No. _____

In the Wisconsin Court of Appeals

DISTRICT IV

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

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,
INTERVENOR-DEFENDANTS-RESPONDENTS.

PETITION FOR PERMISSIVE APPEAL

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INTRODUCTION

This action seeks to vindicate parents' constitutional right to direct the upbringing of their children. The Madison Metropolitan School District (the "District") has violated this fundamental right by adopting a policy designed to circumvent parental involvement in a pivotal decision affecting their children's health and future. The policy enables children of any age to transition to a different gender identity at school, by adopting a new name and pronouns to be used at school, without parental notice or consent, and then prohibits staff from communicating with parents about this change without the child's consent. Even worse, the policy directs staff to actively deceive parents in some circumstances by reverting to the child's birth name and corresponding pronouns when the child's parents are nearby.

Transitioning to a different gender identity during childhood is a major and controversial decision, and the long-term effects of childhood transitions are still unknown and debated. Many psychiatric professionals with significant experience with gender-

identity issues believe that transitioning at a young age may have long-lasting effect and even do serious harm. *See* Dkt. 31 (Affidavit of Dr. Stephen Levine) ("[T]herapy for young children that encourages transition cannot be considered to be neutral, but instead 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."). Plaintiffs, a group of 14 parents[1] 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 important decision.

Because this case raises a controversial and highly sensitive issue that implicates Plaintiffs' minor children, Plaintiffs filed their complaint using pseudonyms and simultaneously filed a motion to proceed anonymously. The circuit court agreed with Plaintiffs that, as a factual matter, they had shown a significant

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

need for confidentiality, but concluded that it did not have legal authority to grant Plaintiffs' anonymity request. Pet. App. 124. Plaintiffs appealed the denial of their anonymity request on June 12, in a separate appeal as of right under Wis. Stat. § 808.03(1). Dkt. 110. For the reasons explained in Part I below, a denial of a request to proceed anonymously is a final order in a "special proceeding," appealable as of right.

However, the proper means for appealing the denial of a request to proceed anonymously is a novel issue in Wisconsin, so, out of an abundance of caution, Plaintiffs are filing this separate petition for permissive appeal within the 14-day time limit. *See* Wis. Stat. §§ 808.03(2); 809.50(1). If this Court concludes that such orders are not appealable as-of-right, it should grant this petition for permissive appeal because every one of the criteria for permissive appeal are met here. Wis. Stat. 808.03(2).

STATEMENT OF ISSUES

1. Whether Plaintiffs may proceed with this case anonymously, using pseudonyms.

STATEMENT OF FACTS

On February 18, 2020, Plaintiffs filed their complaint in this action and simultaneously filed a motion to proceed anonymously, using pseudonyms. Dkts. 2, 8–9.

Plaintiffs' filings provided substantial legal and factual support for their request to proceed anonymously. Plaintiffs identified two sources of state-law authority by which the circuit court could grant Plaintiffs' anonymity request. Dkt. 9:2. First, Wisconsin Statute § 801.21 gives circuit courts broad authority to seal or redact any "portion of a document" or "item[ ] of information within an otherwise publicly accessible document" whenever there are "sufficient grounds to restrict public access"—and those "grounds" can include the "common law," such as the on-point federal cases described below. Wis. Stat. § 801.21(1), (4). Second, the Wisconsin Supreme Court has held that circuit courts have "inherent power … to limit public 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).

Plaintiffs noted that, consistent with this authority, a number of Wisconsin cases have allowed plaintiffs to sue anonymously, Dkt. 9:3 (listing Wisconsin cases); *infra* p. 24. Likewise, nearly every federal circuit has recognized that plaintiffs may sue using pseudonyms in appropriate cases, even though there is no specific federal rule of procedure addressing this, Dkt. 9:4 (listing cases from the Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits); *infra* pp. 24–25. Even the United States Supreme Court has implicitly endorsed the practice. *E.g.*, *Doe v. Bolton*, 410 U.S. 179, 187 (1973) ("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.").

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," Dkt. 9:5

(discussing factors); *e.g.*, *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 189 (2d Cir. 2008) (surveying caselaw). This balancing test is equivalent to the test Wisconsin courts apply to related issues. *See Krier v. EOG Envtl., Inc.*, 2005 WI App 256, ¶ 23, 288 Wis. 2d 623, 707 N.W.2d 915. And Wisconsin Statute § 801.21(4) explicitly authorizes Wisconsin courts to rely on any "common law" ground for a request to seal information that is not otherwise covered by statute.

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); Dkt. 9:7–8. Plaintiffs highlighted that Wisconsin statutes likewise reflect a concern for protecting minors' identities. Dkt. 9:3–4 (discussing various Wisconsin statutes).

Second, the controversial issue in this case creates a serious risk of retaliation or harassment against Plaintiffs or their children, which courts have also recognized "is often 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); Dkt. 9:8–13. Plaintiffs provided substantial factual evidence of a serious risk of retaliation against them or their minor children if their identities become publicly known. That evidence included numerous hateful and threatening comments already made in response to this lawsuit, Dkts. 9:12–13; 50:18–22, *e.g.*, Dkt. 51 ¶ 4 ("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."); Dkt. 51 ¶ 5 ("The time will come to drop the protest signs and pick up [a] gun … Street gangs and assassins would be the only way to stop the bigots"), as well as an affidavit from an attorney who was fired from a job and has been threatened with violence for her advocacy on related issues. Dkt. 13 ¶¶ 1–12. Plaintiffs also surveyed many

other examples of people who have been harassed, threatened, or retaliated against for taking similar positions, Dkt. 9:9–12, including the personal story of a feminist singer-songwriter in Madison who has been "ostracized in [her] community, forced out of [her] job, and banned from playing music at various venues in [Madison]," Dkt. 50:18.

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 (abortion); Dkt. 9:13–14.

And fourth, certain Plaintiffs have 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); Dkt. 9:14.

Plaintiffs then cited 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. Dkt. 9:7–8. To give just one example here, in *Doe v. Elmbrook School District*, 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.[2] 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 parent-plaintiffs were also entitled to anonymity because identifying them "would expose the identities of their children." *Id.* Finally, given

[2] 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).

the nature of the legal issue, the court found no "adverse effect on the District or on its ability to defend itself." *Id.*

After demonstrating their need for anonymity, Plaintiffs then explained why anonymity will not harm either the District or the public interest. Because this case raises an important and "purely legal" question—whether a school district may constitutionally exclude parents from the life-changing decision about whether their child will transition at school—it presents "an atypically weak public interest in knowing the [Plaintiffs'] identities." Dkt. 9:15; *Sealed Plaintiff*, 537 F.3d at 190; *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1072 n.15 (9th Cir. 2000) ("whether there is a constitutional right to abortion is of immense public interest, but the public did not suffer by not knowing the plaintiff's true name in *Roe v. Wade*"). And, given that the answer to this question will not turn in any way on the particular children and parents involved, anonymity will not prejudice the District's defense of its policy. Dkt. 9:16; *Elmbrook Sch. Dist.*, 658 F.3d at 724. 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. Dkt. 9:15–16; *S. Methodist Univ. Ass'n of Women Law Students v. Wynne* & *Jaffe,* 599 F.2d 707, 713 (5th Cir. 1979).

Defendant Madison Metropolitan School District opposed Plaintiffs' motion to proceed anonymously. Dkts. 42, 48. Three high school student groups, represented by Quarles & Brady and the ACLU, moved to intervene in support of the District's policy (hereafter, collectively "Defendants"), and joined the District's opposition to Plaintiffs' request to proceed anonymously. Dkts. 57–59. The circuit court heard arguments on Plaintiffs' motion on May 26, 2020. Pet. App. 103–186 (Dkt. 95).

During the hearing on May 26, 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. Pet. 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 "very serious and very real" and "every additional person who knows [their] identities increases the risk that their identities will be leaked, even inadvertently." Pet. App. 114. Plaintiffs once again emphasized that their identities are irrelevant to this case because the "[t]he only question is whether the [District's] policy is constitutional." Pet. App. 107, 115. Moreover, Plaintiffs noted that they had offered to stipulate to or provide any information about them that the District might need, and the District had been unable to "come up with any specific reason to know [their] identities." Pet. App. 107, 113; Dkt. 50:24–25. Finally, as to the legal authority for their request, Plaintiffs emphasized three things: that multiple of the federal cases they cited had allowed parents to remain anonymous even as to opposing counsel, *see*, *e.g.*, *Elmbrook Sch. Dist.*, 658 F.3d 710; *Madison Sch. Dist. No. 321*, 147 F.3d at 834 n. 1; Dkt. 50:25 (discussing the anonymity order in *Elmbrook*); that Wisconsin

Statute § 801.21(4) allowed the court to rely on those federal cases; and that another judge in Dane County had recently allowed a plaintiff to proceed anonymously even as to opposing counsel, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Dane County Cir. Ct., Feb. 20, 2020, Judge Anderson presiding). *See* Pet. App. 113–20.

The circuit court agreed with Plaintiffs that, as a factual matter, they had shown a significant need for confidentiality. *See* Pet. App. 124 ("[T]he plaintiffs, in my opinion, have 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."). The court also agreed that disclosure to a broader group of people would create more risk of a leak and thus more potential for harm to Plaintiffs or their children, Pet. 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. Pet. App. 124 ("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."). The court agreed to grant a protective order, but required Plaintiffs to disclose their identities to the court and to the lawyers for the Defendants. Pet. App. 126–27.

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. Pet. App. 1–2 (Dkt 84). The court later orally extended Plaintiffs' deadline to disclose their identities until June 12. Pet. App. 230.

The circuit court initially allowed Plaintiffs to draft the protective order, Pet. App. 126, and Plaintiffs did so, Dkt. 87, but Defendants pushed for a much less protective order than Plaintiffs proposed, Dkt. 82; *see* Pet. App. 187–252 (Dkt. 104), so the court scheduled a hearing for June 8 to discuss the terms of a protective order, Dkt. 89; Pet. App. 187–252. During that hearing, the 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 also learn Plaintiffs' identities. Pet. App. 210–16. The court also indicated that it was inclined to model the protective order after the Eastern District's template for orders governing access to confidential information generally, Pet. 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).[3] And, given the disagreement over the terms of the protective order, the court decided to allow Defendants to draft the order. Pet. App. 224–25. The parties continued to negotiate over the protective order, but, as of the

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

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, of the circuit court's June 3 order denying their motion to proceed anonymously and requiring them to disclose their identities. Dkt. 110. Out of an abundance of caution, Plaintiffs are separately filing this petition for permissive appeal within 14 days of the circuit court's June 3 order.

REASONS FOR GRANTING LEAVE TO APPEAL

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

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. Vill. of Deerfield, 819 F.3d 372, 376 (7th Cir. 2016) (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.

Accordingly, on June 12, Plaintiffs filed a separate appeal as of right from the circuit court's June 3 order denying their request to proceed anonymously. Dkt. 110. If this Court agrees with Plaintiffs as to the appealability of that order, it may simply deny this Petition for Permissive Appeal. Alternatively, it may consolidate the two appeals.

II. Even if the Denial of a Request to Proceed Anonymously is not Immediately Appealable as of Right, This Appeal Meets All Three Grounds for a Permissive Appeal

A party may immediately appeal an order that is not appealable as of right if this Court finds that the appeal will serve one of three separate purposes: it will (1) "[m]aterially advance the termination of the litigation or clarify further proceedings in the litigation," (2) "[p]rotect the petitioner from substantial or irreparable injury," or (3) "[c]larify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2). This appeal meets all three criteria.

A. Allowing Plaintiffs to Appeal the Denial of Their Request to Proceed Anonymously Will "Protect [Them] from Substantial or Irreparable Injury"

As surveyed above, Plaintiffs provided substantial evidence showing that they and their minor children are at serious risk of harassment or retaliation if their identities become publicly known. *Supra* pp. 7–8. The circuit court agreed, finding that, "as a factual matter, [if Plaintiffs'] names [were] disclosed, they would likely be subject to threats and intimidation, which would be wholly inappropriate and frustrate the orderly functioning of the court case." Pet. App. 124.

While a protective order provides some protection, Plaintiffs explained that "every additional person who knows [their] identities increases the risk that their identities will be leaked, even inadvertently." *See* Pet. App. 114. 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; once their identities become publicly known, that cannot

be undone, and they and their children would then face potentially serious harassment or retaliation.

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 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. Pet. App. 210–16. This pool of people with potential access to Plaintiffs' identities numbers well over a thousand, if not in the thousands: Boardman & Clark lists 67 attorneys on their website,[4] Quarles & Brady has about 500 attorneys,[5] and the ACLU has "nearly 300 staff attorneys, [and] thousands of volunteer attorneys,"[6] *plus* all the non-lawyer support staff at all three firms. Even more, the Eastern District's template protective order, which the court held

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

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

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

would be the starting point, Pet. App. 224–25, further allows disclosure to court reporters, consultants, investigators, experts, and deposition and trial witnesses. *Supra* p. 15.

The circuit court agreed with Plaintiffs that disclosure under a protective order increases the risk of exposure from what Plaintiffs requested. Pet. App. 126 ("I don't dismiss … your concern over the more people that know, the greater risk. That's true."). But the court concluded it did not have legal authority to grant Plaintiffs' request, even though another Dane County judge granted a similar request just a few months earlier. *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Dane County Cir. Ct., Feb. 21, 2020, Judge Anderson presiding); *see* Pet. App. 116.

Plaintiffs respectfully disagree with the circuit court that it lacked authority to grant their request, and they do not believe that the contemplated protective order is sufficiently protective, for the reasons explained briefly here and to be explained in more detail in this appeal. As every federal court of appeals to consider

this issue has recognized, *supra* Part I, Plaintiffs should have the opportunity to appeal this issue without first having to subject themselves to the risks and potential harm they seek to avoid.

B. This Appeal Will "Clarify an Issue of General Importance in the Administration of Justice"

The questions of when and how a plaintiff may sue anonymously using a pseudonym are not discussed in any published opinion in Wisconsin, but are recurring questions that are important to the administration of justice in Wisconsin courts. Indeed, within just the last six months, two different judges in Dane County, both in cases against the Madison Metropolitan School District, came to opposite conclusions about whether a plaintiff may sue using a pseudonym and remain anonymous even to opposing counsel. *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Dane County Cir. Ct., Feb. 21, 2020, Judge Anderson presiding).

And, while no published case thus far has discussed the grounds and mechanics of suing anonymously, Wisconsin courts have permitted plaintiffs to sue using pseudonyms in a variety of

cases, showing that a published appellate opinion on this issue is long overdue. *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); *see also Doe v. Certain Interested Underwriters at Lloyds London*, 2012 WI App 52, 340 Wis. 2d 742, 813 N.W.2d 248 (unpublished).

Not only does this issue come up regularly in Wisconsin courts, anonymous litigation has also become a regular phenomenon in federal courts. In fact, 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 (2nd Cir.) ; *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.); *Doe v. Porter*, 370 F.3d 558, 560–61 (6th Cir.

2004); *Elmbrook Sch. Dist.*, 658 F.3d at 721–24 (7th Cir.); *Advanced Textile Corp.*, 214 F.3d at 1067–69 (9th Cir.); *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: Designing Pseudonym Use in American Courts*, 63 Ark. L. Rev. 691 (2010); 67A *C.J.S. Parties* § 174.

Plaintiffs cited multiple federal cases allowing parents to proceed anonymously in nearly identical circumstances to this case, Dkt. 9:7–8; *supra* pp. 8–10, including cases in which the court allowed the plaintiffs to remain anonymous even to opposing counsel. In *Doe v. Elmbrook*, for example, the plaintiffs proposed the condition that *if* 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 (May 12, 2009), and 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 (May 29, 2009). Plaintiffs offered this same approach—that they remain anonymous until an issue arises—in the unlikely event that some discovery issue cannot be resolved while preserving their anonymity.[7] Dkt. 50:24–25. In *Doe v. Madison School District No. 321*, the court met with plaintiffs in chambers, without opposing counsel present, to confirm that they had standing. 147 F.3d at 834 n.1. Plaintiffs offered this approach as well. Dkt. 50:24; Pet. App. 113; *see also Doe v. Harlan Cty. Sch. Dist.*, 96 F. Supp. 2d 667, 671 (E.D. Ky. 2000) ("The anonymity of

[7] Plaintiffs can respond to interrogatories, produce documents (with their names redacted), and even participate in depositions (over the phone or Zoom, for example), while preserving their anonymity. Plaintiffs have also repeatedly offered to stipulate to any fact about them that Defendants request. *See* Dkt. 50:24; Pet. App. 115. Defendants have not yet been able to come up with anything they need to know about the Plaintiffs, most likely because, as Plaintiffs have argued all along, their identities are irrelevant to the constitutionality of the District's Policy, which is the only issue Plaintiffs have raised. Dkt. 50:24–25.

the plaintiffs will not adversely affect the defendants. The plaintiffs seek only an injunction, not individual damages.").

Plaintiffs identified two sources of authority by which the circuit court could grant Plaintiffs' anonymity request: either Wisconsin Statute § 801.21(4), which allows circuit courts to rely on "common law" "grounds," such as the federal cases just described, for sealing otherwise unprotected information, and the court's "inherent power," *see Bilder*, 112 Wis. 2d at 556. The circuit court concluded, however, that it did not have the legal authority to grant Plaintiffs' motion. Pet. App. 124.

When and how a plaintiff may sue anonymously is an important issue that warrants a published opinion from an appellate court, especially given that two judges in the same county, and in cases against the same defendant, came to opposite conclusions about their legal authority.

As explained in Part I above, if Plaintiffs are not allowed to appeal this issue immediately, the issue may be rendered moot, preventing the resolution of this important question. *See Village of*

Deerfield, 819 F.3d at 376 ("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.").

C. This Appeal Will "Clarify Further Proceedings in the Litigation"

Not only will this appeal clarify whether and how Plaintiffs may proceed anonymously, it may also help to clarify which issues are relevant and which are not, limiting the scope of potential discovery and thereby reducing the risk to Plaintiffs and their children.

One of Plaintiffs' main arguments for anonymity all along has been that their identities are completely irrelevant to the issues they raise in this case. Dkt. 9:14–16; 50:23–26; Pet. App. 107, 115, 119–20, 121. 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. Whether they are in fact parents is relevant to standing, of course, but Plaintiffs have offered to prove that basic fact (if Defendants dispute it) by

meeting with the court in chambers, as other courts have done. *Madison School District No. 321*, 147 F.3d at 834 n.1. And Plaintiffs' anonymity has not prevented Defendants from raising other standing arguments. *See* Dkts. 42, 48 (District's motion to dismiss on standing and ripeness); Dkt. 79 (Order denying the motion to dismiss). Beyond standing, the only question in this case is the purely legal question of whether a school district may constitutionally exclude parents from the decision about whether a child experiencing gender dysphoria should socially transition to the opposite gender.

Courts around the country have recognized that such "purely legal" issues present "an atypically weak public interest in knowing the [Plaintiffs'] identities," *Sealed Plaintiff*, 537 F.3d at 190, and that, instead, "the public[] interest" is actually *best served* by anonymity because it "enabl[es]" plaintiffs to raise sensitive issues "of interest to the public at large" without "fear of [ ] reprisals." *Advanced Textile Corp.*, 214 F.3d at 1072–73. Thus, for example, "the question whether there is a constitutional right to abortion is of

immense public interest, but the public did not suffer by not knowing the plaintiff's true name in *Roe v. Wade*." *Id*. at 1072 n. 15.

Defendants continue to assert that they need to conduct extensive discovery of the Plaintiffs, but they have not yet been able to identify a single thing—not one—that they want to discover that even might be relevant, nor have they explained why the many alternatives Plaintiffs have offered would be inadequate. *See* Dkt. 50:24–25; Pet. App. 122. Thus, this appeal will help to clarify the scope of factual issues that are relevant to resolving whether the District's Policy is constitutional or not.

CONCLUSION

Accordingly, if this Court concludes that the circuit court's denial of Plaintiffs' anonymity request is not appealable as of right, Plaintiffs respectfully request leave to pursue a permissive appeal, pursuant to Wis. Stat. §§ 808.03(2) and 809.50.

Dated: June 17, 2020.

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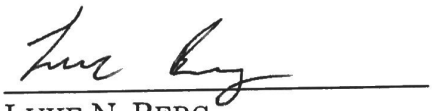
CERTIFICATION

I hereby certify that this petition for permissive appeal conforms to the rules contained in Wis. Stat. § 809.50(2), (4) for a petition produced with a proportional serif font. The length of this petition is 5,268 words.

I also certify that the appendix to this petition contains the judgement or order sought to be reviewed as required by Wis. Stat. § 809.50(1)(d).

Dated: June 17, 2020.



LUKE N. BERG

INDEX OF APPENDIX

FILED
06-03-2020
CIRCUIT COURT
DANE COUNTY, WI
2020CV000454

DATE SIGNED: June 3, 2020

Electronically signed by Frank D Remington
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JOHN DOE 1, et al.,

Plaintiffs,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

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,

Defendant Intervenors.

Case No. 20-CV-454

Honorable Frank D. Remington

ORDER ON PLAINTIFFS' MOTION TO PROCEED ANONYMOUSLY AND PERMANENT PROTECTIVE ORDER

Plaintiffs filed a motion to proceed anonymously using pseudonyms, and a hearing was held on this motion on May 26 before this Court. Having considered the parties' submissions and

arguments, this Court denies Plaintiffs' request as presented for the reasons stated at the hearing. Plaintiffs must disclose their identities to the Court and attorneys for the litigants. However, this Court is satisfied that there is sufficient need to keep the Plaintiffs' names sealed and confidential from the public. Therefore, on or before June 9, 2020, Plaintiffs must file, under seal, an amended complaint that lists the names and addresses of the plaintiffs that are proceeding in this action. Plaintiffs also must promptly circulate a draft protective order to opposing counsel, and all parties are required to negotiate the terms of a protective order in good faith.

So ordered.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

= =

JOHN DOE 1, et al.,

Plaintiffs,

-vs- Case No. 20CV454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant.

= =

PROCEEDINGS: Oral Arguments

DATE: May 26, 2020

BEFORE: HONORABLE JUDGE FRANK REMINGTON

APPEARANCES: JOHN DOE 1, et al., Plaintiffs, appeared via Zoom by LUKE BERG, Attorney at Law; Milwaukee, Wisconsin.

MADISON METROPOLITAN SCHOOL DISTRICT, Defendant, appeared via Zoom by BARRY BLONIEN, Attorney at Law; Madison, Wisconsin.

PROPOSED INTERVENORS appeared via Zoom by ADAM PRINSEN and EMILY FEINSTEIN, Attorneys at Law; Madison, Wisconsin.

ALSO PRESENT: Laurence Dupuis-ACLU (via Zoom)
Asma Kadri Keeler-ACLU (via telephone)
John Knight-ACLU (via telephone)

REPORTED BY: Lynn Schultz
District 5 Court Reporter

THE COURT: This is Case 20CV454, Jane and John Doe, et al. versus the Madison Metropolitan School District.

Attorney Luke Berg appears for the plaintiffs. Attorney Barry Blonien appears for the defendant. And Attorney Prinsen appears for the proposed intervenor.

Mr. Blonien, is there anyone else on this call you'd like to introduce?

MR. BLONIEN: Ms. Terrell-Webb is listening in and can participate; otherwise, just me.

THE COURT: Mr. Berg, same question for you.

MR. BERG: Just me, Your Honor.

THE COURT: Mr. Prinsen?

MR. PRINSEN: Yes, Your Honor. I will introduce my colleague, Emily Feinstein, from my firm, Quarles & Brady, on behalf of the proposed intervenors. And then on behalf of the ACLU, also appearing on behalf of the proposed intervenors, are Attorneys Larry Dupuis by video, as well as Asma Kadri Keeler and John Knight by telephone.

But as we've already clarified, Your Honor, I will be doing the speaking in the hearing today on behalf of the proposed intervenors.

THE COURT: All right. Thank you very much. We're in the court's calendar for oral argument and what

I anticipate is to be an oral decision on the various pending motions.

I'd like to outline my plan for proceeding this morning, and then I'd ask you to participate briefly into adding anything in addition to what you wrote. I do have some questions, and then we'll rule on them one at a time.

I intend to take up the first issue, which is the plaintiffs' request to proceed anonymously, and then I'm going to rule on that. Then we'll take up the defendant's motion to dismiss, and then we'll take up the intervention. I'm not quite sure. We might take up the intervention after the question of anonymity is resolved, depending upon how I rule in that matter.

So let me begin by saying this. Whether I start with you, Mr. Berg, or you, Mr. Blonien, Mr. Berg started this by asking the court to proceed anonymous.

Mr. Blonien, you opposed that motion and then filed a motion to dismiss, which I interpret made a series of arguments on why the defendants believe the case should be dismissed assuming that the case proceeds as currently caption and styled.

To the extent that I rule on the motion for -- Mr. Berg's motion to proceed in this fashion, I anticipate it may then resolve some of the -- or address

some of the defenses that the defendant had argued in support of its motion to dismiss.

So let's begin with you, Mr. Berg. I have read your briefs, and I have looked at the court cases that you have cited. I ordinarily begin these hearings by inviting counsel, if you would like, to make essentially sort of an opening statement adding to the court what you'd like me to consider this morning that's not repetitive or duplicative to what you wrote.

Mr. Berg?

MR. BERG: Plaintiffs' anonymity request is well supported both factually and legally. Four federal circuits, including the Seventh Circuit, along with multiple district courts have allowed parents to anonymously challenge controversial school policies.

These courts identified four compelling reasons for anonymity that are present here. First, to protect the identity of the minor children; second, to protect parents and their children from retaliation or harassment for raising a controversial issue; third, to preserve privacy around sensitive personal matters, especially health-related matters; and, fourth, to preserve privacy around religious beliefs.

Now, with respect to the risks to plaintiffs and their children, the reaction to this lawsuit already

has shown that the risk of retaliation is very real. One comment online ominously asks, "Where do/will staff eat, stay, et cetera, when they're in town to work on this case?" Another said, "The time will come to drop the protest signs and pick up a gun. Street gangs and assassins will be the only way to stop the bigots."

We also provided affidavit testimony from someone who's been retaliated against as well as many other examples of people who have been threatened, fired, blacklisted or otherwise retaliated against for questioning some transgender-related policies or claims.

The identities of the plaintiffs are completely irrelevant to this case. The only question is whether the policy is constitutional. The district has not come up with any specific reason to know the plaintiffs' identities.

But even if this court is concerned that something might come up later in the case, we can cross that bridge when we come to it. We're going to make every effort to give the district whatever they need to defend the policies. I think we've shown that already.

We withdrew a plaintiff to provide a simple solution to the conflict issue the district raised. That's the one specific reason they gave for knowing the plaintiffs even though the conflict problem was theirs

and not ours. So I think we've shown that we're going to make every effort to allow this case to proceed as it should.

So for those reasons, we would ask the court to grant the motion to proceed anonymously. And I'm happy to answer any questions the court has.

THE COURT: Thank you, Mr. Berg. Let's give Mr. Blonien the same opportunity to add his preliminary thoughts that's not repetitive or duplicative to what you wrote. Mr. Blonien?

MR. BLONIEN: Good morning, Your Honor. In appreciating that caution not to repeat the things that we've argued in the brief, I do want to keep it very short here and simply point out that this is a state procedural issue. It should be resolved by state law.

The Supreme Court has given us the guideline, and that is *Builders*. The Supreme Court *Builder* decision makes clear that the public has an absolute right to disclosure of traditional information, which should practically and necessarily include the names of those who are bringing the case, who are invoking the powers of the judicial branch every time that a lawsuit is brought at least initially, and public should have access to all of the records unless there's a statute that specifically authorizes disclosure; disclosure would infringe on a

constitutional right; or this court determines that the administration of justice requires it.

We've laid out why we don't think any of those standards are met in this particular instance, and I'd be happy to address any questions the court has.

THE COURT: So, Mr. Blonien, perhaps you overstate your case slightly, because 801.21 does give the circuit courts the well-settled power to seal certain documents and, in fact, identities on a case-by-case basis. Do you agree?

MR. BLONIEN: I do. I do not agree with the contention by Plaintiffs that 801.21 is a substantive rule. I think the comment itself made clear that it's a procedural rule that allows courts in appropriate circumstances to invoke some other underlying substantive law.

Our point is that they haven't identified a substantive law that would justify the anonymous approach they take in this case, which is pretty extraordinary to exclude not only the public but also the court and the parties from knowing who the litigants are is a pretty extraordinary and unprecedented request.

THE COURT: Well, do you agree that the plaintiffs have made a prima facie showing that they have a fairly serious risk of exposure would their names be

released on a factual basis?

Let me say, Mr. Blonien, Mr. Luke said -- Mr. Berg said that he believed that the plaintiffs had made their case legally and factually. My question to you is, have they not made a case factually in support of their request? And the real question is whether there is a legal mechanism to do what they ask. Do you agree?

MR. BLONIEN: I agree that one question is whether or not -- and there is a legal mechanism and what is that legal mechanism. And the other question is how do the facts play in here.

I don't agree that there's been a demonstration that these particular plaintiffs are at risk of harm. We don't know who these plaintiffs are, and all of the examples that are provided by counsel in the briefs are generic and relate to generalized concerns that other people in the community may have expressed.

And I recognize that that general concern is something that often litigants face whether they like it or not, and the court should take those concerns seriously when individuals identify particular threats to them. They have not done so here, Your Honor.

THE COURT: Mr. Berg, a couple points I think of clarification.

I did not find any published Wisconsin case

that directly discusses this issue; is that correct?

MR. BERG: That's correct. The only thing I would note is there has been a series of cases that have appeared to have allowed plaintiffs to proceed anonymously and one recent from Dane County Circuit Court as well. But none of the cases that I'm aware of have actually discussed the grounds for doing so.

THE COURT: All right. So let's then disassemble your term proceed anonymously. I read all the cases that you cited in your initial brief for the proposition that Wisconsin courts have allowed civil plaintiffs to sue anonymously by using pseudonyms in a number of cases.

There are cases, Mr. Berg, where the court has allowed civil plaintiffs to be anonymous where the court has sealed their identity. And my question to you is, there are two ways I've looked at your issue. One is I could say, okay, I agree that I have the discretion, and the facts support the exercise of that discretion; and as far as I'm concerned, nobody needs to know the identity of the plaintiffs.

Alternatively, I believe that another way of looking at it is for the court to say there is precedent to seal certain court documents under specific factual basis.

Why not proceed by requiring the plaintiffs to identify themselves under a protective order that preserves their confidentiality of their identity but for attorneys' eyes only for the parties in this case?

I believe there is ample precedent to do that. There is -- on page 3 of your brief there's a series of cases where essentially that had been done, I believe, although not discussed directly, where there is a legal basis to preserve the identity of the party.

For example, in the first case, *Doe 56 versus Mayo Clinic*, a case involving minors, it is -- I believe it's possible that the parties and the court knew who the minor was; but to protect the identity of the minor under substantive law, his or her identity was stripped from the caption and presumably prohibited from dissemination by the laws pertaining to juvenile proceedings.

Similarly, in the *Milwaukee Teachers' Education Association*, it seems to me that in that case the parties knew who the individual employees were whose personnel files were subject to the public records case, but yet the court accepted the nomenclature of using the John and Jane Doe under the well-established authority to protect individual personnel files.

And I could go on in the *Doe versus Roe* cases that strip the identity of the parties; although, it

appears to me by reading the case, the lawyers knew who they were; the court knew who they were; but because the court was dealing with confidential medical records and HIV testing, the plaintiffs' names were not contained in the caption, and the identification to the public was protected under the substantive privacy rights of medical records.

So, Mr. Berg, you I think hinted at acknowledging that we could proceed in this fashion because you suggested, I think at one point, well, we could tell the court who these people's names are.

Why not have the court enter a protective order requiring that if the plaintiffs do identify themselves, that their identities be kept confidential? The caption can remain the same and that only the attorneys can see those identities, and that the attorneys under the protective order should endeavor to and protect the confidentiality of the individual plaintiffs' identity.

Are you asking me to proceed in that fashion? If not, why not?

MR. BERG: So a few things I'd like to say, Your Honor. First, the plaintiffs would be happy to turn over their identities to the court. We're not opposed to that at all. We do oppose revealing their identities to

the lawyers in the case for a few reasons.

THE COURT: Why do you do that? I mean, there's many cases and longstanding precedence for the courts issuing protective orders, and the standard protective orders that have been entered into hundreds if not thousands of cases do categorize certain documents, the confidentiality of which should be limited to attorneys' eyes only carrying with it the legal compulsion to protect the information in those documents.

Why are you concerned about that? Because in those situations it would seem to me that it would address the factual bases that you support your motion with and the threats of retaliation. Nobody is going to know who they are except the lawyers involved.

MR. BERG: Right. I have no doubt that the lawyers would follow that protective order to the best of their ability.

I think, however, that the reaction to this lawsuit has shown that the risk is very serious and very real, and every additional person who knows the plaintiffs' identities increases the risk that their identities will be leaked, even inadvertently.

We've been very, very careful. Even the plaintiffs themselves do not know each other. So we've put forth a lot of effort to preserve their anonymity to

make them feel comfortable, and the district hasn't provided any reason that it needs to know their identities, right?

If later in the case there becomes an actual need for them to know the plaintiffs' identities, we can revisit this issue. But from the very beginning we've offered to stipulate to any fact that the district thinks it may need to know about the plaintiffs. I think we've done that already. And the district hasn't provided any good reason that it needs to know them now.

This entire case turns on the constitutionality of the policy. And I think that's part of what distinguishes this case from the other cases that the court identified and that we cited in our briefs in Wisconsin where, you know, facts about the plaintiffs mattered.

In this case the plaintiff -- the facts about the plaintiffs don't matter at all. All that matters is is the policy constitutional or not, and that's why in the federal cases we've cited courts have allowed plaintiffs to proceed anonymously even as against the lawyers.

So I think there is precedent around the country for what we've asked for. I think it would provide the maximum amount of protection for the

plaintiffs. And, again, we can revisit this issue later if we need to.

THE COURT: Mr. Berg, this is not a trick question because I looked, and my staff attorney looked.

Is there a single published case in Wisconsin that discusses or gives the court authority to allow a plaintiff to proceed without telling either the court or the defendant their identity?

MR. BERG: Well, as I've said, we would be more than happy to reveal the identities of the plaintiffs to the court.

There is a case in Dane County Circuit Court just recently where the court allowed a plaintiff to proceed anonymously even as against the defendant's counsel. The case number is 19CV3166.

THE COURT: Hold on. Hold on. 19CV what?

MR. BERG: 3166.

THE COURT: That's a case against the Madison Metropolitan School District. The school district opposed the petitioner's motion to proceed anonymously, and Judge Anderson allowed it at an oral ruling in February.

The basis -- there's no way that I could tell the basis for that, but okay. So I guess Judge Anderson allowed it. But is there any -- I didn't find any Court

of Appeals published appellate decision that said in Wisconsin a party can proceed without telling the court or the defendants their identity.

Is that your understanding too, that this would be a question of first impression?

MR. BERG: Yes, yes, it is.

THE COURT: Then let me get to the next basis for my analysis. Assuming for purposes of argument, Mr. Berg, that it's allowed in the federal court. The federal court have allowed parties to proceed without telling one their identity.

You agree, though, that the federal practice is trumped by applicable state statute. That is, the Wisconsin legislature and the Wisconsin courts control my analysis, right?

MR. BERG: That's absolutely right.

THE COURT: All right. So because I believe there is a current statutory process for sealing the identity of parties and a statutory recognition of the court's authority to enter protective orders to preserve the confidentiality of information in documents, including parties' identities, why do you believe I am not bound by these statutes drafted by the state Legislature and approved by the governor and codified in state law as the principal way of proceeding in this

matter?

MR. BERG: So I read 801.21 as essentially Mr. Blonien does, as a procedural catchall for any sort of anonymity request that isn't otherwise covered by the statute. And 801.21 specifically says in (4) that the court can rely on the common law. And I think you have that in federal court. You have a series of cases that are unanimous actually around the country holding that in facts like this where parents are challenging a controversial school policy, they're allowed to proceed anonymously.

So I think through 801.21(4) and its invocation of the common law in those such cases, this court has more than sufficient authority. But even if you don't want to rely on 801.21, *Builder* recognizes that the court has inherit; and although there's no case discussing proceeding anonymously as against even the defendants, I think this issue just hasn't come up in this state yet. But it has around the country, and courts are unanimous about it.

THE COURT: So, Mr. Berg, my last question for you is then -- it's a repetitive of what I already asked.

I asked you why doesn't a protective order that seals the identity of the named plaintiffs and allows disclosure only for attorneys' eyes only, I asked

you why doesn't that get you everything that you wanted in terms of the threats of retaliation. And your answer to me was, I think just generally, and correct me if I'm wrong, that, well, but the plaintiffs would rather not.

My question is, if I entered a protective order that required the plaintiffs to identify themselves but seal the document and provided that the identity of those named plaintiffs be for attorneys' eyes only with the usual standard argument, in the end, what is the plaintiff concerned about other than just more people know their identity?

MR. BERG: I think that's the concern, Your Honor, that every additional person who knows who they are creates additional risk that their name will be even accidentally leaked, right?

We have two attorneys who have appeared for the district. We have six attorneys who have appeared for the intervening defendants, so that's already eight different people who will know who they are. It will be on different servers and different systems, and the more places their names are available, the more people know who they are.

It creates risk. It creates some risk that their names will be leaked, and there's no point in creating that risk when the District hasn't given any

reason that it needs to know their identity.

Again, this case turns entirely on the policies. There's nothing to do with the facts about the plaintiffs. But if something comes up in the future that the district needs to know and it can't be solved in another way, then we can revisit this.

THE COURT: So, Mr. Berg, I said I had one last question, but your answer generated another one.

You know, from my experience before taking the bench, I worked on the state's pharmaceutical litigation; before that, I worked on the state's tobacco litigation.

And as you might imagine, in both of those cases the court entered detailed protective orders, and in both of those cases the lawyers received and reviewed Tier 1 confidential documents that were deemed to be for attorneys' eyes only.

And to my knowledge, the attorneys in that case, dozens and dozens of attorneys, who had access to the confidential materials from the tobacco defendants and the pharmaceutical defendants, preserved the confidentiality of that information as required by court order.

Do you have any reason to believe that there is any risk in this case with these defendants or these lawyers that makes this court's analysis different than

what the precedent would have been for highly confidential pharmaceutical information or tobacco information?

MR. BERG: No. I have no reason to doubt that the lawyers in this case will make every effort to preserve the plaintiffs' anonymity and follow a court order.

That said, I think there is still some risk that their identities will be inadvertently leaked. And unlike those cases this court is discussing, this case is unique in that there's no need -- there is no fact, there's no reason to identify the plaintiffs.

This is a case about the policy. The entire case is going to turn on whether the policy is constitutional or not. And if there is any fact that the district needs to know, we can get it to the district in other ways or we can revisit this.

Although it may be a small risk, there is some risk, and there is no need on the other side. And the test that federal courts apply is essentially a balancing test, the need for anonymity versus the need on the other side.

And I think even though the risk is small to revealing their identities to the lawyers, there is some risk, and there's no need on the other side. So I think

the balancing still cuts in favor of the request that we've made.

THE COURT: Mr. Blonien, is it true, as Mr. Berg says, the identity of the defendants is completely -- excuse me, of the plaintiffs is completely immaterial and unnecessary for purposes of this litigation?

MR. BLONIEN: We respectfully disagree with that assertion, Your Honor.

THE COURT: In what respect other than, let's say, standing?

MR. BLONIEN: Well, standing would be difficult to overcome; but if you break down what standing is really all about, it's about what is the direct impact, how are these individuals harmed. And in order to understand that, we would need to understand the factual circumstances of those individuals as we laid out in our brief.

It's not enough to allege that your children are students at MMSD. There has to be more than that. And it's specific individualized facts that do matter in shaping whether or not this guidance, the MMSD guidance, is consistent with the law and meets as applied the facts of the particular case. The facts do matter.

THE COURT: Is there anything else, Mr. Berg?

It's your motion. I'll give you the last word.

MR. BERG: Yeah. I think the standing issue fully proves my point. You know, Mr. Blonien says, well, we need to know details about the plaintiffs to know their basis for standing.

At our scheduling hearing back in March, I openly acknowledged that there's nothing special about the plaintiffs. We're not acknowledging that they have any special injury. We're not even arguing that their children are presently dealing with gender dysphoria.

All we're arguing is that they're parents of children in the district and challenging this policy now in case their children deal with this issue. That's our entire basis for standing. The plaintiffs' anonymity hasn't prevented the district from filing a motion to have an argument on standing, so it clearly hasn't interfered with their ability to raise the issue.

And the district hasn't identified anything else. And, again, if something comes up later in the case, we can cross that bridge when we come to it.

THE COURT: Hang on a second. The air conditioning isn't working in the courthouse, and I've got to close the windows. I think there's some construction going on.

All right. Thank you very much, gentlemen. I

appreciate the argument. I also want to commend the parties on the briefs. It's always a pleasure to have well-written briefs that discuss the issue in detail in which both the plaintiff and the defendant presented to the court.

In the end, I'm bound by Wisconsin law, both in terms of what the statutes set forth and the Wisconsin common law as established by the Supreme Court. There is no precedent for what the plaintiff is asking for in the current published appellate case law.

I agree with the plaintiff, Mr. Berg, in terms of the factual basis they've demonstrated on the legitimacy and sincerity of their concern over the release of their identities. And so as a factual matter, I believe the plaintiffs have satisfied the court of the need to preserve their confidentiality and, in particular, when analyzed against the backdrop of the relevance or irrelevance of their identity on their ability to challenge the policy in question.

So the plaintiffs, in my opinion, have made that 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.

Now, however, the question then is what does the law allow the court to do to address the sincere established factual concerns over their safety and well-being? The plaintiffs suggest that nobody really needs to know.

I disagree, and I am not comfortable transporting into Wisconsin jurisprudence the standing and the practice -- the practice of the federal courts in similar circumstances. I believe that Wisconsin's longstanding practice of the public's having a right to know under the public records law and the common law and, in fact, the Constitution's obligation that the courts be open to the public militate dramatically against allowing parties telling no one who they are to come to court.

But that doesn't mean that everything is available and open to the public. That's not true. Whether we close cases and seal information involving minors or personnel records or medical records, the public's right to know is balanced off against situations where that right is outweighed by other concerns.

And I believe that the statutes in Wisconsin allow the plaintiffs to preserve their confidentiality of their identity in ways under 801.21 on an appropriate motion to seal with a protective order preserving the confidentiality of their identities to the attorneys'

eyes only.

I don't dismiss, Mr. Berg, your concern over the more people that know, the greater risk. That's true. But there's nothing about this case that's different than a trade-secret case or a trade -- a business case where confidential information is made known to the parties but yet its confidentiality is preserved.

So I will do as the plaintiff asks but in a different way. If the plaintiff -- I'm going to deny the plaintiffs' right to proceed in the manner in which you've selected by making anonymous all the plaintiffs. You can file an amended complaint identifying those plaintiffs, as ordinarily done, and that document can be filed under seal.

I will grant your motion to seal that information based on the factual demonstration that you've made, but that information will be shared with the attorneys' eyes only. And you'll draft an order for the court to sign protecting the confidentiality of their identity and precluding the dissemination of their identity to other individuals.

Now, I don't know, Mr. Berg, 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 of the school district or in the discovery that may follow.

So I don't know, Mr. Berg, whether that changes your thoughts in terms of what comes next as to how the plaintiffs would like to proceed; but for the reasons stated, based on the analysis of the briefs and the arguments of the parties, like I said, I will allow their identity to be confidential under current state statutes and well-established practice, but they're not proceeding anonymous to the court or to the defendant's attorneys.

MR. BERG: Can I make one additional request in response to that?

THE COURT: Okay.

MR. BERG: Would it be possible to limit the exposure of the plaintiffs' identities to a single attorney from the district and a single attorney from the intervening defendants if they are allowed to intervene?

THE COURT: I don't have any authority to do that. That would entangle me into, you know, the local and national counsel relationship and create a conflict of interest possibly between lawyers and their firms as to how they would share information and divide their

workload.

Look, Mr. Berg, I like to be an optimist in terms of how I proceed. I know Mr. Blonien. I know Ms. Feinstein. I'm not sure I have had the pleasure of meeting Mr. Prinsen or the other lawyers. But I expect when the court enters an order that demands of them to preserve the confidentiality of the identity of the plaintiffs, they will abide by that order as I expect. And to limit which attorneys have access to that information would be an unnecessary intrusion into their practice of law.

MR. BERG: Very well. My second request is could you give us 14 days to decide? Each of the different plaintiffs has different sensitivities as to this.

And so what I've told them from the beginning is after the court makes a decision, we're going to have a conversation about it and decide. They'll have the option to either do what the court asks, withdraw from the case, or we might file an interlocutory appeal. So we'd ask for 14 days to have that conversation and make that decision.

THE COURT: Well, you'll get that, Mr. Berg, ability, because what I envision next is for you to file an amended complaint, and we'll set that out for 14 days.

So if the amended complaint comes in with less names than it was, I'm not going to be concerned about that. The purpose of the amended complaint is not to change the allegations but to tell us who the named remaining defendants -- excuse me, named remaining plaintiffs are in the case.

If there's less, then I don't think that's objectionable. Mr. Blonien?

MR. BLONIEN: I wouldn't object if there were fewer, Your Honor.

THE COURT: All right. If you -- if nobody wants to continue because of the court's determination on your motion, then that would be your choice. If you want an interlocutory appeal, then that's your choice too.

Let's turn to the motion to dismiss. Mr. Blonien, my concern with your motion to dismiss is a general view, is that both parties got into talking about a lot of facts in detail that were not contained in the four corners of the complaint.

There is some leeway, understandably, when one talks about standing or rightness, but my concern with the motion to dismiss is it was really built upon a house of cards -- well, it was built upon a foundation of the plaintiffs' desire to proceed anonymous.

Now that I've concluded that they're not

proceeding anonymously, what remains, if any, in your motion to dismiss?

MR. BLONIEN: Your Honor, I think we can anticipate, based on representations that Mr. Berg has made to this court, that the individuals, the parents who are involved in this lawsuit, do not have children who in any way are atypical, who do not have any gender-identity issues, who have no experience with or have not received a diagnosis of gender dysphoria, and absent those things, MMSD's approach to tolerance and acceptance of the LGBTQ+ community does not apply to them and would never apply to them.

The motion to dismiss, Your Honor, is also based on the law and understanding of the right of parents to direct the upbringing of their children, and it is in no way impacted here even if you accept all of the facts as presented by Mr. Berg and the anonymous plaintiffs.

Even assuming that a child is diagnosed with gender dysphoria, MMSD does not interfere with the parents' right to direct the upbringing of their children. They can choose a school that best suits their child and who supports the treatment for that child's medical care.

THE COURT: Mr. Blonien, is that last

statement of yours a statement of fact or statement of law?

MR. BLONIEN: Your Honor, I believe that it's a statement of law. That is, we can take Mr. Berg and the anonymous plaintiffs at their word that the concern here is a medical diagnosis of gender dysphoria.

We all agree that school teachers are not professionally trained to diagnose or treat a medical disease or a mental health --

THE COURT: Is that a -- you say we all can agree. Is that statement contained in the plaintiffs' complaint?

MR. BLONIEN: I do not have a perfect memory what allegations are there, but I believe, Your Honor, that the allegations are there because they made direct reference to the expert that Plaintiffs are putting forward with Dr. Stephen Levine, who made very similar assertions about who has appropriate qualifications in order to diagnose and treat something like gender dysphoria.

THE COURT: Mr. Berg, as a general feeling, my overall assessment, without talking about the specific legal argument, is that the defendants attack the motion as a motion to dismiss but yet ask me to bring in a lot of facts and inferences that they suggest should be made

from their case, and it's really a -- what they want and present to the court is a motion for summary judgment. Or do you agree that it's really a legal question that they haven't converted their motion to dismiss into motion for summary judgment. The court can look at the complaint and rule on it as is?

MR. BERG: I think there's a lot of subsidiary issues that the district has argued are factual. I agree with the court about that. But the basic argument they're making is parents don't have a right to challenge the policy that directly affects their children, and I just think that's wrong as a legal matter.

Parents have a constitutional right, as we've alleged, to make major decisions for their minor children. And publicly changing gender identity is a huge deal, highly controversial. The long-term effects are unknown, and many experts in the field believe it can actually do lasting harm.

This is the kind of decision that parents need to be involved in. Yet the district believes that children of any age, five on up, can make this life-altering choice at school without any input from their parents but only from teachers and other district staff.

Plaintiffs are parents of children in the

district, so they're directly affected by this policy. And they're challenging it on its face. I think that's more than enough for standing.

THE COURT: Mr. Berg, am I correct when I read the complaint and when I add in reasonable inferences from the complaint, that in addition to the plaintiffs being parents of children in the school district, that the individual plaintiffs have some specific concerns that the policy may apply to their children without them knowing about it and then depriving them possibly of the rights that they think they have with regard to the school district?

MR. BERG: Yeah.

THE COURT: Is that what you've alleged in the inferences from what's in your complaint?

MR. BERG: Yes. We've alleged that the issue of gender dysphoria can come up for the child at any time. The plaintiffs have no way to know in advance whether their children will deal with this issue or not.

The district's policy says, "If this issue comes up, here's how we're going to deal with it. We're going to let children make this decision at school with input from teachers and school staff without parental involvement, and we're actually going to help hide this from parents if the child wants that."

And Plaintiffs challenge the policy because they want to be involved if this issue comes up for their children. There's nothing abstract, hypothetical, or contingent about the dispute. The question is what is the decision-making process if the child wants to transition at school. Our position is parents have to be involved. District's position is parents don't have to be involved. The question is do they or don't they.

THE COURT: Mr. Blonien, this is your motion. You get the last word.

MR. BLONIEN: I understand the court's concern about ruling too quickly on an issue that appears to be based in fact, but I think it's important to distinguish, Your Honor, what facts are, in fact, disputed here and which are not and what facts the court needs to decide this on a motion to dismiss on justiciability grounds, which is a prerequisite. It's a fundamental, necessary requirement to bring an action in Wisconsin.

And the standing and rightness inquiry here, Your Honor, we think, first of all, if you accept that the DSM, the official diagnosis book that provides what the criteria are for gender dysphoria, is something that can be taken judicial notice of, and the plaintiffs did not take issue with that contention in their brief, and the other issue is this is not a policy. This is a

guidance.

The plaintiffs in their complaint allege that this did not go through a full policy-making review and vote by the school board.

THE COURT: Yeah, but even that -- Mr. Blonien, a couple things. I'm not inclined to take judicial notice of things in the context of a motion to dismiss in the ordinary case.

As to your last comment, where in the four corners of the complaint does it outline the nature of the thing that's being challenged, whether it's a guidance or a policy? I mean, these are things that I, in my whole career in my job as a lawyer and as my job as a lawyer I see come up on a motion for summary judgment where the body, administrative or legislative body, provides me with a complete understanding and recitation of what it is that's being challenged.

And it is exceedingly rare and unusual that that can be successfully done on a motion to dismiss because it's not the plaintiffs' job to outline the sort of the legislative history and to describe the limitations on it being a policy or a guidance and the like.

How is it that you suggest that I should do that on a motion to dismiss without being lured into the

additional facts that I would say -- and no disrespect intended -- were peppered in your brief here and there, understandingly may be true, but not in the context of a motion to dismiss?

MR. BLONIEN: Your Honor, I think an important distinction between a motion to dismiss and summary judgment is whether or not there are facts that need to be developed in the course of discovery or whether or not the allegations taken as true suffice to establish a claim.

And I take your point that there could be factual bases that the parties might disagree about that bear on that question. That's not the case here. The law, as clearly provided, requires a vote by the school board for something to be a policy.

And of course the court can take into account what the legal framework is in deciding whether or not the allegations are -- (inaudible) -- and ultimately all of the facts, if accepted as true on behalf of the plaintiffs here, do not create a claim because the constitutional right of a parent to direct the upbringing of a child does not give them a right to tell MMSD or any other public school district how they have to conduct their school day.

THE COURT: Where in the complaint -- what

paragraph in the complaint, Mr. Blonien, is it discussed on the nature of the promulgation of this policy or guide?

MR. BLONIEN: Your Honor, I would have to provide a supplemental response identifying -- and maybe Mr. Berg could help -- of the portion where it recognizes this was not passed by the full school board. That was simply the portion I was referencing.

But my point is a deeper one. Even if we accept that this is a policy, that it's something more than that, it doesn't change the fact that there is interference with parental rights here. That is, parents have a right to choose which school they want to send their child. They have a right to direct medical interventions and diagnose treatment for their children. And MMSD's guidance's approach whether it's a policy or not does not interfere with that right.

THE COURT: Well, right about paragraph 32, Mr. Blonien, the plaintiffs say it is a policy. And, furthermore, in paragraph 32 -- excuse me, 33, it says, the policy sets forth Madison School District's official position on the nature of sex and gender.

It seems to me what you're arguing is that that's not true; that it's not a policy. It's a guidance, and it doesn't set forth the school district's

official position on sex and gender.

MR. BLONIEN: Your Honor, I believe that the case law clearly establishes that they're factual allegations, not legal assertions. Legal assertions aren't set forth in the case law. And if the legal case law and statutes and other sources of law clearly point to something different, the court doesn't need to accept those allegations as true.

It also doesn't need to accept allegations as true that are contrary to widely known and accepted facts as the case for anything the court can take judicial notice of. If they assert that the sun rises in the west, just because that's a factual assertion doesn't mean that the court has to accept that.

And here the allegations, the complaint, the arguments are all premised on two faulty premises that are fundamentally indefensible. Gender-nonconforming behavior is not a disease. It's not categorized as a disease in the DSM. The American Psychiatric Association does not treat it as a disease and can't simply assert otherwise or make implicitly the suggestion of.

And the second is that this guidance, whatever it is, policy or not, is not a medical intervention. It's a policy that promotes tolerance and acceptance of all students. You don't need a medical certification to

administer compassion and tolerance.

THE COURT: Mr. Berg, did Mr. Blonien say anything factually that the plaintiffs disagree with?

MR. BERG: Yeah. I mean, we absolutely disagree that this is guidance and not a policy. You can read the policy itself to see that. It uses language like "shall" and "will" everywhere.

Here's page 9, "School staff shall not disclose any information that may reveal a student's gender identity to others." Also page 9, "If a student chooses to use a different name, this does not authorize school staff to disclose this to parents."

Page 11, "Staff will respect student confidentiality -- (inaudible) -- be careful while communicating with family." Page 18, "All MMSD staff will refer to students by their affirmed name and pronoun. Refusal to respect a student's name and pronoun is a violation of the MMSD nondiscrimination policy."

This is not guidance. This is a clear policy, and it's enforced by the nondiscrimination policy. And we have alleged in our complaint and provided documents showing that the district has trained all of its staff with this being a policy, not guidance.

So, yeah, we definitely take the position that this is a policy and not guidance. But even if it were

guidance, it's irrelevant to our claim. The point is this issue, whether the transition is a significant major controversial decision, even WPATH describes it as a controversial decision, and they're a very pro-transition organization. And that type of decision parents need to be involved.

So even if it was optional guidance, it clearly communicates to the teacher that they don't have to include parents when this issue comes up, and our position is yes, they do. They always have to include parents, right? Students can't take an aspirin at school. They can't go to prom without parental permission. And yet the district has decided that they can change their gender identity. That's huge, hugely significant. Parents need to be involved.

Sort of irrelevant whether it's policy or guidance, but as a factual matter, our position is that it's clearly policy.

THE COURT: All right. Thank you very much, gentlemen.

MR. BLONIEN: Your Honor, may I just add just one thing briefly? I apologize for interrupting.

THE COURT: Okay.

MR. BLONIEN: The paragraph I was referencing previously was paragraph 61 of the complaint, which

states that the district's policy was not adopted in a transparent manner with a full opportunity for all parents to provide feedback and with public vote by the school board.

Our point is that legally, and as the nondiscrimination policy provides a perfect illustration of this, when there is an enforceable policy, it needs to be passed by the board. That's a legal requirement that hasn't by concession of the plaintiffs here been satisfied.

So that's simply the point that we were trying to make, Your Honor, with respect to policy versus guidance. Although, we don't think that ultimately the motion to dismiss turns on that issue.

THE COURT: All right. Thank you very much, gentlemen.

Mr. Blonien, you're right. As an academic question and a theoretical construct, if I had a complaint that alleged that the sun rises in the west and sets in the east, the court can disregard spurious and outlandish factual allegations of the nature. That doesn't really apply to any of the allegations set north in the plaintiffs' complaint of the magnitude of your hypothetical.

All the lawyers know that the court's function

on a motion to dismiss is not to delve into the merits, to weigh the competing claims or interest. It is an examination of the complaint, accepting all of the allegations in the complaint, the well-pled factual allegations in the complaint, as true, and adding to those factual allegations reasonable inference.

It is indeed a one-sided look that the court employs. And to that extent, for non-lawyers' benefit, nothing I say should be construed as any opinions on the plaintiffs' -- merits of the plaintiffs' complaint or the allegations.

Nothing I say or do here should make people think that I'm leaning toward the plaintiff or the defendant. It's only looking at the plaintiffs' complaint to see whether they've stated a claim. And accepting all of the allegations, and even if I were to discount possibly legal claims, although that becomes rather problematic because most legal propositions are actually questions of mixed law and fact, but even if I were to discount those, I believe the plaintiffs have stated a claim in their complaint.

Look, I don't know if it's a policy or a guidance. I don't know if it's a medical decision or not. I don't know whether it binds the staff and students in the district or not. All I know is that the

plaintiffs have outlined a scenario in the complaint that I understand is their belief that what the school district is doing is wrong, and they would like the opportunity for a day in court to prove it.

And to that extent, having taken care of the issues, mooting out those arguments in the defendant's motion to dismiss regarding the complications of proceeding anonymously, what remains, in my opinion, should be denied; that the defendant's motion to dismiss the complaint is denied.

I do think that the plaintiffs have stated a claim, and I also do believe that a number of the arguments that the defendants have made are indeed questions of -- lure the court into weighing and competing factual inferences.

Now, by denying the motion to dismiss, obviously and categorically the defendants can bring on motions for summary judgment. I also point out the court's practice of motions for summary judgment are to require proposed findings of fact.

Now, to the extent that there is some case law to say, well, when a party asks the court to consider some facts in connection with the motion to dismiss, the court should proceed, nonetheless, as a motion for summary judgment. I'm not going to do that today because

of my standard practice that requires proposed findings of fact.

By requiring the moving party to propose findings of fact, then this court or an appellate court knows exactly whether there's genuine issues as to those material facts or not.

So I want to address that in a procedural matter that I'm not suggesting that were the defendant's to re-file many of their arguments as a motion for summary judgment, I'm not rejecting those by my ruling denying its motion to dismiss.

On the contrary, once styled and captioned in the correct form as a motion for summary judgment, accompanied by proposed findings of fact, then the court are in a better position to make a decision as to whether either party should be entitled to judgment as a matter of law. So for those reasons, I'm going to deny the defendant's motion to dismiss.

That then leaves, Mr. Prinsen, the ACLU's motion to intervene.

Mr. Berg, one of the things that was discussed in the motion, well, I guess the plaintiffs did not have a problem with, maybe the ACLU intervening is -- one is they didn't oppose your motion to proceed anonymously, which I guess they said they would not do; although, I

didn't ask them. They didn't participate in that part of the court's proceeding.

Now that I've ruled on how you are proceeding and knowing that their participation will in no way hinder or impede the court's scheduling of this case forward, do you oppose the intervention?

MR. BERG: Yes. We said in our filing we wouldn't oppose it if the court granted the anonymity request outright.

But given that the lawyers are going to find out who the plaintiffs are and from their perspective every additional person who knows increases the risk somewhat, yes, we do oppose their intervention. I think they can -- they haven't shown that they are not adequately represented by the district.

As we said in our filing, they haven't shown that they have a legally protected interest in this case, and they don't meet the criteria for permissive intervention because it will actually prejudice the plaintiffs.

There's no reason that they can't participate in this case in an amicus capacity. You know, this case turns entirely on the constitutionality of the policy. They can comment on that, and we wouldn't oppose that at least. That's all.

THE COURT: Mr. Prinsen, first I'd like to address the fourth prong of the test on intervention, whether MMSD can adequately defend itself and its policy/guidance. You know that the MMSD says that they don't concede their inability -- although they don't oppose intervention, they don't concede that they really need you there.

And, second, how about Mr. Berg's suggestion? What do you get by intervention were I to allow you to file?

MR. PRINSEN: Yes, Your Honor, with respect to the adequate-representation prong that this court has raised, our clients do have a special, personal and unique interest in this matter.

The exact sort of special, personal, and unique interest that the Wisconsin Supreme Court articulated as an exception to the general presumption that a government adequately represent any interested parties when the interested parties and the government have the same ultimate desired outcome, while Attorney Berg and the plaintiffs in their opposition brief did highlight this presumption that is given to the government's interest, they failed to recognize that the very exception discussed by the Supreme Court in *Haverland* is present in this case.

And to answer your question, Your Honor, our clients are the direct beneficiaries of the district's guidance. They directly benefit from the district's guidance, as articulated in the proposed intervenors' briefs and supporting affidavits submitted by representatives of the students' clubs themselves, and they would be directly harmed by the guidance.

And, Your Honor, while proposed intervenors do acknowledge that the district and the proposed intervenors share, again, the same desired outcome in this case, the factors that the court must examine are the difference in the parties' respective incentives to defend the case and what each party has at stake depending on the outcome as the Court of Appeals said in *Wolff versus Town of Jamestown* by the Wisconsin --

THE COURT: Mr. Prinsen, here's a question for you, and I don't know the answer. Your argument that the proposed intervenors have a stake that's not -- that would not be respectfully adequately represented or defended by the school district, there are two different scenarios.

If you told me that these stakeholders had a role in the promulgation of the policy or guidance and presented at its inception their position and interest in the formation of it, then I could see how it would

continue on through the litigation.

On the other hand, if the policy/guidance was promulgated rather unilaterally, that is, that the proposed intervenors were simply just third-party beneficiaries, then I don't see necessarily the draw of the proposed intervenors to weigh in on the policies because they didn't weigh in on its promulgation in the first instance.

Which scenario best describes this case?

MR. PRINSEN: Well, Your Honor, we would have to do further investigation to determine the full answer to your first scenario, Your Honor, whether the students themselves participated in the promulgation of the district's guidance in the first part.

I must admit, Your Honor, I am not sure of that answer at this point in time, and we would need to look into that particular scenario further with our clients.

And in the second part, based on the second scenario you presented where the students were merely incidental beneficiaries, I would remind the court that this policy -- not the policy, excuse me -- this district's guidance was enacted to create a welcoming environment and to teach acceptance of all people who, no matter what their gender identity in the school as a

whole, whereas our clients are a subset of the student body in the district, the school district of Madison, and our clients being that subset are those clients that have the most to gain by the confidential aspects of the guidance and the most to lose, Your Honor. And the standard -- the standard, as inappropriately articulated by Plaintiffs in their opposition brief, are not a legally protected interest.

As we articulate in our reply brief, not only do our clients have a legally protected interest, but even in the case that this court were to find they did not have a legally protected interest, that is not the standard under Wisconsin law.

THE COURT: Mr. Berg, 803.09(2) allows permissive intervention.

Do you agree that the proposed intervenors do have an interest in common with the named defendant?

MR. BERG: Yes.

THE COURT: And I will represent to you that there would not be any delay were the proposed intervenors be allowed to intervene. It comes then down to prejudice. I understand your concerns about now more lawyers knowing the identity of the remaining plaintiffs.

Is there any other prejudice that the plaintiffs would have other than knowing the identity of

the remaining plaintiffs if they were to be allowed to permissively intervene?

MR. BERG: Well, look, I know that this court will schedule things in the same manner and try to proceed as expeditiously as possible. But the more lawyers involved, the more filings there are going to be. And that can slow things down, and that can delay, and that can complicate the case.

And so, yes, I think them being involved in the case will complicate the case. The issue in this case is a binary one. There's two options. Either parents get to be involved in this major decision or they don't. The district represents the position that they don't get to be involved in this. We represent the position that they do.

So there's nothing unique for the intervenors to add. The district has shown that it's going to defend the policy quite well, and so the intervenors don't need to be in this case because it's not a policy. They can comment on it in an amicus capacity.

THE COURT: Mr. Blonien, your thoughts.

MR. BLONIEN: I do think that there are important constitutional rights that are being implicated by the policy, but I don't think that there are those that belong to the anonymous parents.

I think that there are those that belong to individuals in the LGBT+ community who experience discrimination on a day-to-day basis and who depend on tolerance and acceptance that is outlined in the guidance to protect those constitutional and statutory rights that we recognize at the state and the federal level.

I think their voice is important to be heard. MMSD's position is simply that we can present the same interests here but from a permissive respect. We think plaintiffs who are anonymous who have children who in no way are impacted directly by this policy are permitted to come into this court -- (inaudible) --

THE COURT REPORTER: Wait. I'm losing you there.

THE COURT: Mr. Blonien, you were cutting in and out.

MR. BLONIEN: Pardon me. I'm saying that it seems to me pretty sure that the individuals who are directly impacted by the guidance that MMSD puts forward should be allowed to participate if anonymous parents who have children who aren't impacted by the policy are allowed to bring this lawsuit in the first place.

THE COURT: All right. Thank you. Mr. Prinsen, it's your motion. You get the last word.

MR. PRINSEN: Yes, Your Honor. The plaintiffs

have attempted to stress in their opposition brief because it's a question of law, it's not appropriate or necessary for our clients to intervene. But our clients respectfully highlight in this court that under permissive intervention, it is common questions of law and fact.

And as this court has said, most legal questions are mixed questions of law and fact. And if not allowed to intervene, the clause could not present evidence on factual issues that may need to be resolved before reaching a conclusion on the constitutionality of the district's guidance.

They cannot challenge the evidentiary support for Plaintiffs' assertions of injury, and they cannot offer evidence of actual injury that we've suffered by students if the district's guidance is removed or limited.

Our students and our -- our clients and representatives of our clients, the student clubs, can provide personal student testimonials as to the benefits that they received from the guidance and the harm that they would experience if the guidance was limited or rid of.

And beyond that, Your Honor, they can contribute to the true and long-lasting harm that may

result if schools are forced to oust students who may face a hostile environment at home, such as rejection or verbal and physical abuse by one or both of their parents or guardians.

The plaintiffs have asserted, albeit in their briefing in support of the motion for preliminary injunction, that there would be no harm resulting if the guidance was -- if the school district was enjoined or the guidance was limited in some fashion, but our clients can provide extremely important, significant, personal, factual evidence to this court that that indeed is not true and that our clients would suffer direct harm.

And the district's interest of protecting their guidance or defending their guidance constitutionally is to protect the very set of students that our clients represent. And our clients could also contribute, Your Honor, with respect to providing expert testimony to contradict those assertions made by Dr. Levine asserted by the plaintiffs in this case as well, Your Honor.

THE COURT: Thank you very much, Mr. Prinsen.

MR. BERG: May I --

THE COURT: Yeah. Okay.

MR. BERG: -- may I have one more -- I forgot to add. I wanted to add that as we said in our brief, we

would not oppose intervention if the plaintiffs could remain anonymous as to the intervenors.

So if this court were willing to hold that district lawyers could find out the identifies of the plaintiffs but not the intervenors, then we would not oppose. I just wanted to add.

THE COURT: So, Mr. Berg, I'll just give you my gut reaction to that.

Assuming Mr. Prinsen, Ms. Feinstein will continue as they always have, to obey the orders of the court, why would I make them essentially a second class behind Attorney Blonien and deny them information that Mr. Blonien can be trusted with?

I think you've respectfully said it's not a question of personal trust. You trust the lawyers will abide by the protective order, which, by the way, Mr. Berg, I want you to draft the court's protective order that contains language in there that protects the anonymity of your clients.

So why would I trust Mr. Prinsen and Attorney Feinstein any less than I trust Mr. Blonien? And, as I said earlier, to the extent that they have a joint defense agreement and work together, why would I put that impediment in their way?

MR. BERG: Not because you should distrust

them any more than Mr. Blonien but for the same reason I argued before, which is that every additional person who knows who the plaintiffs are creates some additional risk for them.

And as I've argued, there is no reason for anyone to know who the plaintiffs are. But given that the district will know who they are, given the court's earlier ruling, the district can raise any defenses or get any information that it needs about the plaintiffs.

So there's no need for the intervenors to know who they are, especially given that their interests are so closely related. Their are arguments are going to be so similar.

THE COURT: Mr. Prinsen, when I looked through your papers, I was curious to see whether your proposed intervening natural person had similar concerns over their anonymity, and I didn't see that.

Are you going to be suggesting later on at some point that the individual students and/or families are anonymous as much as the plaintiffs may want to be?

MR. PRINSEN: Your Honor, I want to make sure I understand your question. Do you mind repeating your question one more time?

THE COURT: You bring together a list of groups and various schools, and I got the impression that

the members of those groups are not proceeding anonymously themselves.

MR. PRINSEN: Your Honor, that is correct. With respect to the representative of those groups, as is clear from our affidavits, the students themselves are not -- the individual students themselves are not who are proceeding in this action in attempting to intervene.

It is the student clubs, first of all, Your Honor, and the representatives, the officers of those clubs who drafted and submitted the affidavits in support of the motion intervention, did indeed identify themselves on the public record.

Your Honor, I will submit that we did do an analysis ourselves of whether or not we were comfortable submitting those affidavits publicly, and we decided in the interest of justice and public access to the courts, there was not a strong enough reason to file or proceed anonymously like the plaintiffs are seeking to do here.

Even though our clients and representatives of the student clubs are students who actually directly benefit from the welcome environment created by the guidance inarguably are also at risk by individuals who are transphobic or whatever it may be, Your Honor.

THE COURT: Thank you very much. Well, I'm going to grant the motion to intervene permissively. I

do think that there's no prejudice that -- for the reasons I've stated, I assume the lawyers, all lawyers, will dutifully comply with the order that, Mr. Berg, you're going to draft for attorneys' eyes only.

Let me say, I'm going to assume every lawyer involved here has some experience in a protective order with the obligations that goes with attorneys' eyes only. That is, the identity is not going to be shared with your clients, with anyone else, period, unless or until you come back to the court and ask to share that information, and then we'll look at it specifically. And that includes expert witnesses. That includes your other clients.

And given the court's expectation that the attorneys comply with that, I can't find any prejudice, and I am not -- I'll pledge to you there will be no delay about the proposed intervenors' participation in this case.

I do think they have an interest in common, and the interest in common, you know, I think could it be adequately defended by MMSD? I think the result is. I think MMSD can defend its guidance and policy just as capably as it endeavors to promulgate it, but I believe that the proposed intervenors do present a perspective that would benefit the court in how they look at the

guidance and policy as it relates to the issues that the plaintiffs bring in this case.

Look, if there's one thing that's very clear in terms of what happened today is I think that I'm not comfortable allowing the parties to come in anonymous to the court, to the parties, to the lawyers to argue their issues.

I've structured a resolution to the concerns, the legitimate concerns, that the plaintiffs had, and I would say, incidentally, Mr. Prinsen, if your clients had similar concerns over, as you bring transphobic reaction to their participation, I would be equally solicitive of how their participation in this case affects them, just as I am solicitive of the plaintiffs, the parents, and/or their children over ramifications and fallout of bringing this I think legitimate and interesting legal question before the court.

And there is precedence in the case -- in the statutes to protect that information but not from the court and not from the lawyers. What they will do with that information, Mr. Berg, I don't know. But I've long since given up trying to anticipate and predict what comes next in terms of motions and the like.

But I think that the plaintiffs have brought a

challenge to this -- in declaratory judgment proceedings to this policy/guidance, and I think they have a right to test it in the court. So far that's what I'm concluding, and that the MMSD will defend it because the plaintiffs have made allegations in a complaint that state a claim and that the intervenors have a similar interest; that all the parties that seem to be affected by the policy/guidance are now in the court; and that one way or the other, at present, the plan is to rule on the legal questions that the parties bring.

I do anticipate this is probably a motion for summary judgment. I don't see necessarily that there are going to be genuine issues of material fact, but I could be wrong. But I need to know that in the format associated with a properly-filed motion for summary judgment in accordance with the procedure; and that one way or the other, when the case is done, we'll know whether it stands or falls based on the arguments and perspectives of the three parties that are now before the court, each representing their own individual and legitimate perspectives.

So for those reasons, I'm going to grant the permissive intervention. That moots out, quite honestly, intervention as a matter of right. I don't need to rule on that. On the one hand, I think as to the issues that

are square in the lap of MMSD, MMSD can do an adequate job, but there might be some other issues that come up in this case that would not be adequately represented by the school district itself that the individual -- individuals who are members of the organization represented by Mr. Prinsen may weigh in on.

But I don't need to get into that given that I believe firmly that the proposed intervenors have met their burden under 803.09(2) to permissively intervene. So I'll grant that motion.

Mr. Blonien, have I ruled on all the -- have I answered all the questions and ruled on all the motions that you presented to the court?

MR. BLONIEN: Well, there are two things I could use some clarification on, Your Honor.

The first is with respect to the protective order that Mr. Berg is preparing for everybody and for the court's review. There are general counsel and attorneys over at MMSD -- (inaudible) --

THE COURT REPORTER: You're cutting out.

THE COURT: You're cutting -- Mr. Blonien, you're cutting in and out.

MR. BLONIEN: I'm sorry.

THE COURT: You're asking about -- you're asking about the lawyers --

MR. BLONIEN: At MMSD.

THE COURT: I think the way to handle that, Mr. Blonien, is they're licensed to practice law in Wisconsin?

MR. BLONIEN: I believe so, Your Honor.

THE COURT: They can just enter a notice of appearance in this case and then be submitting themselves to the jurisdiction of this court.

MR. BLONIEN: Okay. Thank you, Your Honor.

The second issue is with respect to our arguments on standing, if I'm understanding this court's ruling is use these as factual issues that will be coming later on in the case.

But I wanted to clarify that we still have the right, and the intervenors do as well, to explore whether or not these plaintiffs are, in fact, impacted by the policy, whether or not this affects their rights.

THE COURT: Well, I'm not -- I'm not, based on the present factual basis of the court, in the context of the motion to dismiss, I concluded that the issue presented by the plaintiffs was squarely before the court.

Because now I've required them to identify themselves, your concerns about not knowing how or whether they, in fact, are even -- have children in the

school district are mooted out. You're going to know the names of the individual plaintiffs.

So I can't tell you -- to the extent that you went further and made some arguments over whether the anonymous parents have standing or not requires me to delve into facts that I did not believe were set forth in the complaint or reasonable inferences from the complaint or were sufficiently certain in order to prove me to take notice of on the question of standing.

Look, the plaintiffs' response to that is their clients, that the plaintiffs don't -- presumably don't like the policy or guidance, have concerns about it, don't think it's legal, and want it gone, and if they have students there and they don't know whether or not that it would be applied to them, I understand why they're here in the form that they're here.

Now, if what you're saying, Mr. Blonien, is, yeah, but I'm going to pick off each of them one individually and, what, say that the child does not have any proclivity or nature that would be implicated in the policy?

I'm not -- I'm not telling you what to do, but I'm not sure that's going to be enough to dismiss the case based on standing, because I don't think -- it seems rather unseemly for any of the parties to get into an

analysis of a child's struggle with these issues in predicting whether in the course of their tenure in the school district they'll be impacted.

If not these individual plaintiffs, there are certainly individuals who I think can -- and appropriately can bring this issue to test it before the court. And right now what I'm saying is that I understand why the plaintiffs are here; and barring any other motions and rulings otherwise, they'll get an answer on the legal questions presented.

So, no, I mean, that's a way of saying I'm not telling you what to do. I don't see that it -- I don't envision it. I'm not scheduling for what you propose, and I don't see really the wisdom or merit in it. But I'm not denying you it if, in fact, that's the way you want to set off and proceed. Otherwise, when we proceed here, we're going to set up some briefing when we schedule this case.

Any other questions or clarifications, Mr. Blonien?

MR. BLONIEN: No, thank you, Your Honor.

THE COURT: Mr. Berg, did I answer all the questions that you thought were framed and the issues raised in your motion?

MR. BERG: Raised in the anonymity motion,

yes.

I would just note we still have the standing preliminary-injunction motion that was put on pause that we filed back in February. So I don't know if we're planning to schedule that now or just planning to issue a schedule later. We can schedule that now if the court would like.

MR. BLONIEN: May I ask a clarification question?

THE COURT: Okay.

MR. BLONIEN: I understood your ruling to be a dismissal requiring re-filing within 14 days of an amended complaint naming the plaintiffs. I'm not sure what motions for preliminary injunctions technically remain. It would have to be re-filed along with the amended complaint.

THE COURT: Yeah. Well, first of all, I'm not dismissing it pending re-filing.

Mr. Berg, you're just going to file an amended complaint in 14 days. If you decide none of the plaintiffs want to do that and you're going to go to the Court of Appeals, you just let me know that you take issue with the court's ruling and that you will either, by right, go to the Court of Appeals, but you're just going to let me know, okay?

MR. BERG: Yes, yes.

THE COURT: So I'm a little puzzled. I'm the first to admit on the plaintiffs' motion for preliminary injunction we had a hearing. I did not have the opportunity to study --

MR. BERG: Your Honor, maybe I can provide a quick refresher.

So we filed a motion to proceed anonymously and a preliminary-injunction motion. The district filed its motion to dismiss. This court ruled back that the motion to dismiss essentially paused the preliminary-injunction motion. So now that's denied our hope is that we could proceed with the --

THE COURT REPORTER: You're cutting out.

THE COURT: You've been cutting in and out. I understand what you're saying, and it's true. But where I'm -- you're right. A motion to dismiss under the new Rules of Civil Procedure thwarted your ability to get the motion for preliminary injunction before the court because it did stay all proceedings. That's right. I do recall that.

I also, though, however, recall talking about the language in the Supreme Court's decisions on challenges to the so-called Lame Duck laws that express the Supreme Court's concerns about preliminary

injunctions to stop -- well, in that case the legislature's and the properly promulgated statutes as being irreparable harm to the legislative process.

Now, this isn't -- maybe that's not a fair analogy because I don't even right now know, to be honest, whether this deserves the same respect that bicameral presentment and enactment has with statutes whether this is a policy.

I think this is what we should do, if you'd like. I'll give you a hearing on if you want to now argue the preliminary injunction. I don't think, Mr. Blonien, although I expressed some concerns about the merits, I don't think I addressed the merits. I stopped its briefing upon your motion to dismiss. Isn't that what happened?

MR. BLONIEN: That is my understanding as well, Your Honor. Although, without the plaintiffs being named, they would have to -- and I understand it's just a technicality -- (inaudible) --

THE COURT REPORTER: Wait --

MR. BLONIEN: I'm looking at that point upon identification if the parties have other issues to raise with the court at that time.

THE COURT: So how about this, Mr. Berg, before I answer your question. We know the policy,

according to Mr. Blonien's filing, what, school, if at all, is out now and not likely to be resumed until after Labor Day, right?

MR. BERG: Right.

THE COURT: So I anticipate ruling on this case before Labor Day.

MR. BERG: Right.

THE COURT: But now would you need a preliminary injunction?

MR. BERG: What the court is saying is you anticipate ruling on summary judgment?

THE COURT: Right.

MR. BERG: Well, I think there's a chance, of course, that the court, after seeing the summary-judgment filings will think that there is some factual issue that needs to go forward. So, yeah, we still would like to have a hearing on our preliminary-injunction motion.

Now, that can be consolidated with a hearing on summary judgment, and obviously if the court rules on summary judgment, then the preliminary-injunction motion is mooted. But if the court decides there is some factual issue that needs to go forward, then -- (inaudible) --

THE COURT REPORTER: Wait --

MR. BERG: -- entitled to the preliminary

injunction while the case is pending.

So what I would propose in terms of scheduling is we'd have 14 days to file an amended complaint. After we filed the complaint, the district has 30 days to respond to our -- 30 days from whenever we file our amended complaint to respond to our preliminary-injunction motion. We have a two-week reply, and then we can schedule the hearing sometime in August or later July.

THE COURT: Well, you're right. In the court's earlier scheduling order, I said the existing briefing schedule is modified -- I said if the court denies the motion to dismiss, the court will proceed to schedule and decide by its motion for a temporary injunction -- okay.

So I'll give you a choice, Mr. Berg. You can bring it now. I'll schedule it now and set a hearing for it now, or you can wait with the assurances that one way or the other I'll decide the issue before school reopens in the fall.

So you could bring on your motion for summary judgment; and if I can -- if it's not disposed on summary judgment, then we can proceed with the motion for preliminary injunction. The reason, quite honestly, I like that is after that, after briefing and oral argument

and decision on summary judgment, I'm going to know the facts, undisputed facts, a lot more than what I'm going to do in the abstract of a preliminary -- preliminary motion for preliminary injunction.

If, in fact, the plaintiffs are concerned that the policy/guidance be stopped before school enters, we can build that in. You can just bring it on afterwards. That would be my preference because of the educational benefits of the cross-motions for summary judgment, but I won't deny you the ability to bring it on first. What would you like to do?

MR. BERG: I'm not entirely sure I'm understanding the court. I would have no objection if the court wants to coordinate the briefings and hearing on both summary judgment and preliminary injunctions. Is that --

THE COURT: All right. So let's just get to that. Mr. Berg, do you anticipate filing a motion for summary judgment?

MR. BERG: Yes.

THE COURT: When can you do that?

MR. BERG: 30 days after we file the amended complaint.

THE COURT: Okay. So amended complaint is -- today is the 26th. Amended complaint goes out until,

what, June 9th. File your amended complaint by June 9th. A month after that is July -- let's just go to the Monday after. July 13, can you do it by then?

MR. BERG: Yes. We could do July 6th.

THE COURT: What's that?

MR. BERG: We could do July 6.

THE COURT: You pick. Whatever you'd like.

MR. BERG: July 6.

THE COURT: July 6. It's my preference not to sort of have dueling cross-motions for summary judgment. Mr. Blonien and Mr. Prinsen, is it acceptable for the defendants, intervening defendants, just respond to Mr. Berg's motion for summary judgment by August 6, and a reply brief then -- how about by the end of the following week, August 14th?

MR. BERG: That leaves only a week. Can it be two weeks for reply?

THE COURT: Well, then we're going to get into the start of the school year because I'll need some time to read the briefs and then to schedule an oral argument/oral decision.

MR. BERG: Right. We can do a week.

THE COURT: All right. So, Molly, let's give an oral argument/oral decision the last week in August.

THE CLERK: Do you mean the week of August

31st or August 24th?

THE COURT: 24th.

THE CLERK: August 26 at 8:30.

THE COURT: Do we know when the school resumes in the fall, Mr. Blonien? Is it after Labor Day, which is this year September 7th?

MR. BLONIEN: Your Honor, I don't know, but I can say that certainly everything is up in the air right now in terms of how things are going to be approached and likely will remain -- (inaudible) --

THE COURT REPORTER: I can't hear you.

THE COURT: You're going in and out. I tell you what, Mr. Blonien, Molly, can you put it the following week? Because, truth be told, I go up north that earlier week, and then I'll have a week after my trip up north to study the briefs, which would be a decision before the 31st -- could be a decision before the Labor Day weekend.

MR. BERG: Judge, can I back up for a second?

THE COURT: Yeah.

MR. BERG: I assume that the district is going to want to file their own motion for summary judgment.

Are we assuming that their deadline to file their motion is June 6 or --

THE COURT: I was kind of hoping they didn't

because, you know, I can promise you that cross-motions for summary judgment are -- as a judge, I'm just saying cross-motions for summary judgment aren't really better than a motion for summary judgment.

The only scenario would be, Mr. Blonien, if -- I'm not saying you do this, Mr. Berg -- if the defendants get sandbagged and a bunch of stuff comes in on the reply, sometimes I get a request for a sur-reply, which I routinely grant when it's obvious.

But cross-motions for summary judgment are really awful on summary judgment when you have a summary-judgment methodology that requires post-findings of fact, because then I have cross-proposed findings of fact that are repetitive or duplicative.

So I can't deny the defendants their right to file a motion for summary judgment, but the present schedule envisions the plaintiff files a motion. The defendants respond. You reply. And I would just -- I won't build it into my schedule. But if they need to tie up a loose end on a sur-reply, they'll get that in before the oral argument/oral decision.

I think that's the plan. Is that acceptable to you, Mr. Blonien?

MR. BLONIEN: I understand the court's preference. I will need to consult with my clients.

Ultimately, it does mean potentially a loss of one briefing opportunity, and I appreciate the court's initial willingness to consider sur-reply if something comes up. So I can certainly bring that back to my clients and have a look.

I would like to state for the record, Your Honor, that we don't believe there's any irreparable harm here that would justify consideration of the preliminary injunctions. School's not out. We don't know what it's going to look like. Even if school were in session, none of these are impacted by whatever MMSD -- (inaudible) --

THE COURT REPORTER: You're cutting out.

THE COURT: All right. Here's what we'll do. I'm not going to deny you. We'll just set the briefing schedule as to all motions for summary judgment.

MR. BLONIEN: Your Honor, my -- I apologize for interrupting.

My concern is that while it may work for July 6 for the plaintiffs to bring a summary-judgment motion, because they've had more than six months to a year to work on this case and have already prepared a 75-page expert report, frankly, Your Honor, we've got a lot of work cut out for us between then and now, and I'm concerned about us meeting that deadline.

I would be inclined to take the court up on

the scheduling approach that you initially suggested so we have more time to develop --

THE COURT: Well, you can always wait and file a response brief, and you can argue in that response brief that the nonmoving party is entitled to judgment as a matter of law. That's your right to do that.

I'm just saying that if your clients say, no, I want you to -- I want the court to have six briefs instead of three or eight briefs instead of five, then you can throw briefs at my way. I'll just say to you lawyers what I learned as a judge is more is not better. Less is more in terms of the economy and focusing.

So the present plan is if anyone wants to file a motion for summary judgment, they do so under the schedule I just set. I can't give you more time to file your own motions for summary judgment, Mr. Blonien, because then we get into the school year.

But you're certainly capable and available to just respond to the plaintiffs' motion for summary judgment and argue that the plaintiff is -- the defendant is entitled to judgment, not the plaintiff. And if you get sandbagged in that there's a -- on a sur-reply, you can file a motion for leave to file a sur-reply and a sur-reply, and I'll look at it to see whether it's truly warranted or not or whether it's just more of what's been

already before the court.

Mr. Berg, what the present plan is, is for you to file a motion. The defendants will defend, and you'll reply, and I'll rule on it. I would also then, because there's not a lot of time, if I deny the motion for summary judgment, then I would address the preliminary injunction at that hearing date.

Look, I think I know the standards on summary judgment. You can just argue it. After all, Mr. Berg, I think you're reasonably confident by your suggestion of filing a motion for summary judgment. And as to the issues, there are no genuine issues of fact that are material to the issues, right?

MR. BERG: Yes. That's our position, yes.

THE COURT: I mean, I think -- Mr. Blonien and Mr. Prinsen, I think it presently you think so too. No one really anticipates this case going to a jury trial. With that kind of optimism, I'm comfortable holding off on scheduling the preliminary injunction in the event that the summary judgment doesn't resolve the case.

But, look, let's do it this way so I don't deny people their ability to tell me what they think. You filed a brief, Mr. Berg, in support of your motion for preliminary injunction, right?

MR. BERG: Yeah.

THE COURT: Are you standing on what has been filed?

MR. BERG: Yes, for purposes of the preliminary injunction, yes.

THE COURT: All right. So, Mr. Blonien, when you file your response to their motion for summary judgment, you can also, in a separate brief, respond to the motion for preliminary injunction, if you'd like.

Mr. Berg, when you do your reply in summary judgment, you can also file a separate document replying in support of your motion for preliminary injunction.

I'll be curious on how those come out inasmuch as maybe both of you think there's no genuine issue and the court is going to decide it one way or the other on summary judgment what you say on the need for preliminary injunction, but I'd like to read those in context with the summary judgment because I'd be better informed as to what the facts are.

That way then I would rule on the motion for summary judgment at the oral argument/oral hearing date; and if I denied it, I would rule on the motion for preliminary injunction. That's what I intend and I think the schedule to be. I'll also send the briefing schedule out, my clerk will prepare, and I'll attach to it what I have as my order on proposed findings of fact,

conclusions of law.

Now, just a heads-up. It's not perfect. I was going to do exactly how the Western District did it; but their standing order is, like, 13 pages long, and I couldn't see wasting the paper in all my cases. So I require proposed findings of fact. And then, Mr. Blonien, Mr. Berg will propose what findings of fact he thinks are undisputed in material issue, and then you can respond to his proposed findings of fact.

Sometimes, as you know, in the federal court, the nonmoving party wants to propose their own findings of fact. My standard order doesn't go into that level of detail, but you are able to do that. If you think that Mr. Berg has left out facts that are equally undisputed but necessary for the court to consider on the summary judgment, you can in addition to respond to his proposed finding of fact propose your own.

And, Mr. Berg, then on your reply you'll need to respond to what proposed findings the nonmoving parties have suggested to the court indicating whether you think they're disputed or not. Just bear in mind my standard order didn't get into the nuance of that particular filing, but certainly you're welcome to do that.

I think all of you have experience in federal

court and the Western District's standing order on summary-judgment methodology. If you abide by that, you will abide by every expectation I have here.

All right. Is there anything else anyone wants to bring up at this time for purposes of scheduling?

THE CLERK: I do, judge. You had said you wanted me to move it to the following week for oral arguments. I did want to tell you that the school district presently is scheduled to start September 1st.

THE COURT: Unfortunately, I'm going to be gone for a week's vacation up north. I think just go ahead and schedule that week.

Mr. Berg, knowing that we miss it by a couple of days, is that acceptable to you?

MR. BERG: Yes, that is fine.

THE CLERK: September 3rd at 8:30.

THE COURT: Hang on. Let's get that date picked. What was it, Molly?

THE CLERK: September 3rd at 8:30.

THE COURT: Is that a date good for all your calendars?

MR. BERG: Good for me.

MR. BLONIEN: We can make it work, Your Honor.

THE COURT: Okay. I will set that in the

court's order.

Mr. Prinsen, you were going to say something.

MR. PRINSEN: Yeah. That date works for us, Your Honor.

On behalf of the intervenors, we just wanted to note for the record that obviously with the relatively quick schedule set by the court, that we will need obviously expedited discovery and cooperation from the plaintiffs.

Given the plaintiffs' concern about their identity, we just want to make sure that we are able to schedule the deposition of their experts, schedule our own -- or, sorry, line up our own expert. So just keeping all of those things in mind, there is quite a bit of discovery that needs to be conducted prior to the deadline for the summary-judgment motion.

THE COURT: Well, duly noted, Mr. Prinsen. But I'm not making any orders today on anything else. I don't know what you mean by expedited or not. I'm not ruling on whether responses should be expedited.

It might be that the lawyers want to get together and have some mutual agreement that what comes around goes around, but that's entirely up to you. I've got a schedule set that I hope that you'll do what you need to do and comply with the court's schedule that I've

entered today.

MR. PRINSEN: Certainly, Your Honor, and the intervenors will abide by the court's schedule.

I have three other minor points to address. The first is just a point for clarification for the record. Upon granting the intervenors' motion to intervene under permissive intervention, the court stated that there's now three parties.

I just wanted to clarify that there are three separate student clubs that move to intervene. So there are technically five parties, three intervenors that are now defendants in the case, three separate student clubs from three separate, different high schools.

And then I just wanted to clarify for the record, and the court already proactively alluded to this, but to return to the court's question about the student confidentiality and the intervenors' interest in confidentiality, the intervenors appreciate the court's acknowledgment of the sensitivity of their identity also being disclosed.

And I just wanted to reiterate that the intervenors are independent student clubs themselves, the entities that are defendants in this case. And while the officers of those intervenors did disclose their names in their supporting affidavits in support of the motion to

intervene, the intervenors do wish to keep the identities of the students who are participants in the clubs as well as any other students in the school district confidential, so appreciate the court's acknowledgment of a similar protective order in the event that student identities were to arise.

And then finally, Your Honor, the last point was just to bring up the pro hac vice motion by Attorney John Knight of the ACLU and just wondering if the court had a decision on that pro hac vice motion.

THE COURT: I probably did, but I didn't see an order drafted for my signature.

I'll go ahead and grant the motion. I think the statutes are clear that you've met the minimum requirements. Admission will be allowed.

Also, I thought you were going to say something else, Mr. Prinsen. I think since this was commenced with a summons and complaint, the intervening, of course, are accepting service of the summons and complaint as a condition of their permissive intervention, and you should file an answer within ten days.

MR. PRINSEN: Okay, Your Honor. Understood.

THE COURT: And otherwise I'm not making any rulings as with regard to discovery or the identity of

any of the parties.

You're right. I said three parties. I meant three groups. I've got MMSD. I've got the plaintiffs. There are multiple individuals that comprise the plaintiffs. And, Mr. Prinsen, you represent a constellation of groups. But all your groups will be speaking with one voice through one counsel.

MR. PRINSEN: That is accurate, Your Honor. That is correct.

And also I just have one question or point of clarification. You said that the intervenors are to answer within ten days. Just to make sure that we're all on the same page, that's ten days within the filing of the amended complaint; is that correct?

THE COURT: No. Why don't you get going. The only difference the amended complaint is going to have is the names. You don't anticipate changing the substantive portions of the complaint; do you, Mr. Berg?

MR. BERG: No.

THE COURT: No. Just answer this complaint knowing that the names will be added in.

Mr. Berg, you're going to draft an order, the confidentiality order.

MR. BERG: Yes.

THE COURT: Since you're doing that, in that

order go ahead and, for the reasons stated by the court, indicate that I'm denying your motion to proceed anonymously.

Mr. Blonien, you're going to draft the court's order denying the defendant's motion to dismiss. And, Mr. Prinsen, you'll draft an order for the court's signature granting your permissive intervention.

All right. Anything else on this matter at this time?

THE CLERK: I do, judge. I want to know how to actually implement your protective order.

So when they file their amended complaint, am I supposed to just redact the names or is the entire complaint sealed from the public?

THE COURT: That's a good question. So, Mr. Berg, one of the things we need to do is the Supreme Court is very insistent to follow the standard court order on sealing and redacting.

I think the thing to do to make it cleaner is you can draft just simply a document amending the cover page and the preliminary paragraphs that previously describe Jane and John Doe. You don't have to submit a whole other document. So the names will be on the cover page, and the names will be on the first, what, nine paragraphs or ten paragraphs, whatever the number of

paragraphs were.

So just amend those paragraphs that previously reference Jane and John Doe to now reference their actual names and then file that document under seal.

There's no objection, Mr. Blonien or Mr. Prinsen, to the court receiving that document under seal; is there?

MR. BLONIEN: Nothing I can think of at the current time, Your Honor.

MR. PRINSEN: Same.

MR. BLONIEN: I would like to follow up, if I may, on the clarification that Adam asked, Mr. Prinsen, about the response or answer.

We may have an answer or other response that relates specifically to the identities of the individual plaintiffs when they're named, and we'd like an opportunity to do that. And it seems not the best of use of our resources to do so twice.

May we respond with an answer or motion to dismiss on individual issues at the same time as the motion for summary judgment schedule that you provided, Your Honor?

THE COURT: No. That just complicates things right now. You've consolidated your motion to dismiss, so you only get one motion to dismiss.

Now, when the names come in, look, if something comes up and you need to file something, you can tell me what you need to file and why you need to file it, and I'll address it accordingly. But in advance, I can't think of any -- just now knowing the names, I can't think of any other thing that you need to do to preserve on additional motions to be filed.

The court grants -- Mr. Berg, the court grants -- even though with objection and even though I know I didn't do what you want, as a default, I will grant the motion to file that document under seal. I do believe, for the reasons stated, there's been a sufficient factual showing that allows you to file that document under seal.

All right. Mr. Blonien, you wanted to say something more?

MR. BLONIEN: I'll stop here, Your Honor. Thank you.

THE COURT: Okay. Thank you very much for calling in. You guys have a great rest of the day. Stay well.

(Adjourned at 11:31 a.m.)

STATE OF WISCONSIN)
) ss.
COUNTY OF DANE)

I, LYNN SCHULTZ, District 5 Court Reporter, do hereby certify that I took in shorthand the above-entitled proceedings held on the 26th day of May, 2020; I reduced the same to a written transcript; and that it is a true and correct transcript of my notes and the whole thereof.

Dated at Madison, Wisconsin, this 4th day of June, 2020.

Electronically signed by
Lynn Schultz
District 5 Court Reporter

The foregoing certification of this transcript does not apply to any reproduction of the same by any means unless under the direct control and/or direction of the certifying reporter.

STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY
BRANCH 8

JOHN DOE 1 et al,

Plaintiffs, STATUS CONFERENCE

vs. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant,

GENDER EQUALITY ASSOCIATION et al,

Intervenors.

HONORABLE FRANK D. REMINGTON PRESIDING

Monday, June 8, 2020

A P P E A R A N C E S:

WISCONSIN INSTITUTE FOR LAW & LIBERTY
Attorney Luke N. Berg
Appeared on behalf of the Plaintiffs, John and Jane Doe et al.

BOARDMAN & CLARK LLP
Attorney Barry J. Blonien
Appeared on behalf of the Defendant, Madison Metropolitan School District.

QUARLES & BRADY LLP
Attorney Adam R. Prinsen and Attorney Emily M. Feinstein
Appeared on behalf of Defendant Intervenors, 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.

A P P E A R A N C E S: (Continued)

ACLU of Wisconsin Foundation, Inc.
Attorney Asma Kadri Keeler and Attorney John A. Knight
Appeared on behalf of Defendant Intervenors, 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.

Reported By: Meredith A. Seymour
Official Court Reporter

TRANSCRIPT OF PROCEEDINGS

THE COURT: This is case 20-CV-454, Jane and John Doe versus Madison Metropolitan School District.

Let's start with the plaintiff. May I have your appearance of all those appearing on Zoom hearing this morning?

Mr. Berg?

MR. BERG: Luke Berg on behalf of the plaintiffs, and that's all.

THE COURT: Okay. And then I've got a number of people appearing on behalf of Madison Metropolitan School District I believe.

Mr. Blonien?

MR. BLONIEN: This is Barry Blonien with Boardman & Clark on behalf of Madison Metropolitan School District and one of the defendants in the case.

THE COURT: Okay. And then the intervenor, Gender Equity Association et al.

MR. PRINSEN: Yes, Your Honor. This is Adam Prinsen with Quarles & Brady appearing on behalf of the defendant intervenors along with my colleague, Emily Feinstein, also with Quarles & Brady.

Also appearing on behalf of the defendant intervenors, Your Honor, is Asma Kadri Keeler and John Knight of the ACLU.

THE COURT: Good morning, everybody.

So I put this on the calendar fairly quickly and I appreciate you rearranging your schedules to accommodate it.

I saw that there was some difficulty looming large on the horizon with regard to the drafting of the order; it's not surprising to me. I did read, Mr. Berg, your letter that had come in. And I've also had the opportunity to read the proposed orders.

But first before I get going, I know that, Mr. Berg, at the last hearing and as reflected in the draft of your order about what the plaintiffs intended to do, your decision was not technically due until tomorrow, but do you know how the plaintiffs are going to proceed?

MR. BERG: Yes. If the Court signs the order that we have proposed, then three of the families are willing to proceed under the proposed protective order and the remainder are going to appeal.

THE COURT: Okay. Well, I want to go through these orders. I've got two in my queue yet to be signed. The first is -- let's take up the proposed order on anonymity and protective order. I -- there is a second order, proposed protective order.

Mr. Berg, can you explain, there's an amount

of overlap. Why do I have two orders and is that necessary?

MR. BERG: No, not at all. The first one you can just deny. The first one was I had combined the terms of the protective order with the Court's order on the anonymity motion, just so we wouldn't get in this position where plaintiffs have to disclose their identities on June 9th with no protective order in place. But then defendants submitted a proposed order just on the anonymity motion which this Court signed.

So we stripped out the portions related to the protective order, put them in a separate order, made some minor modifications, and then submitted that as a standalone protective order.

THE COURT: Okay. So that's the one that was submitted on June 3rd?

MR. BERG: Ah, it was submitted last Friday, so June 5th. The June 3rd one you can just deny, discard, whatever. The June 5th one is the one that we're considering right now.

THE COURT: All right. So I'm going to deny -- the way that -- Mr. Berg, I want to explain because it seems rather dramatic, I am going to decline it on my desktop. The way CCAP set it up, I can either discard it and sign manually, hold it, review it later,

sign it, or decline it. So what I usually do is I decline it and the reason to be declined is withdraw -- I just write in withdrawn by counsel.

MR. BERG: Yep.

THE COURT: All right.

Then I'm now looking at the proposed protective order. I have some questions and some comments, but before I begin with that, Mr. Blonien, have you seen the proposed protective order?

You're locked up. Start over. You locked up on me.

MR. BLONIEN: I did see the protective order, Your Honor, Friday afternoon, less than 48 hours after the Court had issued its order. We have not had an opportunity to meet and confer in good faith.

MR. BERG: Your Honor, we sent this order to the defendants and defendant intervenors on Wednesday, a few hours after this Court issued its orders. They've had it since Wednesday and haven't responded to it.

THE COURT: Okay. Hang on. We're all in different places. I'm in the courthouse. My clerk is working remotely. She sent me a text.

Molly, rather than respond -- just so I can get this cleaned up -- she says I did sign something on

6/3. If I signed the wrong version, I want to fix that. Let's see what happened.

MR. BERG: No. What you signed was the -- just the brief order on the anonymity motion, denying the anonymity motion, ordering the parties to confer in good faith on the protective order and ordering plaintiffs to disclose their identities by June 9th.

THE COURT: Okay. That wasn't done in error?

MR. BERG: Right.

THE COURT: All right.

Here's what I'd like to do this morning because things are moving fairly quickly. Obviously, people have a strong opinion about the decisions that I'm making on the issues that are presented.

I had one regret at our last hearing is we didn't -- I didn't take the time to walk through really what I was anticipating seeing in terms of a protective order, especially as it related to the vari -- Mr. Blonien, your comments about, well, how does it relate to what the defendants intended to do with regard to discovery. I think the meet -- that the hearing got cut off, I mean, at my decision and left the parties understandably a little unsure as to what I had in mind.

So I thought that we could move this case

quicker and easier if we got on the phone today and heard a little better explanation. And then I'd just like to go through the -- the order and redact the portions -- I'll hear from the parties if there's an objection, redact it, and so we can keep moving forward.

I anticipate -- I don't know, I think, Mr. Berg, it was in one of the letters you wrote where you said that you anticipated that the parties probably would not come to a meeting of the minds on these issues and I agree with that.

So I want to go back just the way we left off. So far what the Court has decided is it's denied the plaintiffs' request to proceed and prosecute this case anonymously. As everyone knows, I ordered the plaintiffs to disclose, under a protective order, the names of the individuals that are pressing this cause of action before the Court.

I did agree that for the -- that there was sufficient facts before the rec -- before the Court, that there were sufficient grounds within the contours of the existing state statutes and court procedure to issue a protective order preserving the confidentiality of the individual plaintiffs' names because of the affidavits that were submitted by[sic] the Court and

the likelihood of recriminations or retaliation to the individual plaintiffs, were their names publicly disclosed.

I want to say, that's it, that's what I've decided so far. I haven't ruled on discovery motions, I haven't given opinion on the extent or degree of what either party should do next.

I would envision as Mr. Berg -- and I'll go into it on your proposed order, just as you anticipated that on your amended complaint, for example, the three individual parties that remain, the amended complaint would just say -- let's say John and Jane Smith, that's their real names, hereinafter referred to as John Doe number 1, that -- that everyone would be on the same page in terms of aligning with the -- there's a word for it, it's not euphemism. What's the word for -- you give some name -- what's that?

MR. BERG: Pseudonym?

THE COURT: Pseudonym. Thank you, Mr. Berg. You give a pseudonym to each of them. And so then if Mr. Blonien, you wanted to take a deposition of the first named plaintiff, you would not use their real names, you'd use the pseudonym because everyone knows that you look back on the amended complaint, there's a key that corresponds the pseudonym to the original

identity, and that during the course of the litigation, it's pretty easy just to refer to the first named party as -- and according to their pseudonym. There really wouldn't be any reason necessarily to use their real name.

That's what I anticipated would come out of the protective order. But I just wanted to make clear that because there was a protective order and that I had come to the conclusion that there was -- a plaintiff had -- the plaintiffs had demonstrated to me a significant and legitimate request for their names being sealed, that I was doing anything more or less with regard to either party's next step on how it proceeds and defends or prosecutes the case.

So let's just go over the protective order, because there are some things, Mr. Berg, in here -- yeah, Mr. Blonien?

MR. BLONIEN: Your Honor, I just do want to state for the record the procedural history here in that the defendants jointly proposed the protective order on Friday afternoon to Mr. Berg. We have not had an opportunity to meet and confer based on our proposal or Mr. Berg's proposal, and we think it would be helpful to do that first before this exercise, Your Honor.

I think all defendants' attorneys can agree that we're not going to reveal the names of any individuals who are disclosed under seal when Mr. Berg files them. Until we can figure out the terms of this protective order, we've suggested using the standard model Eastern District which could more than adequately address the needs we have here, Your Honor.

THE COURT: Mr. Berg?

MR. BERG: Um, well, we disagree that the Eastern District's model order is sufficient. You know, the reas -- the way we drafted the order was to try and minimize both the number of individuals who are aware of plaintiffs' identities, but also -- documents in the case that contain identifying information. And I just don't think the Eastern District order captures the situation in this case.

Now, as for the history, we sent our proposed order to the district and the defendant intervenors on Wednesday; didn't hear anything back for two days. They sent back the Eastern District's order which I had already communicated we would not agree with and haven't responded to anything else in our order. So I just think we're not going to reach agreement on this. Now, if the Court wants to order the parties to continue to confer, I'm fine to do that, as long as

we're not required to disclose our iden -- the plaintiffs' identities until an order is in place.

So if the defendants are willing to postpone the disclosure of identities until that conferral is completed and we have some time to evaluate what the final order is, I'm totally fine with that.

THE COURT: Okay. Here's what I'd like to do. The truth be told, I had envisioned that the parties would submit a standard protective order in this case. Now, I'm not familiar with what's called the Eastern District Protective Order, but I will tell you in the cases that I have had in the past with protective orders, there wasn't a lot of thought or work gone into drafting one. My understanding was -- is that generally there was a standard protective order that one could look for and use in this case. I -- I did not realize that, you know, there were these many variations.

So whether it's called the Eastern District or the Western District or whether it was the protective order we used in the pharmaceutical litigation or the tobacco litigation, I can say being involved in all those cases and cases with protective orders, my -- my recollection was -- is one was readily available that was relatively fungible that could be

used in a variety of cases. But that's not to say that this case presents some additional concerns that deserve some specific language.

Here's what I'd like to do. Knowing that I had envisioned the standard order, calling it the Eastern District, let's go through what Mr. Berg proposed, because after all, I did ask Mr. Berg to draft the order. You know, as a judge, you turn to one or the other, and you say would you draft the order, and they do a lot of work drafting the orders at the Court's request, and because of that, I think it's fair to then comment on what the person who I asked to draft the order has presented. I think with my comments about the specific provisions in here, then the parties can meet and confer go through and present either the standards Eastern District order or something very similar.

So that discussion about your specific -- your specific paragraphs, Mr. Berg, and my reaction to as to whether they were either envisioned by me at the time I granted your motion or not I think will be helpful in the parties' subsequent discussion.

Let's go just through it very quickly. Paragraph 1, plaintiff shall submit an amended version of the cover page in the first nine paragraphs of the

complaint that contain their true names and addresses. This document shall be filed under seal, the sealed complaint, and will be available only to the Court and the counsel for parties -- now -- who have direct functional responsibilities for preparation and trial of the lawsuit and who have appeared in this action. All such counsel of record shall be made aware of the terms of the protective order.

I -- first, I have a recollection that we had a discussion about the limits sort of internally in the law firms as to who could see the documents or whether the two defense groups could see the documents together.

I think your concern about -- let's say Quarles & Brady that there's a fourth lawyer or third lawyer that's brought in, the -- I'm not so much concerned -- I don't believe that I've ruled that there was a limit to the availability of the documents who have, quote, direct functional responsibility for the preparation and trial of the lawsuit. I don't know what that means. And what I would -- I've envisioned that it's for the attorneys' eyes only and that the attorney usually I think -- if it's in the Eastern District version -- signs a sheet of paper on the end indicating that he or she has read the protective order

and is bound to comply with it.

Mr. Blonien, is that signature page on your standard version binding the lawyer to the terms of the order?

MR. BLONIEN: Yes, Your Honor. It was submitted in the standard form order that -- that we submitted that has the standard definitions and standard terms. The biggest change that we made at this Court's instruction was to specify that the names of the individuals would be attorneys' eyes only as defined by those typical terms. And it did include a signature page, the version that we proposed to Luke on Friday.

THE COURT: So Mr. Berg -- Mr. Berg, your proposal, what if -- what if Mr. Prinsen is going to be the principal, lead attorney for Quarles & Brady and Ms. Feinstein is not going to be at the trial, can she see the documents?

MR. BERG: Yeah. What matters to me is the -- that counsel who have appeared in the case, that is limited to lawyers who have appeared in the case. So, you know, trying to limit the number of people who are aware of the plaintiff --

THE COURT: -- Mr. --

MR. BERG: -- protective order is serious,

but from the plaintiffs' prospectives, if it's breached, there's no way to get to the bottom of how that happened and there's no way to undo that. Once their names are in the public, that can't be undone.

So, you know, we want to keep a limited number of people who know who they are. I heard the Court say at the prior hearing that it would be limited to counsel who appeared in the case. Mr. Blonien asked specifically about the District's in-house counsel, and his answer was if she appears in the case, then she can become aware of the plaintiffs' identities because she'll be subject to the order. So that's -- that's what I was trying to capture.

Now, the phrase direct responsibility, I'm fine if that comes out, as long as the rest of it stays in, it's limited to lawyers who have appeared in the case.

THE COURT: Before I turn to Mr. Blonien or Ms. Feinstein, Mr. Berg, what do you think the difference is legally between filing a notice of appearance and -- as opposed to signing the appendix A, binding the lawyer to the Court's order?

MR. BERG: Yeah. Probably not of a big difference, but I just -- I -- this was the most consistent with what I heard the Court say at the prior

hearing.

THE COURT: All right.

Mr. Blonien?

MR. BLONIEN: Your Honor, at the Court's hearing when Attorney Luke Berg requested this Court to limit attorneys' eyes only to one attorney for each party, the response of this Court was, quote, that would entangle me into, you know, the local and national counsel relationship and create a conflict of interest possibly between the lawyers and their firms as to how they would share this information and divide their workload. I do not see any basis for the Court right now to reconsider that decision. As this Court is well aware, the halls of justice have handled confidential information quite well. We are all officers of the Court and we are all capable of respecting this Court's order and wishes. Mr. Berg's concerns respectfully are unfounded and should be rejected.

THE COURT: Ms. Feinstein, you raised your hand.

MS. FEINSTEIN: Your Honor, I was going to bring the same exact quote that Mr. Blonien brought to your attention. I think there was a distinction, because the Court was talking about attorneys' eyes

only which generally means attorneys and not parties, and Mr. Blonien had asked about in-house counsel for his client, and the Court had suggested that with respect to those attorneys who were also perhaps a representative of the party that -- that maybe we would need to consider a different approach.

But I work in a national law firm. I work with lawyers across the country in my law firm, and I don't -- there are certainly maybe times in this case where Mr. Prinsen may be busy and I need to find another associate to do some research for me, and I don't think my hands should be tied in doing that, having an attorney in Wisconsin and enter a notice of appearance before they do a small research project for me. It's inefficient. And I think that's an appropriate -- protective order.

I will say, Your Honor, I have been involved in numerous cases over the course of my career involving protective orders. I've used versions of the Eastern District Model Protective Order repeatedly, been involved in secret cases and cases involving confidential information, cases involving protected health information. I've never seen a protective order like the one Mr. Berg proposed and the burdens that it places on the other parties.

THE COURT: Mr. Berg?

MR. BERG: Can I respond to that? Yeah.

So, you know, we already have eight lawyers in the case, right? The concern from the plaintiffs' perspective is every additional person who knows who they are creates more risk to them, and it makes it much harder to identify if there is a leak and to get to the bottom of how it happened.

So, you know, right now we have eight lawyers who've appeared in the case for the defendants, the defendant intervenors. If the rule is any associate at any of the three firms represented can learn who they are simply by signing this thing, then, you know, it's -- it's a much larger number of potential people who know who the plaintiffs are.

So the plaintiffs are going to have to reevaluate that risk. It's a different risk than what I thought, what we proposed, and what I thought the Court was saying which is the number of lawyers who appear in the case, so the ones who can know who they are.

THE COURT: Well -- but last question to you, Mr. Berg, same question as I asked before. So what the standard procedure and certainly the one I was familiar with is the lawyer -- let's say for instance

Ms. Feinstein says Mr. Prinsen is tied up and they need to bring in another lawyer from Quarles & Brady. Court will take judicial notice of the fact Quarles & Brady has lots of lawyers.

So what you propose is if I were to agree with you that, okay, so Ms. Feinstein says fine, do a notice of appearance, and all of a sudden now my staff is -- is listing 5, 8, 10, 20 notices of appearance.

What's the difference between Ms. Feinstein saying to the associates enter your notice of appearance and then now you can see the documents as opposed to sign this sheet submitting yourself to the Court's jurisdiction and the order? I don't see the difference; could you explain?

MR. BERG: I just -- I don't see any reason for an associate who's doing a random research process -- research assignment to learn who the plaintiffs are. You know, each side, the District already has two lawyers who've appeared in the case, the defendant intervenors have six. You know, if they need to get an associate to do some lead project of the case, they can do that without those people learning who the plaintiffs are. The requiring notice of appearance will effectively limit the number of people who learn who the plaintiff are, and that's the point.

THE COURT: You know, I don't agree with you, Mr. Berg. I mean, I'm not going to go back and revisit the -- the whole anonymity thing. I think -- I don't want 10, 20, 30, notices of appearance to be filed in Court. I think what I certainly intended before, and I apologize if I don't use my words in ways that -- that promote sort of a clarity, but I envision that an order that bounds the lawyers to the jurisdiction of the Court and the terms of the protective order but didn't overly complicate the practice of law and the joint defense agreement or how each individual law firm or Mr. Knight's firm or a group divided their labor among the lawyers. And seeing that there really is no significant difference between a notice of appearance is subjecting one's self to the jurisdiction and order of the Court and signing the appendix A, binding the lawyer to the order of the Court, I'll go ahead and I would not approve an order that made that limitation.

So as to who will be bound by it, once again, it would be only attorneys' eyes only and the attorneys whose eyes see these documents and learn these names should, before seeing those documents, sign the appropriate appendix, subjecting themselves to the order of the Court.

Further, Mr. Berg, the reason, as additional,

is I just don't know what it means to have direct functional responsibility for the preparation and trial of the lawsuit. And where I can enter an order that way, I can envision the Court's entanglement over the micromanagement, for example, if Mr. Prinsen was going to try the case, whether Ms. Feinstein's role in it was -- met the definition of direct functional responsibility, no more, Mr. Berg, than I would intend to entangle myself, were this case to go to trial, your relationship with other legal counsel that you may bring in to assist you in the prosecution of the case.

So as to paragraph 1, the final order should delete that language about limiting by definition which lawyers get to see it, but which lawyers get to see it, those lawyers should sign the appendix in the Court's protective order.

Paragraph 2, counsel of record shall not disclose the contents of the sealed complaint to anyone, including, but not limited to the Madison Metropolitan School District. Any employees of the school district except the lawyer licensed to practice law in -- practice in Wisconsin who appears in the case is counsel of record.

Any of the intervening student groups or their members, any lawyer who does not appear in the

case, the counsel of record, any other staff of the law firm participating in the case, or any experts.

Well, for the same reasons as I said in paragraph 1 that overly complicate it again, the problem with this paragraph is I think my recollection, Mr. Knight, you're granted appearance in this case pro hac vice?

MR. KNIGHT: Sorry. Yes. That's true, Your Honor.

THE COURT: So the problem with that is I didn't intend to sort of exclude non-Wisconsin lawyers. I could envision a lawyer maybe with regard to Mr. Knight or his colleague, though they're not licensed to practice law in Wisconsin, being able to see these documents, I think the language in that, certainly I didn't discuss that, I think might run a follow the law and the right to practice law with the Court's authority pro hac vice admission, and really quite honestly, run sort of contrary to the commerce clause and the ability of multi-state firms to -- to work across state lines and the like.

Again, for the reasons I stated in paragraph 1, the limits -- somewhat redundancy of paragraph 2 should not focus on the -- who filed the notice of appearance. But again, I go back to the simple

proposition that it's individuals for attorneys' eyes only and the attorneys must first sign the appendix.

Mr. Blonien, your screen is frozen with your hand up. There you go.

MR. BLONIEN: Your Honor, I do want to make two concerns I have with respect to this provision -- not to -- the Standard Eastern --

[Court reporter requests counsel to repeat due to counsel's video/audio breaking up.]

THE COURT: You have to repeat that, Mr. Blonien. The court reporter didn't get it. You're breaking up.

MR. BLONIEN: Your Honor, my objection is that the standard order -- with respect to attorneys' eyes only, employees, and staff as well of the law firm to our subject to that protective order, it would be very difficult for us to operate if we're not allowed to allow staff as is typical to sign the protective order and subject themselves as well.

I just wanted to clarify that when it says to -- not to disclose to everyone, that would effectively mean that the names are -- are not able to be used in any discovery purpose. I strongly object to any of these deviations from the standard order.

THE COURT: Mr. Berg?

MR. BERG: Well, I disagree with that. We just had a conversation that -- about how the identities would be limited to lawyers for the firms and now all of a sudden, now it's any staff of the firm. I mean, this is -- this is expanding the group, and expanding the group, and the more people -- it hurts the plaintiffs. So we're -- we want to keep it as limited as possible to minimize the risk.

THE COURT: So I have one question, then I'll turn to you, Ms. Feinstein.

Mr. Berg, clearly I -- somewhat tongue in cheek, I think at Ms. Feinstein's or Mr. Prinsen's hourly rate, they probably don't do their own typing.

Are you suggesting that the lawyers at Quarles & Brady do their own typing and photocopying and putting these documents in the envelopes?

MR. BERG: Not at all. I don't see any reason why any filing going forward to include any personal information about the plaintiffs. They can use their pseudonyms and that should -- that should work just fine. So any staff member can be -- in any filings, the extent, as long as it doesn't include the plaintiffs' identities.

THE COURT: Ms. Feinstein?

MS. FEINSTEIN: Sure, Your Honor.

This restriction that Mr. Berg is proposing would require us, for purposes of this case, to use an entirely different document management system than we use at Quarles & Brady. It would require us to train our staff on that new document management system. So it is of incredibly onerous -- while Mr. Berg seems to think it's very simple, it actually is incredibly onerous.

And I will say that you're right at my hourly rate, I do have my assistant do significantly more of those kinds of administrative tasks and perhaps Mr. Prinsen does, although, I'm working with him on that.

But you tie my hands and not allow my -- not allow me to use my administrative staff as efficiently as possible, and again, to make me have to use a different document management system, we have an electronic document management system that we use at Quarles & Brady for all of our cases, and we would have to make significant -- I don't even know if we can make modifications to the way that this file would be -- under our current system, we have to I guess use a different system which also I'm sure my general counsel would tell me require some significant concerns from our malpractice carrier.

THE COURT: Mr. Berg, aren't your concerns in this regard controlled by SCR 20:5.2(b)?

MR. BERG: I will have to pull that up --

THE COURT: -- I'm sorry. 20:5.3, the responsibilities regarding nonlawyer assistance. The Supreme Court rule really is envisioned that the situation where lawyers in the practice of law have to interact with regard to -- interact with nonlawyer assistance. But SCR 20:5.3 makes very clear that the lawyer ultimately has the responsibility for nonlawyer assistance, and if there's a problem with the nonlawyer assistance, namely paralegal or secretary, it's the lawyer's license and ethical responsibility on the line.

So -- and I'd envisioned the way the system works is if I order, for example, Ms. Feinstein to protect the information and she happens to have her secretary type up something, then she's ethically responsible to -- for that nonlawyer assistance, she's ethically obligated to inform the nonlawyer assistant that the order of the Court and the terms that she, as an attorney, have committed to, and ultimately be responsible for the nonlawyer assistance.

MR. BERG: I understand that as a theoretical matter, Your Honor, but as a practical matter, there's

still just not a lot of protection for the plaintiffs, right? Say a paralegal is working on something related to this and tells a friend who the plaintiffs are, and the friend tells a friend, and then the friend calls the paper, and all of a sudden their names are in the paper. How do we get to the bottom of that? There's no way for us to get to the bottom how that happened -- significant in energy --

[Court reporter requests counsel to repeat due to counsel's video/audio breaking up.]

THE COURT: Mr. Berg, you've cut in and out. I know -- I know that your concern, once again, is -- is with minimizing risk.

But here's the point. I mean, I will say in my experience if you -- I don't know if everyone remembers the toba -- the great tobacco litigation, but if you remember, it was the paralegal at Shook, Hardy & Bacon that made a second set of documents as she was photocopying them from I think Philip Morris that then got leaked to the public.

So I don't for a moment suggest, Mr. Berg, that your concerns are irrational and not real. Our history has been full of situations where yes, employees of law firms have taken it upon themselves to do things that are prohibited by the law.

But what we're -- the Court is forced to do is -- is balance things. I mean, if I were to give the plaintiffs the utmost protection, I would have granted obviously your motion to proceed anonymously. As you argued, that's ultimately the protection that most likely secures their anonymity. But for the reasons stated, I didn't agree with that, and now we're talking about reasonable balancing of the interests of the -- of the -- of the parties as against the practicalities and the reality of the practice of law.

And as Ms. Feinstein says, and I agree, that I don't know, Mr. Berg, how your practice is organized that the efficient, modern practice of the law just simply can't exclude the involvement, the tangential involvement of nonlawyer assistants to assist a lawyer. But that SCR 20:5.3 places the direct and ultimate responsibility on the lawyer, and it will be the lawyers' responsibility if there's a problem to explain.

So I would not make that limitation. You might want to incorporate the -- either in the appendix A, maybe even incorporate it in the standard order, obviously that the Court accepts that nonlawyer assistants may provide clerical assistance, but that the lawyers ultimately are legally obligated by the

Court's order and are responsible and its individuals for protecting the anonymity of the -- of the individual plaintiffs' names.

I don't have a problem with paragraph 3. I don't worry about the caption in the case. They can certainly continue to use the same pseudonyms that correspond as a key for what plaintiffs remain.

Again, paragraph 4, we're going -- what -- what, Mr. Berg, did you intend to say in paragraph 4 that hasn't already been said in previous paragraphs?

MR. BERG: Paragraphs 1 and 2, we're dealing with the sealed complaint. Paragraph 4 was other information, just so that they -- subjects the other can't disclose -- anybody else, not just the complaint, but the information itself.

[Court reporter requests counsel to repeat due to counsel's video/audio breaking up.]

MR. BERG: Yeah. Sorry. Paragraphs 1 and 2 deal with the sealed complaint which will contain just the plaintiffs' names and their -- paragraph 4 is intended to deal with additional information that the -- anybody subject to the order could learn, that would identify the plaintiffs or their children, so for example -- names will not be in the sealed complaint, but it would be very easy for the lawyers to learn the

plaintiffs' children's names, so this is intended to prevent them from revealing that information to everybody else.

THE COURT: I'm not sure what -- what you're thinking about. I mean, it's somewhat sort of tongue in cheek, I guess are you saying that, well, the plaintiffs -- excuse me -- the defendants can't say, you know, the family with three kids, two boys, one girl with a girl that has a birth mark over her left eye who happens to go to a school on the west side of Madison. I mean, I don't -- explain what -- where would I draw the line? I mean, obviously that would be inappropriate to be creative and to do that, but what are your concerns as a practical matter, what's this paragraph intended to do?

MR. BERG: Well, plaintiffs' children's names. So, you know, the sealed complaint is not going to contain plaintiffs' names, plaintiffs' -- it will only be plaintiffs' names and their addresses. So paragraph 1 and 2 are meant to deal with the sealed complaint. This is meant to deal with additional information that could identify the plaintiff, so that could be, you know, driver's license number, Social Security number, plaintiffs' children's names, information and educational records that could identify

plaintiffs or their children, anything that could identify them.

THE COURT: Mr. Blonien?

MR. BLONIEN: Your Honor, I certainly don't want to go backwards, but there are other concerns with respect to the limitations on disclosure that are contained in the typical protective orders such as what are we going to do about court reporters if we hire an investigator or consultant that agrees to be bound by these terms, how would we deal with those? This is why I would simply encourage us to work from the protective order that most courts and most parties use in most instances.

With respect to this issue of paragraph number 4 specifically, I have grave concerns that this shifts, A, the burden onto the defendants and the intervenors to determine subjectively what they believe might expose a person's identities, at what sort of information that is. In all of my experience practicing as a lawyer, Your Honor, it's typically the party asserting the confidentiality that has the burden to first identify the document to the parties and make sure then that everyone knows what the scope of the confidentiality is. This puts great burden and risk on all of counsel, trying to faithfully carry out their

duties as officers of this Court.

MR. BERG: Your Honor, this is not intended to impose duty on them with respect to discovery, so before we turn over any documents, we will identify everything that we think meets this paragraph. This is intended to capture if in the process of preparing for -- they -- their own research through their own efforts find information that could identify the plaintiffs, that they won't turn it over, that they won't disclose it to someone that could identify the plaintiffs. That's -- that's what this is intended to capture.

THE COURT: Well, look. I think -- I think we're getting into an area that's going to be impossible to define in a succinct paragraph.

Look, Mr. Berg, I -- I agree if what you were saying is Judge, I mean, the previous paragraph says don't use their names, their real names, I mean, that's clear, I agree with that, those are sealed, those shouldn't be in any documents and letters, so when the defense are typing things up, they should use the pseudonyms.

If what you're saying is in -- but they all shouldn't be sort of nefarious and creative to identify the individual parents' names by some means of referring to the street they live on or the number of

children they have, or that something peculiar and unique to them that is intended to be designed to out the individuals, I don't know how I would put that in writing and how, more importantly, Mr. Blonien and Ms. Feinstein or Mr. Prinsen would do that.

Obviously it -- you know, it's sort of like, as they say, pornography, you'll -- you'll know it when you see it. If a lawyer has described everything about one of your clients leaving out only their name, but making it very clear by the description is the category one that anyone can effectively find the person out, and where that description had no real useful purpose in the context of which it's used, then I think they have some explaining to do.

But the problem with paragraph 4 as the way it's drafted is it's -- it states the sort of the principal, but it uses words that are completely -- or that are susceptible to multiple interpretations.

So once again, I mean, I think everyone agrees that the confidentiality of the plaintiffs' identities should remain intact, either by prohibiting their -- use of their names or by identifying information. But I don't -- I can't see putting paragraph 4 in as the way it's drafted.

MR. BERG: Can I --

THE COURT: -- So --

MR. BERG: -- just --

THE COURT: -- Yeah?

MR. BERG: Focus on the plaintiffs' children's -- because those are not going to be in the sealed complaint. But it would be trivially easy for the District's lawyers to learn plaintiffs' children's names. So that needs to be protected too, and that's pretty clear.

MR. BLONIEN: Your Honor, may I speak?

THE COURT: Okay.

MR. BLONIEN: The process that we envision, and I encourage the intervenor counsels to speak up if I -- I'm not accurately portraying their view, is that anything that someone in this case as in any other case with a protective order believes is confidential or protected or deserves that added level of attorney's-eyes-only protection, that party then notifies counsel, hey, this information is attorney's eyes only, if you disagree, then let's fight about it and take it to the Court.

And we don't anticipate that there would be any difficulties with us following the ordinary procedure here and determining in good faith as officers of this Court what this Court intended by

the -- a non -- anonymity ruling here and carrying it out to the best of our abilities, and if we can't, to come back and argue again, I -- I am concerned at the number of times we're revisiting the same issues by counsel for plaintiffs over and over again. We're barely into this case and this is the third motion for reconsideration that plaintiffs have filed.

THE COURT: Mr. Blonien, just so I have it on the record, when you referred to the Eastern District Protective Order, is there such a thing officially from the United States District Court for the Eastern District of Wisconsin or is this just euphemistically referred to as the kind of order that one commonly finds used in the Eastern District?

MR. BLONIEN: It is the Eastern District's standard form order that the judges of the Eastern District make available for counsel to use. And in my experience before the Western District and in a number of state courts, it is sort of the -- the standard model that people go to, because this is pretty cookie cutter stuff for most people in most instances, most counsel can work this stuff out.

THE COURT: You agree, Mr. Berg, was that the description of this standard federal court order?

MR. BERG: Yes, I agree that it's the

standard federal court order, and I reviewed that order, I just didn't think it captured this situation.

THE COURT: So you also agree that had you filed this case in federal court, most likely this would be the court order that the federal judge would use?

MR. BERG: Well, had we filed this in federal court, I think we likely would have been able to proceed unanimously because there's unanimous federal precedent.

But -- but if the Court disagreed with us on that, would have done the same thing we're doing here which is propose a different order because this is a different situation than the standard protective order. This is -- we're trying to be very careful to protect plaintiffs' identities. We're trying to add additional protection because there is a substantial risk for their children.

THE COURT: Mr. Blonien.

MR. BLONIEN: Your Honor, I just want to state for the record that Mr. Berg did not accurately reflect the law of the Seventh Circuit with respect to proceeding anonymously in that Court, or for that matter, the bulk of federal court jurisprudence. But I really am trying hard not to work backwards, but I felt

that the record needed to be clear on that point.

Thank you.

THE COURT: All right.

Here's what I think I'd like to do. Rather than continue on with the paragraphs, I'm now satisfied that -- Mr. Blonien, I'm going to shift the responsibility to you to begin with the model federal court protective order. I'd like you to meet and confer with Mr. Berg. I don't have any problems for -- the parties using that as a departure point for a draft. And then if there are some additions that are unobjectionable and are appropriate in this case, then you should entertain the suggestions by Mr. Berg for that purpose.

I -- I'm now satisfied with that the better way of proceeding because the proposed order that's been submitted, Mr. Berg, has some redundancy and duplicity that is creating I think some confusion and ambiguity.

I'd like to start with the Eastern District and what used to be the federal court's model order, because I am familiar with it without knowing exactly its -- its lineage, but I believe it's better organized and more clearly defines the degree and scope of responsibility that the lawyers will be familiar with.

There was one other thing in here that I saw, maybe it's in the other name -- other order that's been withdrawn.

There was a provision in here that talked about a stay pending appeal. I don't -- maybe that's not -- that was in the earlier version.

Mr. Berg?

MR. BERG: Yeah. That was in the earlier version.

THE COURT: Okay. I want to make clear that I've -- I'm not ruling on that at all. There -- in fact, the Court's position, absent the motion, would be this case is proceeding in accordance with the Court's scheduled set, regardless of an interlocutory appeal by one or more parties.

MR. BERG: Understood.

THE COURT: All right. So I apologize for not taking the time at our last hearing to work through the issues.

But Mr. Blonien, do you feel like you have a sufficient understanding of what the Court's expectation is in terms of drafting an order to memorialize the rulings that I've made, protecting the secrecy of the individual names, but otherwise allowing the lawyers, plaintiff and defendant and intervenors

ability to practice law?

MR. BLONIEN: Yes, Your Honor. We believe, as defendants and defendant intervenors, that we have circulated a proposed order that does precisely that, and I will commit on behalf of MMSD to diligently work in good faith with Attorney Berg to resolve any objections that come about in the best way that we can.

THE COURT: Okay.

Now Mr. Berg, you did make a point about timing. I don't know, you said at the outset that three of the individual plaintiffs have indicated a decision to proceed, and I think you said assuming that the Court would enter the orders as drafted, you know now that I'm not entering the order as you drafted, I'm inclined to draft -- enter an order that Mr. Blonien describes as the model protective order used by the federal courts. Whether there's additional changes or amendments to that, if those are stipulated to, then I don't have a problem with it. If they are opposed, most likely I'm going to use the model order. But I will entertain specific arguments about individual changes that the parties can't agree on.

Knowing that that's the way I am going to proceed but understanding that today's the 8th and tomorrow is the day you were to file, do you have

anything to say?

MR. BERG: Yeah. The same thing we said in our motion last Friday which is we need seven days to confer with the plaintiffs to evaluate the order and the risk, you know. The -- the risk that I pitched to the client was, you know, the lawyers alone will know who you are, it'll be eight and maybe a few more who appear. Now this has changed dramatically, I mean, it's any employee of the three firms, lawyer or not. So that's a -- that's a significant additional risk that I need to give to the plaintiffs and they need to evaluate.

So we'd ask for seven days from the time that the Court enters a protective order to evaluate and decide whether to appeal or whether to disclose identities.

THE COURT: Okay. Let me just look here for a minute at the court file. In particular, I'm looking at the scheduling order that I submitted.

Mr. Blonien or Ms. Feinstein, Mr. Prinsen or Mr. Knight, I think it's appropriate to give a little more time for you guys to meet and confer. I don't -- seven days, I don't know what that means. But I certainly think that I would have no trouble with giving Mr. Berg till the end of this week.

Yeah, Mr. Blonien?

MR. BLONIEN: Your Honor, if I may state my concerns with that approach and offer an alternative.

We are under an extraordinarily tight timeline in order to accommodate the plaintiffs' demand that this Court issue a ruling by Labor Day. Discovery is going to be hard as it is, and we would like to use that opportunity as best as possible. We now know that Mr. Berg and his law firm intend to open up a second front and engage in an appeal; that's going to be consuming time.

What I would recommend instead, Your Honor, is that this Court accept that everyone on this call who is an attorney is an officer of this court. I will certainly commit to not sharing any identity information that is put in a document and filed under seal with this Court until we have a protective order in place that lays out more specifically the scope of any disclosure.

THE COURT: When did you submit your draft to Mr. Berg? Did you say last Friday?

MR. BLONIEN: That's correct, Your Honor. Friday we submitted a response to the proposal that we received Wednesday afternoon from Mr. Berg, asking that we resolve the issue by the 9th of June.

THE COURT: All right. I think -- I understand why Mr. Berg wants some time. He does have clients, these are important decisions to be made, regardless of whether he should have anticipated my rulings here or not.

Look, I get it. If the -- if -- what did you start out with? Eight families, Mr. Berg?

MR. BERG: Um, seven -- eight, sorry.

THE COURT: All right. Eight. If he's telling me five families have now decided that the risks are so great they want out, simply by my denying their ability to proceed unanimously, I understand that if now that they -- if they don't know, they should know that the secretary or the paralegal at Quarles & Brady and Boardman will see possibly these documents, that they ought to have a frank discussion with his clients who have the -- I think the rights to make that decision, and I -- and I don't want to take that from Mr. Berg, his ethical obligations to allow his clients to make a very important decision.

So, I mean, you may be -- the plaintiffs' position may be, Mr. Blonien, that I'm so wrong on the initial decision that they want to test the case in the appeals, regardless of whether anyone wants to proceed or not.

Right now, of course, I'm not staying the school district's -- what it's doing in the fall or how it's operating. I had intended to get an answer so as to avoid entanglement with the school district. But we'll take it one step at a time. If the plaintiffs decide to do an appeal, if they all decide to do an appeal, then obviously that should be taken as a factor to consider as to whether the Court would extend -- obviously extend -- to have a stay pending appeal or whether I would enter a preliminary injunction prohibiting the implementation of this policy or not.

But simply saying that learning what I've done here today, he needs a couple of days to talk to his client I think is reasonable.

So, Mr. Berg, I'll extend -- I'll change the scheduling order on paragraph 1 -- excuse me -- paragraph 2. Your amended complaint should be filed by noon on Friday, June 12th.

MR. BERG: Understood, Your Honor.

THE COURT: That's all the matters I intended to discuss this morning.

Mr. Berg, is there anything else?

MR. BERG: Nope. Nothing else.

THE COURT: Mr. Blonien?

MR. BLONIEN: Not at this time, Your Honor.

Thank you.

THE COURT: Mr. Prinsen?

MR. PRINSEN: Other than, Your Honor, wondering if the Court would possibly like to address Mr. Berg's proposed reconsideration or modification of the summary -- summary judgment briefing schedule.

I understand, Your Honor, that would only be relevant if the plaintiffs, any plaintiffs do decide to proceed by revealing their identities.

THE COURT: So I did read that, I apologize. I did not focus on that.

I think Mr. Berg, you did have something in there that probably did accurately reflect that.

What I had hoped to do is to avoid -- what is it -- six briefs on cross motions for summary judgment, and try to get the parties to say, well, who wants to do a motion and who wants to do the response? My order reflects no such limitations, that -- look, if someone wants to file a motion for summary judgment, either the plaintiff or the defendant, it should be filed by July 6th. If -- excuse me -- yeah, by July 6th.

Now, everybody knows that a nonmoving party can be entitled to judgment as a matter of law, if you're not ready to file your July 6th motion and you know the other side is, then you could certainly ask

for summary judgment, even though you're a nonmoving party and your response brief of August 6th.

On the other hand, if I get cross motions for summary judgment on July 6th, certainly that's everyone's right to do that. I -- I can't stop a party from availing themselves of the rules of civil procedure on the ability to ask the Court for summary judgment. But it's a tactical decision on each individual party's response as to, well, whether there's any viable summary judgment argument to be made, and if so, whether you want to get it out on the 6th or wait to see what the other side does and then respond on the -- August 6th, knowing that you don't get a reply brief, the moving -- only the moving parties do.

I think the paragraph 3, Mr. Prinsen, even though we had some discussion about it back and forth, just simply says that any party desiring to file a motion for summary judgment shall do so with a supporting brief filed no later than July 6th. Knowing, by incorporation, that I do have the requirement of proposed findings of fact as similar to the federal courts.

Does that need more clarification by any of the parties?

Mr. Blonien?

MR. BLONIEN: Your Honor, the concern that Mr. Berg had raised with us, and I encourage Mr. Berg to correct me if I'm misunderstanding things, was that he believes that the rights of a respondent on summary judgment to submit independent evidence that they believe supports judgment as a matter of law is curtailed when a respondent does not individually file a motion to dismiss, and that's a point we strongly disagree on and may be helpful to hear the Court's voice on that issue.

THE COURT: Mr. Berg, rather than hear from Mr. Blonien what do you think, I think you can speak for yourself.

MR. BERG: Yeah. I don't disagree that a person responding on summary judgment can submit additional facts and additional evidence. My concern is if the District and the defendant intervenors come in with a whole bunch of new facts that are not -- are facts and they have lengthy expert affidavits like we do and additional affidavits, we can't possibly respond to that in a week which is the [inaudible.]

So what's going to happen on August 6th, if they take that approach, is we will have to file a motion with -- look, we need more time to depose their

experts like they wanted to depose ours, to depose their affiants like they wanted to depose ours, so that we can respond to their additional facts and their argument that they are entitled to summary judgment based on those new facts that are being presented for the first time on August 6th. So that has the potential to totally derail the schedule that we've set. And I am okay with that as long as the preliminary injunction schedule goes forward before the school year begins.

So I proposed an alternative where we can avoid this fight down the road which is building in a staggered briefing schedule. I offered it to the defendants and defendant intervenors rejected it.

So we're -- we're sort of left with this position we're most likely where going to have a fight on August 6th, the whole schedule is going to be blown up. But I was just trying to avoid that. That's all.

THE COURT: Mr. Blonien.

MR. BLONIEN: I do want to say for the record, Your Honor, that we've offered to allow for additional time, assuming that the hearing is not currently -- the hearing doesn't remain on September 3rd. These are conditions that are essentially set by the demands of Mr. Berg and his

clients that are creating these fundamental problems that he's complaining about now with respect to timing.

Respectfully, Your Honor, there is no way for him to have his cake and eat it too, and to the extent that the schedule is set in order to accommodate a ruling by September 3rd, this Court has issued a very clear ruling, there is no misunderstanding. Essentially what Mr. Berg is saying is that he doesn't think that that schedule is fair; we respectfully disagree. Everyone is taking a little bit of a hit trying to make this happen under the schedule that the Court has proposed.

Under Luke -- Mr. Berg's proposal, we would lose an additional 20 days in an already extremely tight briefing schedule. We simply can't afford to lose that time, Your Honor.

MR. BERG: Your Honor, I'd just like to respond briefly.

We filed a preliminary injunction back in February. And at the scheduling hearing back in --

THE COURT: -- Mr. Berg, Mr. Berg. I actually agree with you on this. Mr. Berg, I completely understand.

Look, here's the concerns that you raised, and it concerns me as well. If -- if -- I think what

he's saying is if both parties file cross motions for summary judgment on July 6th, then the moving parties -- then both parties will see what evidence both parties have submitted, including affidavits or experts' affidavits and the like.

So, Mr. Berg, if I understand it, says, well, that's scenario number 1, then the schedule does have 30 days for a response brief and then a reply brief. It's tight, but it's doable to take depositions in the 30 days to get evidence to respond to the moving party.

If on the other hand the plaintiff moves for summary judgment on July 6th and the defendant or the intervening defendants do not and they filed a response on August 6th and now it has multiple affidavits from multiple experts previously adhered to, sort of non-disclosed, I agree with Mr. Berg, he is not going to be able to get depositions of those experts in the time between August 6th and the 14th. And I don't say this that I -- don't take this the wrong way, but that appears like Mr. Berg has been sandbagged, that the defense -- or let's say the other party filed -- asked for summary judgment, but doesn't ask for summary judgment until August 6th, it may look like it was -- it's been -- that party has been -- I could say this could go both ways by and large by the way if the

defendant moves for summary judgment on the 6th and the plaintiffs respond on -- on August 6th with affidavits, the same concerns I have. But I'll know whether either party has kind of manipulated the schedules to try to gain advantage over the timing.

Look, I don't want to be melodramatic, but litigation should be a search for truth and sometimes the search for truth takes some time.

So Mr. Berg, I'll tell you, look, I agree, if you get dumped on under scenario number 1, you file and they don't, and all of a sudden you get dumped on on the 6th, I anticipate and welcome a motion to amend the scheduling order to say I need more time, look at what I've gotten now for the very first time. I have to look at the facts and understand it.

Now, I apologize for interrupting you, Mr. Berg, but you were talking about your filing a motion for preliminary injunction. The plaintiff did a motion for preliminary injunction. The plaintiff is entitled to an answer to the question that he raised in the motion for preliminary injunction.

The schedule I have, hopefully was intended by the motions for summary judgment proceeding the preliminary injunction was intended to move out the possibility of a preliminary injunction being entered,

depending upon or if how I ruled on a motion for summary judgment. And I set the schedule up for the efficiency of the Court and the conservancy of judicial recourses.

But it very well may be that if a scenario number 2 comes in and that the nonmoving party has waited to dump on the moving party so much that a response can't be made in the time, I'll have to change the schedule, and then I would turn to the motion for preliminary injunction which should at the same time be fully briefed, and I may very well enter a motion for preliminary injunction, stopping the implementation of the policy so we can get the parties back on track and give the Court some time to make a decision.

I don't know. That's why I also set a schedule for the -- the preliminary injunction that roughly follow the schedule on the summary judgment so that at the time of September 3rd, I would have all the documents necessary to decide the preliminary injunction, even if on September 3rd, I was on -- not prepared to rule on the motion for summary judgment.

So if you guys can -- want to change that schedule to address those concerns, because I -- I can understand, Mr. Berg, it could work the other way as well, it's just that the point you expressed concern

about was the nonmoving party to manipulate the schedule to deny the moving party the ability to do discovery, I think that's a point well taken, and I would have to deal with it if it in fact occurred.

Is that essentially what your concern was, Mr. Berg?

MR. BERG: Yeah. That's exactly my concern. And as long as the preliminary injunction motion will be heard on September 3th, one way or the other, we have no complaints with the existing schedule.

THE COURT: The motion for preliminary injunction is set to be heard on the 3rd. I would envision, by the way, if the -- if I've had no motions to change the schedule on summary judgment and the summary judgment was right, if I grant summary judgment to one party or the other, obviously then, Mr. Berg, I won't be taking up the motion for preliminary injunction.

If I deny the summary judgment to both parties, then I would take up the preliminary injunction, pending what we do between then and trial or pending interlocutory appeal and the like.

Mr. Prinsen, you want to say something?

MR. PRINSEN: Yes, Your Honor. Just on the point about conducting discovery. Given the fact that

it is June 8th, Your Honor, and plaintiffs now having even more time to build their identities of the plaintiffs, defendant intervenors just want to state for the record that we just did become a part of this case, we are working to retain a rebuttal expert witness. But, Your Honor, even if we dis -- serve discovery request today, the deadline to respond wouldn't be until after July 6th.

So there would be no intent by defendant intervenors or I would imagine by the District either to surprise or dump anything on plaintiffs in any sort of nefarious way come August 6th, just given the limited schedule here.

We -- we were relying on, you know, the Court's ruling at the last hearing where the Court did say that it's standard orders not as nuanced as you expressed, you know, what responding parties can do, but that we are certainly allowed to submit new facts or in this case would those new facts may be in the form of affidavit as we just became involved in this case, and clearly plaintiffs had time to retain their expert prior to even filing because they submitted a very lengthy affidavit in support. And we can get discovery to respond to the preliminary injunction motion as well, Your Honor, in that -- in that

timeframe.

THE COURT: Well, I don't know what quite -- what -- I mean, I apologize, but I didn't know whether you were suggesting anything different.

Look, I would say one thing comes to mind, Mr. Prinsen, is the Court expects the lawyers to cooperate with each other. Now, for example, if -- because of the tight schedule which I actually say enures to the benefit of both parties, the District does not want a preliminary injunction and was amenable to a decision by the Court before the commencement of the school year, and the plaintiffs are going to get an answer to the legal questions before the school district starts.

Look, nobody wants to enjoin the policy if the Court can answer the question before school reconvenes and both parties agreed that being in school is the policy and being challenged doesn't become an issue until school reconvenes. So both parties should work together.

Now if you say, look, because of the tight schedule, could you answer my -- get my documents in 21 days instead of 30 days, then I expect you to reach out to each other.

But look, I have 30 years of litigation

experience, and what goes around comes around. You have to be mutually agreed to say I need some shorter, you need some shorter, we'll work with you. As lawyers and officers of the Court, to step aside from the -- the passions that are enflamed in the case and the -- and what the parties may think, the lawyers need to know how to get from here to there, and sometimes it requires a degree of cooperation.

So I think it's completely understandable for both -- all parties to -- to give freely accommodations that don't -- that are reasonable and don't really -- that are practical, and it may include agreements to cooperate on scheduling depositions or shortening the times to produce documents.

And if you get in a jam because of the schedule that someone wants to take 30 days for no apparent reason and you ask to get it in 27 days or 21 days and it was summarily rejected without any discussion, then it can be a motion for -- filed to the Court, I will put it on the calendar fairly quickly. And I have experienced enough to see fairly easily, you know, who's being obstructed and who's not and who really needs the time.

Mr. Blonien?

MR. BLONIEN: Your Honor, I would offer this

as a -- as a request for clarification. I think that I understand what you're saying, but I'd like to take a shot at something just to make sure.

From the perspective of -- go ahead. I'm sorry, Your Honor.

THE COURT: No. I just -- my chair has a squeak.

MR. BLONIEN: From MMSD's perspective, it's going to be extraordinarily difficult and likely practically impossible to submitted an independent summary judgment on the schedule that the Court has set with respect to July 6th. And so we do anticipate filing a response, and in no way do we intend that as a sandbag or a tactical advantage, but simply a practical necessity here. Recognizing as the Court has that it may be the case, and I would suggest, Your Honor, the Court consider it likely the case that there is going to be considerable materials filed in response to the summary judgment, because we already know there's a 75-page expert report we need to deal with, and we'll likely be dealing with that on August 6th.

To the extent that Mr. Berg and his clients need additional time or discovery to resolve those issues, if the Court intends to proceed with the hearing on September 3rd to determine whether the Court

can in fact make a legal determination at that time, then I understand the Court's ruling. I understand the Court's pressing concern about issuing a ruling by September 3rd. Again, our position is there is no ongoing harm that plaintiffs or frankly anyone are suffering as a result of this practice being at the school.

THE COURT: Well, again, I don't know if you want clarification. Let me just try it this way.

If now what you're telling Mr. Blonien is, Mr. Berg, your fears may come to fruition, that the plaintiff files summary judgment on July 6, MMSD is not going to be ready, and I think that's fair, and I don't think that's -- I appreciate your candor, then, Mr. Berg, you're going to get a lot of stuff on August 6th. And Mr. Berg, it doesn't -- honestly, it doesn't look -- it looks reasonable to me that it's very likely you're not going to be able to meet the Court's deadline for reply brief on August 14th.

You guys can either get together and change the schedule and it unfortunately would include the -- if by agreement, a temporary or short stay being entered on the policy, so the Court can rule on it. If there -- if there's no agreements in that respect, then what will happen, Mr. Berg, is you'll bring that

motion, and if it is as you anticipate, then I would -- I would change the schedule and give you more time to file your reply brief. That would -- I would vacate the Court's schedule on summary judgment to give you more time.

I would not vacate -- I'm not going to change the briefing schedule and the oral argument date on the motion for preliminary injunction.

So then what will happen is the oral argument date for summary judgment let's say it get's pushed out until October or November, then I'll hear the preliminary injunction on September 3rd.

If I grant the preliminary injunction, then it will be coterminous with the Court's decision on the motion for summary judgment. If I deny the motion for preliminary injunction, then I just deny the motion for preliminary injunction, the policy remains in effect, and then we proceed on the new schedule for summary judgment.

Now, you can talk about, you know, what -- whether there's an agreement on that or not. I mean, I think I would expect parties -- it's not unusual to have a momentary interruption of a policy that's being challenged in Court. But I can't tell you what to do in that regard.

Mr. Blonien.

MR. BLONIEN: Your Honor, MMSD has grave concerns that suspending a policy that is expressly designed to protect people who may be exposed both to discrimination but also to harm would potentially expose MMSD to liability from the other direction here.

I understand the issues that the Court is -- is facing and dealing with, and some of these things inevitably we're going to have to wait until we get to that stage in the litigation.

But I do want to and I appreciate the Court hearing my forecast that this will likely be staggered. I'm hopeful that the Court can take into account at the time of the preliminary injunction hearing the state of the record and make a confident determination that a preliminary injunction will not be necessary at that point.

But I think I understand the Court's process, and thank you.

THE COURT: All right.

Well, then my -- really, you know, my prediction unfortunately, Mr. Berg, is -- is what you fear will probably come to reality.

The other factor in all of this is -- is as much as you all are focusing on the short turnaround

times for yourselves, I do note that I have in only between August 14th and September 3rd to digest, research, read, draft an oral decision, it was envisioned that I'd make an oral decision on the 3rd, and I'm not going to rush things just for the sake of rushing things too.

So if all of a sudden I'm overwhelmed -- either the schedule could change or the schedule doesn't get changed, if I'm overwhelmed and not able to make an oral ruling, then I'm going to have to make a decision on the preliminary injunction even if you do everything under the Court's scheduling order, and I'll have to rule on the motion for preliminary injunction at that time.

I mean, I wouldn't take the 90 days, but just bear in mind that under the -- that guideline, if the reply brief comes in on August 14th, I could take until November 14th under the 90-day rule for deciding pending motions. I don't -- I don't plan to do that. But this is a tight schedule for everyone, and it probably means that things -- something is going to go wrong and we're going to have to -- I will have to hear and decide the preliminary injunction on the 3rd. So plan on that.

MR. BERG: Thank you, Your Honor.

MR. BLONIEN: Your Honor?

THE COURT: Yeah? Mr. Blonien?

MR. BLONIEN: If I may suggest, based on the predictions as just outlined by the Court, currently the reply deadline for summary judgment is August 14th. If this Court were to provide some additional time before the September 3rd hearing, perhaps it -- it would provide the full record this Court needs to feel comfortable on that motion in deciding the preliminary injunction and in knowing which way it's going to go on summary judgment.

THE COURT: I don't know what that means. You have to --

MR. BLONIEN: -- Perhaps Mr. Berg could take more time on the reply and that way we can all address these issues at the hearing in a full account. I understand that means less time for you to prepare. But if you're thinking, Your Honor, going in that all we'll be able to get to effectively is the preliminary injunction, then I would suggest that if Mr. Berg is asking today for more time so that he can respond to the issues raised in our summary judgment response that we simply build that time in now so we can have a meaningful discussion on September 3rd.

THE COURT: All right. Well, no. I -- for

heaven sakes, I'm not going to shrink the little time I have even further to make it a fait accompli that I won't decide the motion for summary judgment, because, you know, if I can review summary judgment and there's clear material fact that's genuinely disputed, then I can have an oral ruling pretty easy. It's really the more complicated if the -- if it's questions of law that need to be decided and the like.

And I think any kind of -- I can tell you, I'm am not speaking for Mr. Berg, but I think the plaintiffs' unmistakable and consistent position is is they don't want this policy to be applied to any individuals until -- until this Court makes a decision on the legal questions they present.

So, look, I've got to -- we've got a schedule. We're going to stick with the schedule, but we all understand that the summary judgment briefing schedule is a little precarious and very well may not stand. I will hear the motion when I hear the motion, I will decide it based on the facts and the arguments made at that time. But if the summary judgment decision gets pushed into the school year, then I will -- then I may very well enter a preliminary injunction, but that depends upon the briefs and the arguments that the parties submit to the Court that will be heard on

the 3rd.

All right. Well, I appreciate you guys calling in and taking the time. I guess, you know, my apologies to the extent that we rushed through these issues last week and didn't have the ability to talk through what I was anticipating.

So what I'm now leaving this with is Mr. Berg is going to get back on by noon on Friday with that amended complaint.

Mr. Blonien, if you think you had that first draft in to Mr. Berg that the Court envisioned the federal order being the model, then, Mr. Berg, if that's the case, then I'd expect that you respond to that proposed order, given consideration of my comments here this morning to see what, if any, changes you want to make to what's been proposed. Get that done as soon as possible. I would hope that you should have that -- either that stipulation as to a protective order done by noon on Friday, or if not, then get it done as -- get it to me as soon as possible. I will have no further hearings. I'll just call it up in a Word format and make changes myself, that affect the Court's rulings in this matter.

Please don't do that to the extent that as a substitute for working, negotiating in good faith

together on a stipulation.

And then, Mr. Berg, for the record, by working together on the proposed protective order, I will in no way construe your cooperation as an acceptance or waiver of the objections that you've made as to all of the rulings that I've issued thus far on all of these issues, even though they haven't been drafted yet.

MR. BERG: Understood. Thank you, Your Honor.

THE COURT: Thank you very much. Have a good rest of the day. I appreciate you calling in.

MR. BLONIEN: Thank you, Your Honor.

[Adjourned at 9:57 a.m.]

STATE OF WISCONSIN)
) SS:
COUNTY OF DANE)

I, Meredith A. Seymour, District Court Reporter, do hereby certify that the foregoing proceedings were stenographically reported by me and reduced to writing under my personal direction to the best of my ability.

Dated and signed this 15th day of June, 2020.

electronically signed
_____
Meredith A. Seymour
District Court Reporter