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, and JANE DOE 5,
PLAINTIFFS-APPELLANTS,

JOHN DOE 6, JANE DOE 6,
JOHN DOE 8, and JANE DOE 8,
PLAINTIFFS,

v.

MADISON METROPOLITAN SCHOOL DISTRICT,
DEFENDANT-RESPONDENT, and

GENDER EQUITY ASSOCIATION OF JAMES MADISON MEMORIAL HIGH SCHOOL, GENDER SEXUALITY ALLIANCE OF MADISON WEST HIGH SCHOOL, and GENDER SEXUALITY ALLIANCE OF ROBERT M. LA FOLLETTE 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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

Plaintiffs have multiple, well-recognized grounds for anonymity. Most significantly, Plaintiffs submitted compelling evidence that they or their minor children face a serious risk of retaliation if their identities become known. Opening Br. 28–36. The Circuit Court agreed that, "as a factual matter," Plaintiffs "would likely be subject to threats and intimidation" if their names were disclosed, "which would be wholly inappropriate and frustrate the orderly functioning of the court case." App. 124. Defendants do not dispute this finding or even respond to it.

Nor do Defendants dispute that this case (1) implicates Plaintiffs' minor children, (2) involves a controversial medical and social issue, and (3) has forced Plaintiffs to reveal their religious beliefs about this sensitive subject, each of which courts have found to provide independent compelling grounds for anonymity. Opening Br. 8–9, 28, 35–36, 38 n.18. And Defendants have no answer to the many cases allowing anonymity in nearly identical circumstances, Opening Br. 23–28, failing to cite even a single case *denying* an anonymity request by parents bringing a constitutional challenge to a controversial school policy. Defendants also do not discuss or apply the balancing factors other courts have adopted for anonymity requests—but neither do they provide any alternative test or factors.

Instead, Defendants' main response is that plaintiffs in Wisconsin may *never* sue anonymously because, they argue, Wisconsin courts "do not have authority to allow anonymous litigation." Resp. Br. 12–13. That is an extraordinary position to take, especially given that Wisconsin courts *have* allowed this, most recently in an open-records case in Dane County, Opening Br. 18–19, and given that *every* federal circuit to consider this agrees that plaintiffs may sue anonymously in appropriate cases, Opening Br. 20–21. Such a holding would have broad ramifications in a variety of contexts recognized to warrant anonymity, including challenges to laws regulating abortion, *Roe v. Wade*, 410 U.S. 113 (1973), and birth control, *Poe v. Ullman*, 367 U.S. 497 (1961), laws affecting undocumented immigrants, *Plyler v. Doe*, 457 U.S. 202 (1982), and, most relevant here, parent challenges to a school policy or practice, Opening Br. 23–25 (discussing cases); *e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). It would also force plaintiffs in important but sensitive cases out of state court and into federal court.

Fortunately, the law in Wisconsin is not as inflexible as Defendants suggest. Opening Br. 18–19. Like federal courts, Wisconsin courts have "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). And, unlike federal courts, Wisconsin has a catch-all procedure for protecting information that is not explicitly protected by statute, a

procedure Plaintiffs followed here. Wis. Stat. § 801.21. Defendants have no good answer to either.

Defendants' other arguments are devoted to minimizing the Circuit Court's errors and to convincing this Court that they do need Plaintiffs' identities to defend this case. But Defendants cannot explain how or why Plaintiffs' identities are relevant to a facial, constitutional challenge to the District's Policy, nor can they justify the Circuit Court's failures to weigh the irrelevance of Plaintiffs' identities or to apply the balancing test.

ARGUMENT

Before replying to Defendants' arguments, a few things need clarification. First, the question in this appeal is *not*, as Defendants suggest at various points, whether Plaintiffs may remain anonymous to the *court*. *E.g.*, Resp. Br. 12, 14. Plaintiffs have offered to disclose their identities to the court since the beginning of the case. R. 45:26; App. 113.

Likewise, the question is also not whether Plaintiffs' identities must be disclosed to the public or even to the parties themselves, despite Defendants' suggestions otherwise. *E.g.*, Resp. Br. 10, 13. The Circuit Court ruled that Plaintiffs' identities may remain sealed from the public and the parties themselves, App. 126–27, 210–216, and Defendants have not appealed that portion of the Court's ruling, as they acknowledge, Resp. Br. 12.

The sole question then is whether Plaintiffs must disclose their identities to the lawyers for the District and/or the lawyers for the Intervenors and any employees of their law firms, as well as any consultants, outside vendors, or deposition witnesses, etc.[1], a very large group of people, *see* Opening Br. 41–42. Given the serious risk to the Plaintiffs and their children—a factual finding that Defendants do not dispute, App. 124—and the irrelevance of their identities to the legal theories Plaintiffs raise, disclosure would serve no purpose whatsoever, but would only increase the risk to Plaintiffs and their children.

I. Defendants Cannot Explain Why Plaintiffs' Identities Are Relevant or What Discovery Would Be Pertinent to a Facial Challenge to the Policy

As Plaintiffs explained in their opening brief, they challenge the District's Policy *on its face* as a violation of parents' constitutional rights to direct the upbringing of their children. Opening Br. 36–39. They do not seek damages; only

[1] Defendants claim Plaintiffs "fail[ed] to mention that Defendants-Respondents circulated a draft protective order that would prohibit parties from disclosing names to consultants, investigators, experts, or witnesses." Resp. Br. 6. Plaintiffs did not "fail to mention" anything; they properly chose not to discuss negotiations not in the record. But now that Defendants have raised the issue, Plaintiffs must clarify that *Defendants* misrepresent those negotiations. Plaintiffs and Defendants exchanged emails about disclosure to "consultants, investigators, experts, or witnesses," and in their last email before Plaintiffs filed this appeal, Defendants insisted that the order must "allow disclosure to deposition witnesses," as well as "outside vendors" such as "trial, jury consultants, presentation experts, and like." Plaintiffs can submit the email exchange if this Court believes it relevant.

declaratory and injunctive relief. R. 1:20–21. Plaintiffs intentionally have not alleged or relied upon any disputable facts about themselves or their children. Plaintiffs raise only two facts about themselves, neither of which are disputable: that they have children in District schools; and, for some, their religious beliefs. Opening Br. 37, 38 n.18.

Defendants do not indicate any intention to challenge Plaintiffs' beliefs or that Plaintiffs have children in District schools. Nevertheless, they assert that they need Plaintiffs' identities to defend this case, but for reasons they cannot explain. Defendants vaguely invoke their "need for discovery," Resp. Br. 18–19, but they are unable to give specifics, instead asserting generically that they need to "test … the [Plaintiffs'] allegations" and to "explore the facts surrounding Plaintiffs' claims." Resp. Br. 5–6, 18-19. There are no "facts surrounding Plaintiffs" to explore because Plaintiffs *do not allege any*; they challenge the District's Policy on its face. Plaintiffs are the "master[s] of the[ir] complaint," *Caterpillar Inc. v. Williams*, 482 U.S. 386, 399 (1987)—Defendants cannot convert *Plaintiffs'* claims into something they are not and use hypothetical, non-pled allegations as a hook for something to "explore" in discovery.

Defendants briefly assert that they need to know Plaintiffs' identities to "challenge their standing" and "evidence of harm" for purposes of an injunction. Resp. 5–7, 19. But, as Plaintiffs explained in their opening brief (and in their recent injunction motion), their basis for both standing

and harm is that their children, like all children, might begin to struggle with their gender identity, that gender-identity transitions are an experimental and controversial form of psychotherapeutic treatment with lifelong implications, and that Plaintiffs cannot wait to challenge the Policy given that it allows this major life change to be facilitated at school in secret from parents. Opening Br. 36-37; Inj. Mot. 58–69. None of that depends in any way on Plaintiffs' identities; and Defendants have already shown they can fully respond to the merits of the claim without knowing who the Plaintiffs are. *E.g.*, Inj. Mot. App. 196–240 (Dkt. 140).

Even if Defendants could identify something arguably relevant about the Plaintiffs, Plaintiffs have offered, repeatedly, to provide that information to Defendants in other ways while protecting their identities, via stipulations, responses to interrogatories, or depositions over Zoom. Opening Br. 39–40. Defendants do not even attempt to argue that these options are insufficient.[2]

Perhaps recognizing that they cannot explain why Plaintiffs' identities are relevant, Defendants argue, as a backup, that "[r]elevancy is *not* a factor the circuit court needs to consider under either *Bilder* or the federal standard." Resp. Br. 19. Defendants cite nothing for that assertion, and it is directly refuted by the cases Plaintiffs cited. Opening Br. 21–

[2] Defendants' conflict-of -interest argument is a distraction, Resp Br. 14, as Plaintiffs offered a solution to ensure that there are no such conflicts. R. 45:25–26.

22, 44. Those cases show that the "purely legal" nature of a lawsuit and the absence of prejudice to the defendant are two of the main factors courts consider when evaluating an anonymity request. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189–90 (2d Cir. 2008) (surveying caselaw); *Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 658 F.3d 710, 721–24 (7th Cir. 2011). Even more, in one case Plaintiffs cited, relevancy was the primary rationale for allowing anonymity: the issues were "unquestionably legal in nature," the court emphasized, and the defendant "cannot" "make a showing of necessity" to learn the plaintiff's identity. *Campbell v. U.S. Dep't of Agric.*, 515 F. Supp. 1239, 1245–46 (D.D.C. 1981).

So too here. Despite many opportunities to do so, Opening Br. 10–16, Defendants have never been able to explain why they need to know who Plaintiffs are to defend the challenged Policy—because they do not.

The Circuit Court's order would make Plaintiffs' identities available to well over a thousand people, Opening Br. 41–42, and in a highly-charged case, this poses a completely unnecessary risk of a leak, Opening Br. 44–45.

II. This Court Should Reject Defendants' Argument That Plaintiffs May *Never* Sue Anonymously in Wisconsin Courts

As noted above, Defendants' main argument is that Wisconsin courts "do not have authority to allow anonymous litigation." *E.g.*, Resp. Br. 12–13. Yet Defendants have no good answer to *Bilder*, recognizing courts' inherent authority to

protect sensitive information in cases before them, or to Wis. Stat. § 801.21, a procedural catch-all that incorporates the "common law" (such as the instructive federal cases) as a substantive basis for protecting otherwise unprotected information. *See* Opening Br. 18–20.

Defendants concede that courts' inherent authority is "undeniably broad," but argue, without citation, that it is "not so expansive to allow a court to … disregard Wis. Stat. § 802.04(1)." Yet the federal rules have the exact same requirement, Fed. R. Civ. P. 10 ("the complaint must name all the parties"), and not a single federal circuit has deemed this an insurmountable roadblock to anonymous plaintiffs in appropriate circumstances. Opening Br. 20–21 (listing cases). Surely Wisconsin courts have just as much authority as federal courts to allow anonymity in the right cases. Section 802.04 is also beside the point since Plaintiffs have offered to disclose their identities to the Court alone in a sealed complaint.

Defendants' remaining discussion of courts' inherent authority all goes to *when* exercising that authority is appropriate, not *whether* the court has the authority. Defendants argue that there is a "presumption of [ ] access" and that the party seeking an exception "bears the burden of demonstrating, with particularity," the grounds for its request. Resp. Br. 10, 12, 15–16 (similar quotes from federal cases). Plaintiffs do not disagree with any of that; but Defendants concede there are exceptions, Resp. Br. 1, 9, and Plaintiffs have shown that they fit into multiple of them, as evidenced by the

many federal cases allowing anonymity in nearly identical circumstances. Opening Br. 23–28.

Plaintiffs explained that, at the highest level, the balancing test Wisconsin courts have used for similar questions is equivalent to the balancing test federal courts apply to anonymity requests. Opening Br. 19–20; *compare Krier v. EOG Envtl., Inc.*, 2005 WI App 256, ¶ 23, 288 Wis. 2d 623, 707 N.W.2d 915; *with Sealed Plaintiff*, 537 F.3d at 189 (2d Cir. 2008). Wisconsin courts have never had the opportunity to expand on the factors to consider, but federal courts have, and Plaintiffs showed that nearly every one of those factors cuts in favor of anonymity here. Opening Br. 8–10; 20–25; 28–40.

Defendants *concede* that the ultimate inquiry is roughly equivalent in state and federal courts, *see* Resp. Br. 14 (the "state of federal law … is not dissimilar to *Bilder*"). Yet they do not respond to or apply the federal factors, nor do they propose different factors or offer an alternative test.

Even putting aside courts' inherent authority, Wisconsin also has a catch-all provision for confidentiality requests not otherwise covered by statute. Wis. Stat. § 801.21. Defendants argue that § 801.21 "is a rule of procedure—not substance—and does not independently provide a legal basis for" sealing a party's identity. Resp. Br. 10–12. Plaintiffs agree that § 801.21 is procedural, but § 801.21(4) explicitly incorporates the "common law" as a substantive ground for protecting otherwise unprotected information.

There is no question that Plaintiffs followed the procedure in § 801.21: they "file[d] a motion," "served [it] on all parties," and "specif[ied] the authority" for their request. That is all § 801.21 requires. Defendants argue that, additionally, a party "*must,*" "in all circumstances," "submit the unredacted material for filing with the court under seal," Resp. Br. 11, but that conflicts with the text of 801.21(2): "The information to be sealed or redacted *may* be filed under a temporary seal." In any event, Plaintiffs have explained that they are ready and willing to submit their identities under seal to the Court. App. 114.

Defendants' dismiss the cases Plaintiffs cite as a "very small number," Resp. Br. 14; *but see* Opening Br. 25–28 (citing 15 cases), responding only to the Seventh Circuit's directly-on-point decision in *Elmbrook*. Surprisingly, Defendants attempt to distinguish *Elmbrook* on the grounds that there was no "adverse effect on the District or on its ability to defend itself"—the very thing Plaintiffs argue, *supra* Part I, and Defendants elsewhere claim is irrelevant, Resp. Br. 19. Defendants also assert that the parties in *Elmbrook* agreed to work together in "good faith," whereas "[t]he same is not true here," Resp. Br. 14—but that is only because *Defendants* have refused Plaintiffs' repeated offers to get them any information they can articulate a need for. R. 5:16 n.16; Opening Br. 13.

III. Defendants' Attempts to Downplay the Circuit Court's Errors Fall Flat

Implicitly recognizing the reversible error, Defendants attempt to show that the Circuit Court *did* apply the balancing

test, quoting one brief instance where the Court used the word "balancing." Resp. Br. 5, 7, 18. As an initial matter, the quote Defendants refer to is from the stay hearing on June 25, R-App. 13, a week after Plaintiffs filed their permissive appeal, emphasizing that the Court had erred by concluding it lacked authority to grant their request. Defendants do not dispute that, when the Circuit Court denied Plaintiffs' request, its entire rationale was that it was "bound by Wisconsin law." Opening Br. 14.

Regardless, even during the subsequent stay hearing, the Circuit Court did not actually discuss or apply *any* of the balancing factors Plaintiffs had identified. R-App. 13–14; R. 5:5, 7–16. Most significantly, the Court failed to weigh the relevance of Plaintiffs' identities, as Defendants tacitly concede. Resp. Br. 19; *supra* Part I. Indeed, the Court had previously stated explicitly that it did *not* evaluate the relevance of Plaintiffs' identities. App. 126–27 (noting that Plaintiffs "may be" "right" that "their identit[ies] [are] completely immaterial," but concluding "it's not for me to say" "at this point"); Opening Br. 14–15.

Thus, Defendants are wrong to argue that an abuse of discretion standard applies here. Resp. Br. 7–8, 13. The Circuit Court did not apply the correct legal standard to Plaintiffs' anonymity request—or any standard, for that matter—instead erroneously concluding that plaintiffs may never sue anonymously as a matter of Wisconsin law; so there was no exercise of discretion for this Court to review. And

even if the Circuit Court's subsequent, brief use of the word "balancing" were to trigger an abuse-of-discretion standard, the Wisconsin Supreme Court has held that a circuit court abuses its discretion when it "fail[s] … to consider and make a record of factors relevant to a discretionary determination." *Wisconsin Ass'n of Food Dealers v. City of Madison*, 97 Wis. 2d 426, 430, 293 N.W.2d 540 (1980).

Finally, the Circuit Court magnified these errors, and the risk to the Plaintiffs and their minor children, when it required Plaintiffs to also disclose their identities to counsel for the Intervenors (and their associates, paralegals, consultants, etc.), parties they did not sue. Opening Br. 11–12, 15, 44–45. Defendants have no response to this error whatsoever, so this Court should, *at the very least*, reverse as to the Intervenors.

IV. A Denial of a Request to Proceed Anonymously Is Immediately Appealable as of Right

On this issue, Plaintiffs will largely rest on their opening brief, except to respond to *L. G. by Chippewa Family Servs., Inc. v. Aurora Residential Alternatives, Inc.*, 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590. That opinion not only reaffirmed *Scott*, *see* Opening Br. 45–47, it also disclaimed language in prior cases suggesting that "special proceedings" include only those that "can be commenced independently of a pending action." *Id.* ¶¶ 21–22. The Court concluded that a denial of a request to compel arbitration is immediately appealable as of right because it "resolves an issue separate and distinct from the issues present in the pending lawsuit,"

even though the issues "are nevertheless related or connected." *Id.* ¶ 19 (citations omitted). A request to proceed anonymously is also "separate and distinct" from the underlying merits, and is properly considered a "special proceeding."

CONCLUSION

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

Dated: October 23, 2020.

Respectfully submitted,

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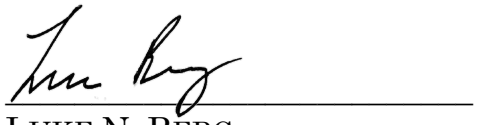
CERTIFICATION

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 2,999 words.

Dated: October 23, 2020.



LUKE N. BERG

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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:

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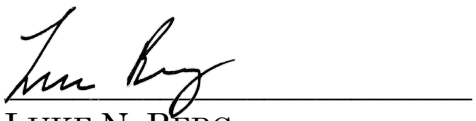

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