appealable as of Right[24]

A denial of a request to proceed anonymously is appealable as of right because it is a final order in a "special proceeding." *See* Wis. Stat. § 808.03(1). Although the means for appealing the denial of a request to proceed anonymously is a novel issue in Wisconsin courts, multiple federal courts of appeals have considered the issue (including the Seventh Circuit), and every one (that undersigned counsel is aware of) has held that a denial of such a request is immediately appealable under the "collateral order" doctrine. *See Doe v.*

[24] This Court took jurisdiction over this appeal, but directed the parties to brief this issue.

Vill. of Deerfield, 819 F.3d at 376 (listing cases). The collateral order doctrine is the federal equivalent to Wisconsin's statutory provision for final orders from a "special proceeding."

As the Seventh Circuit explained in *Village of Deerfield*, an order denying a request to proceed anonymously is immediately appealable because such an order is "conclusive on the issue presented" (whether the party may proceed anonymously), because "the question of anonymity is separate from the merits of the underlying action," and because, if such orders were not immediately appealable, they would be "effectively unreviewable"—"If parties were required to litigate the case through to a final judgment on the merits utilizing their true names, the question of whether anonymity is proper would be rendered moot." *Id*.

Although no Wisconsin appellate court has yet considered whether the denial of a motion to proceed anonymously is appealable as of right, the Wisconsin Supreme Court recently held that involuntary medication orders (which pose a similar dilemma) are immediately appealable as of right for essentially the same reasons the federal cases invoke for orders pertaining to anonymity requests. *State v. Scott*, 2018 WI 74, ¶ 27, 382 Wis. 2d 476, 914 N.W.2d 141. The Supreme Court explained that an involuntary medication order "resolves an issue separate and distinct from the issues presented in the defendant's underlying criminal proceeding," and, if such orders were not

immediately appealable, they would be "effectively unreviewable." *Id.* ¶¶ 27–34 and n. 17. Thus, the Supreme Court held that such an order is "best classified as a final order from a special proceeding." *Id.* ¶ 31.

As with involuntary medication orders, a denial of a request to proceed anonymously "resolves an issue separate and distinct from the issues presented in the … underlying [case]," and, if such orders were not immediately appealable, they would be "effectively unreviewable." *Id.* ¶¶ 27–34 and n. 17. Thus, an order denying a request to proceed anonymously is "best classified as a final order from a special proceeding." *Id.* ¶ 31.

CONCLUSION

This Court should reverse the circuit court's decision and allow Plaintiffs to proceed anonymously.

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Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 10,610 words.

Dated: August 31, 2020.

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LUKE N. BERG

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: August 31, 2020.

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