No. 2020AP1032

IN THE WISCONSIN COURT OF APPEALS
DISTRICT IV

JOHN DOE 1, JANE DOE 1, JANE DOE 3, JANE DOE 4, JOHN DOE 5, and JANE DOE 5,
Plaintiffs-Appellants,

JOHN DOE 6, JANE DOE 6, JOHN DOE 8 AND JANE DOE 8
Plaintifffs,

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. LAFOLLETTE HIGH SCHOOL,
Intervenors-Defendants-Respondents.

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ORAL ARGUMENT AND PUBLICATION

The arguments put forward by Plaintiffs-Petitioners[1] on appeal are contrary to settled Wisconsin law, which already provides both the mechanism and standard for evaluating such requests to withdraw public access to information in court records. *See* Wis. Stat. § 801.21; *State ex rel. Bilder v. Delavan Township*, 112 Wis. 2d 539, 334 N.S.2d 252 (1983). The circuit court's decision clearly comports with these authorities, and Plaintiffs' arguments do not. Defendants-Respondents state that neither oral argument nor publication is warranted here.

INTRODUCTION

Plaintiffs initiated this action against the Madison Metropolitan School District ("MMSD") without including their names and addresses in the complaint, as Wis. Stat. § 802.04(1) expressly requires. The circuit court correctly ruled that Wisconsin law does not permit anonymous litigation in this fashion, and therefore required that Plaintiffs file an amended complaint under seal listing their names and addresses. At the same time, the court *allowed* Plaintiffs to proceed using pseudonyms in public filings. Plaintiffs appeal the circuit court's order, arguing that the circuit court did not go far enough to protect their interests. According to Plaintiffs, they are entitled to sue anonymously *as a matter of law*. That argument cannot be squared with the statutory text or precedent.

As the Wisconsin Supreme Court recognized in *Bilder*, this State has long embraced the view that court and other government proceedings should be open and that court records and other government documents should be available for public inspection. That principle is enshrined in Wis. Stat. § 59.20(3). Plaintiffs do not dispute that names are statutorily required in complaints pursuant to Wis. Stat. § 802.04(1). Plaintiffs also apparently concede that *Bilder* requires public access to information in court records, unless one of three limited exceptions applies. But Plaintiffs failed to show (or even meaningfully argue) that any such

[1] Wis. Stat. § 809.19(1)(i) states that briefs must contain "[r]eference to the parties by name, rather than by party designation, throughout the argument section." For obvious reasons, however, Defendants-Respondents cannot refer to Plaintiffs' real names; and it would be cumbersome and is unnecessary to use their pseudonyms. Instead, John Doe 1, Jane Doe 1, Jane Doe 3, Jane Doe 4, John Doe 5, and Jane Doe 5 are collectively referred to as "Plaintiffs" throughout this brief.

exception applies here. They do not identify a substantive statute that allows (let alone entitles) Plaintiffs to disregard the statutory requirement of including names in complaints, nor do they adequately explain why it is in interest of the administration of justice to do so. Instead, they fault the circuit court for refusing to adopt and apply a "balancing test" they derive from federal cases applying federal law. But *Bilder* and the state statutes control, of course, and Plaintiffs disregard them at their own peril. These authorities clearly show that Wisconsin law does not permit anonymous litigation.

Even assuming *arguendo* that a circuit court's inherent authority were expansive enough to allow a plaintiff to sue anonymously, Plaintiffs are certainly incorrect in claiming that they are *entitled* to proceed in that manner. Plaintiffs ignore the circuit court's clarification stating that it would deny the request even if the court had such authority based on the factors present in this case. That decision is subject to the "misuse of discretion" standard and must be upheld—particularly because Plaintiffs make no effort in their brief to explain how the circuit court erroneously exercised its discretion. Even under the federal standard Plaintiffs advocate for, Plaintiffs have failed to articulate a legitimate reason why the circuit court was required to allow them to omit any reference to their names in all court records, even those filed under seal.

Plaintiffs are not entitled to appeal the circuit court's order as a matter of right. The order under review was rendered in connection with preliminary proceedings in the civil action that Plaintiffs initiated against MMSD. The order cannot fairly be construed as emanating from a "special proceeding," because it relates to discovery and other matters still pending before the circuit court. Circuit courts are often called upon to resolve disputes over redacting or sealing information in court records, and this dispute is no different in kind. Furthermore, the order is not final in any sense. Plaintiffs attempt to draw support from the federal "collateral-order doctrine," but there is no state equivalent. Under Wisconsin law, all non-final orders may be reviewed before a final decision only through the permissive review process.

STATEMENT OF THE CASE

A. Facts

On February 18, 2020, Plaintiffs filed a declaratory judgment action against MMSD, challenging as unconstitutional a document that MMSD

made available on its website in April 2018 entitled, "Guidance & Policies to Support Transgender, Non-Binary & Gender-Expansive Students" (referred to here as the "Guidance"). (*See* R. 1, Compl.; Int. Resp. App. at 1–35, Guidance.) The Guidance states that MMSD is committed "to providing all students access to an inclusive education that affirms all identities." (Int. Resp. App. at 3.) The Guidance provides that "[a]ll MMSD staff will refer to students by their affirmed names and pronouns." (*Id.* at 20.) A student's name and gender may be changed in District systems only with a parent's or guardian's permission, but "[s]tudents will be called by their affirmed name and pronouns regardless of parent/guardian permission to change their name and gender in MMSD systems." (*Id.*)

The Guidance also states that "families are essential in supporting our LGBTQ+ students," and that, "with the permission of our students, we will strive to include families along the journey to support their LGBTQ+ youth." (*Id.* at 18.) The Guidance encourages staff to give families the resources, consultation, and support they need; and it states that families can at any time request a meeting with staff to discuss their child's gender support plan. (*Id.*)

According to the Complaint, Plaintiffs are fourteen parents with children enrolled at various public schools in the District. (R. 1 ¶¶ 2–9.) Many of them have been voluntarily dismissed from the lawsuit, so that now five individual plaintiffs remain. (*See* R. 47, Order Granting Pls. John Doe 7's and Jane Doe 7's Mot. for Voluntary Dismissal Without Prejudice; R. 85, Order Granting Pls. John Doe 2's and Jane Doe 2's Mot. for Voluntary Dismissal Without Prejudice; Doc. 152, Order Granting Pls. John Doe 6's, Jane Doe 6's, John Doe 8's, and Jane Doe 8's Mot. for Voluntary Dismissal Without Prejudice.) The remaining Plaintiffs claim that the Guidance violates their parental rights, and all but Jane Doe 3 claim that it interferes with their Christian beliefs. (*See* R. 10, Affidavit of John Doe 1; R. 11, Affidavit of Jane Doe 1; R. 18, Affidavit of Jane Doe 3; R. 19, Affidavit of Jane Doe 4; R. 12, Affidavit of John Doe 5; R. 20, Affidavit of Jane Doe 5.)

On the same day they filed their Complaint, Plaintiffs also filed a Motion to Proceed Using Pseudonyms, moving the Court "for an order allowing them to file and litigate this case anonymously, using pseudonyms." (R. 4 at 1.) In their motion to use pseudonyms, Plaintiffs made clear that their request was actually much broader—they sought

to remain completely anonymous by omitting their names and addresses permanently from the court record. Plaintiffs argued that their challenge to the Guidance could "arouse strong emotions in the affected community and therefore create a significant risk that the plaintiffs or their children will suffer ostracism, harassment, economic injury, governmental retaliation, and even physical violence." (*Id.*) Plaintiffs did not list the names and addresses in the title of the Complaint, nor did they file that information under seal. Instead, they simply omitted that information from the Complaint. (*See* R. 1.)

B. Procedural History

MMSD moved to dismiss the Complaint and opposed Plaintiffs' motion for complete anonymity. (R. 42.) On May 4, 2020, student clubs from three different Madison high schools moved to intervene in the lawsuit and joined in MMSD's Motion to Dismiss. (R. 50, 51.)

On May 26, 2020, after hearing arguments on the pending motions, the circuit court denied Plaintiffs' request for complete anonymity, stating that it "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." (Pet. App. at 116–17.) The court stated that it was "not comfortable transporting into Wisconsin jurisprudence . . . the practice of the federal courts in similar circumstances." (*Id.* at 125.) It also recognized "Wisconsin's longstanding practice of the public's having a right to know under the public records law and the common law and . . . the Constitution's obligation that the courts be open to the public," which "militate dramatically against allowing parties telling no one who they are to come to court." (*Id.*)

The circuit court held that it was "bound by Wisconsin law, both in terms of what the statutes set forth and the Wisconsin common law as established by the Supreme Court," and it stated that "[t]here is no precedent for what the plaintiff is asking for in the current published appellate case law." (*Id.* at 124.) Acknowledging Plaintiffs' concerns over disclosing their identities, however, the court ordered that Plaintiffs' names be sealed and subject to an appropriate protective order. (*See id.* at 125–26.) In other words, the court denied Plaintiffs' request to shield their identity from *everyone*, including the court, but instead ordered that disclosure be limited to the court and "attorneys' eyes only." (*See id.* 125–27.) The court ordered Plaintiffs' counsel to file an amended Complaint under seal by June 9, 2020. (*Id.* at 126, 169–70. *See also* Pet.

App. at 101–02.) The court granted the Motion to Intervene, but denied MMSD's Motion to Dismiss. (*Id.* at 143, 156–57.)

Two days later, Plaintiffs filed a Motion to Reconsider. (R. 76.) The circuit court denied Plaintiffs' request for reconsideration on June 8, 2020, and it instructed counsel for MMSD to draft a protective order based on the Eastern District of Wisconsin's Model Protective Order. (Pet. App. at 224.) At this same conference, the court extended the deadline for Plaintiffs to disclose their identities by filing an amended complaint under seal by noon on June 12, 2020. (*Id.* at 230.) Plaintiffs appealed the court's decision by filing a Notice of Appeal as of Right. (R. 84.) The same day, Plaintiffs filed a Motion for Stay Pending Appeal with the circuit court, which was granted. (R. 83, 91.) Plaintiffs also filed a Petition for Permissive Appeal with this Court on June 17, 2020. The circuit court record was transferred to this Court on July 22, 2020.

At a hearing on Plaintiffs' motion for relief pending appeal held on June 25, 2020, the circuit court reiterated that Wisconsin law does *not* support Plaintiffs' request to proceed anonymously, but even if there were supporting legal authority, it would not grant the Plaintiffs' request here under its discretion. (R-App. at 13–14.) The court explicitly applied a balancing test:

> I believe that in balancing the considerations sought by the plaintiff, a more appropriate course of conduct was to require disclosure of the names under seal with a protective order for attorneys' eyes only, and that proceeding in that fashion addressed and appreciated the defendants' desire to test the standing or efficiency of each individual plaintiff who bring the issue before the Court and yet recognize the legitimate claims I believe exist on behalf of the individual plaintiffs' parents feel that there would be some consequences or retaliation or harassment for their exercise of their rights of access to the courts.

(*Id.*)

C. Misrepresentations and Inaccuracies Asserted by Plaintiffs in Their Opening Brief

Plaintiffs' opening brief contains several misrepresentations and inaccuracies that Defendants-Respondents must address.

First, Plaintiffs represent that Defendants-Respondents never served any discovery requests during the pendency of this case in the circuit court as if this somehow proves Defendants-Respondents do not need discovery or information about the Plaintiffs to litigate this case. (*See* Pls.' Br. at 11.) In reality, discovery was stayed by the circuit court per Wis. Stat. § 802.06(1)(b) pending resolution of MMSD's motion to dismiss, and Plaintiffs appealed shortly after.

Second, Plaintiffs argue that the Eastern District of Wisconsin Model Protective Order (which the circuit court instructed parties to use as a starting point) puts Plaintiffs' identities at risk by allowing "disclosure to court reporters, consultants, investigators, experts, and deposition and trial witnesses." (Pls.' Br. at 11.) Although that issue is irrelevant to this appeal, Plaintiffs fail to mention that Defendants-Respondents circulated a draft protective that would prohibit parties from disclosing names to any consultants, investigators, experts, or witnesses.

Third, Plaintiffs assert that the Guidance "prohibits staff from communicating with parents" about gender identity and "directs staff to actively deceive parents, even to the point of violating record-keeping laws." (Pls.' Br. at 4–5.) While this too has no bearing on the issues before this Court, Plaintiffs' assertions are patently untrue. The Guidance does no such thing. (*See* Int. Resp. App. at 1–35.) Consistent with MMSD Policy 1301, new policies and procedures must be adopted by a simple majority vote of the School Board to be mandatory. (*See* R. 42 at 2 n.1.) Plaintiffs admit that the Guidance was not voted on by the School Board (*see* R. 1 ¶ 61), but they continue to argue that it is an MMSD "policy" and assert that it "sets forth [MMSD's] official position on the nature of sex and gender." (*See* R. 1 ¶ 33.) That is not true.[2]

Fourth, Plaintiffs argue that when the circuit court "pressed" the District's counsel for an explanation as to why Plaintiffs' identities are necessary for purposes of this litigation at the May 26, 2020 hearing,

[2] The Guidance does, however, reference relevant District policies, including anti-discrimination and anti-bullying, which are mandatory. (Int. Resp. App. at 12–13.)

"counsel had no response other than vague generalities." (Pls.' Br. at 13.) In reality, the District's counsel explained that Plaintiffs lack standing to challenge the Guidance, that there is no direct impact or evidence of harm to Plaintiffs, and that MMSD is entitled to explore the factual circumstances underlying Plaintiffs' claims. (Pet. App. at 122.) As MMSD's counsel stated at that hearing, the "facts do matter." (*Id.)*

Fifth, Plaintiffs argue that "[b]ecause the court declined to import the practice of the federal courts in similar circumstances, it never applied the balancing test that federal courts uniformly employ for anonymity requests, nor did it walk through the factors federal courts (and Plaintiffs) identified as relevant to such requests." (Pls.' Br. at 14 (internal citations omitted).) That is false. In fact, the circuit court *did* perform a balancing inquiry and made very clear that "even if there was a legal authority for [it] to do what the plaintiff asks, [it] wouldn't do it." (R-App. at 13.) In exercising its discretion, the circuit court stated that "in balancing the considerations sought by the plaintiff, a more appropriate course of conduct was to require disclosure of the names under seal with a protective order for attorneys' eyes only," which addressed Plaintiffs' concerns about retaliation or harassment. (*Id.* at 13–14. *See also id.* at 26.) Plaintiffs disregard that discussion entirely.

Finally, it is important to note that Plaintiffs include arguments in their brief that are wholly irrelevant to the issues before this Court. For example, they bring in the views of their expert, Dr. Stephen Levine, on the purported effects of referring to a student by a different name or pronoun. (*See* Pls.' Br. at 5–6, 38.) That issue may or may not be relevant to the merits of the lawsuit (and Defendants-Respondents submitted their own expert affidavit to address the errors in Dr. Levine's assertions), but it has no bearing on whether or not Plaintiffs should be allowed to proceed anonymously.

STANDARD OF REVIEW

Plaintiffs argue that the circuit court's decision denying their request to proceed anonymously is subject to *de novo* review in all respects. (Pls.' Br. at 18.) Defendants-Respondents agree that this Court must review *de novo* whether Wisconsin law permits Plaintiffs to withhold their names from the parties and the court record entirely and permanently. This Court should also decide *de novo* whether *Bilder* provides the standard for evaluating Plaintiffs' request to withdraw court records from public scrutiny, and whether the circuit court's denial is

immediately appealable as of right under Wis. Stat. § 808.03(1). Plaintiffs are incorrect, however, that a court's decision involving the exercise of its inherent authority must also be reviewed *de novo*. Instead, such a decision clearly should be reviewed under the "misuse of discretion" standard, as with other orders pertaining to discovery or protective orders. *See Konle v. Page*, 205 Wis. 2d 389, 393, 556 N.W.2d 380 (Ct. App. 1996) ("We review a trial court's discovery ruling under the misuse of discretion standard."). *Cf. Doe v. Village of Deerfield*, 819 F.3d 372, 376 (7th Cir. 2016) (reviewing denial of motion to use pseudonyms for abuse of discretion).

Plaintiffs' citation to *Democratic Party of Wisconsin v. Wisconsin Department of Justice*, 2016 WI 100, 372 Wis. 2d 460, 888 N.W.2d 5841, is inapposite. That case involved the Public Records Law, Wis. Stat. § 19.31, which is different from Wis. Stat. 59.20(3) at issue here, which broadly mandates public access to court records. As the Court stated in *Bilder*, "the two statutes govern different public offices and have been given different interpretations by this court." *Bilder*, 112 Wis. 2d at 552.

ARGUMENT

Plaintiffs challenge the circuit court's order allowing them to use pseudonyms in public filings but denying their request for complete anonymity. According to Plaintiffs, the circuit erred by holding that it lacked authority to grant Plaintiffs' request; by refusing to adopt or apply the balancing approach some federal courts have taken; and by failing to assess the relevance of Plaintiffs' identities to the claims and defenses. (Pls.' Br. at 3–4.) All of Plaintiffs' arguments miss the mark.

The circuit court correctly held that anonymous litigation is contrary to Wisconsin law. And even if the law were otherwise, the circuit court did not misuse its discretion here—it allowed Plaintiffs to proceed using pseudonyms in publicly available filings and place their names and addresses under seal in an amended complaint, which adequately protects their privacy interests. The court properly rejected Plaintiffs' invitation to disregard state jurisprudence in favor of federal decisions applying federal procedure. And it rightly afforded counsel for Defendants-Respondents an opportunity in discovery to explore the individual facts and circumstances surrounding Plaintiffs' claims.

I. WISCONSIN LAW DOES NOT PERMIT—LET ALONE ENTITLE—A PLAINTIFF TO SUE ANONYMOUSLY.

As the circuit court observed (and as Plaintiffs concede), there is no precedent in Wisconsin authorizing a plaintiff to sue *anonymously*, in the manner Plaintiffs attempt here. (Pet. App. at 124; Pls.' Br. at 19.) Plaintiffs identify two sources of authority that allow for the *use of pseudonyms* in some public filings: Wis. Stat. § 801.21 and *State ex rel. Bilder v. Delavan Township*, 112 Wis. 2d 539, 334 N.S.2d 252 (1983). Both authorities are important and deserve attention, but they do not authorize *anonymous litigation*, as Plaintiffs incorrectly suggest. Section 801.21 and *Bilder* may provide for the placement of Plaintiffs' identities under seal, as the circuit court ordered here; but they do not empower a court to abandon the basic statutory requirement that the complaint must include the names of all known parties.

In *Bilder*, two newspapers intervened in an action brought by a police chief against his town board. *Bilder*, 112 Wis. 2d at 543. The newspapers contested a court order that placed pleadings and other filings under seal, arguing that the clerk's office had a statutory obligation to make all court records available for public inspection under Wis. Stat. § 59.14(1), which has since been renumbered as § 59.20(3). *See State v. Stanley*, 2012 WI App 42, ¶ 30 & n.9, 340 Wis. 2d 66, 814 N.W.2d 867. The court agreed, holding that the statute "reflects a basic tenet of the democratic system that people have the right to know about operations of their government, including the judicial branch, and that where public records are involved the denial of public examination is contrary to public policy and the public interest." *Id.* at 553. The Court ruled that filed exhibits are court records and, as such, the public has an "absolute right" to examine them, subject only to three recognized exceptions, none of which had been established in that case:

> (1) "a statute authoriz[es] the sealing of otherwise public records";
>
> (2) "disclosure [would] infringe[] on a constitutional right"; or
>
> (3) the circuit court in its "inherent power" determines that "the administration of justice requires it."

Id. at 554–56 (internal quotation marks and citations omitted).

Plaintiffs recognize *Bilder* only for the proposition that "circuit courts have 'inherent power' to restrict 'access to judicial records when the administration of justice requires it.'" (Pls.' Br. at 19 (quoting *Bilder*, 112 Wis.2d at 556).) But they disregard the rest of the Court's ruling. For instance, Plaintiffs make no mention of Wis. Stat. § 59.20(3), or the "legislatively mandated policy favoring open records" that it reflects. *Bilder*, 112 Wis. 2d at 556. And Plaintiffs ignore that as the party seeking to restrict access to court records based on the court's inherent power, they "bear the burden of demonstrating, with particularity, that the administration of justice requires that the court records be closed." *Id.* at 556–57. Those holdings remain controlling precedent and courts have consistently applied them. *See, e.g.*, *State v. Stanley*, 2012 WI App 42, ¶¶ 29–31, 340 Wis. 2d 663, 814 N.W.2d 867; *Krier v. EOG Envt'l, Inc.*, 2005 WI App 256, ¶ 9, 288 Wis. 2d 623, 707 N.W. 2d 915.

By its plain terms, Wis. Stat. § 802.04(1) requires a plaintiff to identify in the title of the action the names and addresses of all the parties.[3] Plaintiffs do not argue otherwise. Nor do they dispute that a complaint is a court record subject to public examination under Wis. Stat. § 59.20(3). Therefore, under the framework of *Bilder*, a party's identity (like any other information contained in court records) must be made available to the public, and courts may seal or redact that information only if a recognized exception applies. Nothing in Wis. Stat. § 801.21 (or anywhere else in Wisconsin law) allows Plaintiffs to exclude their names entirely and permanently from all court records.

Plaintiffs argue that Wis. Stat. § 801.21 itself supports their request for complete anonymity, but as explained below, that is a rule of procedure—not substance—and does not independently provide a legal basis for anonymous litigation. Plaintiffs do not assert that disclosure would infringe on a constitutional right, so the second *Bilder* exception can be set aside here. And Plaintiffs have not met their burden to show that the administration of justice requires complete anonymity in this case, such that the circuit court misused its discretion by denying their request. The circuit court's ruling should therefore be affirmed.

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[3] Other provisions reflecting the need for parties to disclose their identities include Wis. Stat. § 802.06(2)(a)1 (providing for dismissal for lack of capacity to sue or be sued); § 802.06(2)(a)7 (providing for dismissal for failure to join necessary party under § 803.03); and § 803.01 (requiring that claims be pursued by real party in interest).

A. Neither Wis. Stat. § 801.21 nor Any Other Wisconsin Statute Authorizes Anonymous Litigation.

The Wisconsin Legislature has provided a specific mechanism for requesting that information in court records be sealed or redacted, *see* Wis. Stat. § 801.21; and *Bilder* sets the legal standard for the courts to evaluate such a request. Plaintiffs' motion does not seek to seal or redact their names, but to omit them from the record *entirely* and *forever*. The circuit court properly rejected Plaintiffs' request because it conflicts with the framework set forth in § 801.21 and *Bilder* and has no basis in law.

Some information (such as social-security numbers and driver-license numbers) is deemed protected by statute. *See, e.g.*, Wis. Stat. § 801.19. The Director of State Courts maintains a list of commonly filed documents or case types that courts treat as confidential without the need for a motion to seal.[4] If a party seeks to protect information in a court record that is not automatically treated as confidential, then the party must file a motion and specify the authority for restricting public access. Information may be sealed temporarily until the court rules on the motion. Wis. Stat. § 801.21(2). If a court finds grounds to seal or redact information in public filings, then it must use "the least restrictive means that will achieve the purposes of this rule and the needs of the requester." *Id.* § 801.21(4). Critically, this statutory scheme allows for protection from *public disclosure*, but in all circumstances a party must submit the unredacted material for filing with the court under seal, and others may have access to the material subject to a protective order.

Plaintiffs incorrectly assume that Wis. Stat. § 801.21 is a substantive rule allowing anonymity, when it is plainly a procedural one setting forth a process to seek sealing of court records. In addition to the provisions discussed above, subsection (4) requires that a court determine "whether there are sufficient grounds exist to restrict public access according to applicable constitutional, statutory, and common law." *Id.*[5] There are

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[4] *See* https://www.wicourts.gov/services/attorney/docs/conf_flyer.pdf.

[5] The 2015 Comment to the Rule states:

> This section defines the procedural prerequisites for filing of documents under seal. This section is not intended to expand or limit the confidentiality concerns that might justify special treatment of any document. This section is intended to make it clear that filing parties do not have the unilateral right to designate any filing as confidential and that permission from the court is required. This permission may flow from a statute or rule explicitly requiring

undoubtedly statutory provisions that authorize redacting or sealing information, but none of those provisions entitle these Plaintiffs to seal or redact their name in court records, nor do they exempt Plaintiffs (or anyone else, for that matter) from the requirement in § 802.04(1) that the complaint must name all of the known parties to the litigation.

Defendants-Respondents acknowledge that a circuit court has discretion to protect certain information from public disclosure pursuant to Wis. Stat. § 801.21 if sufficient grounds exist to do so under *Bilder*. And Defendants-Respondents have not sought immediate review of the circuit court's order allowing Plaintiffs to proceed using pseudonyms. It bears repeating that the central issue that Plaintiffs present on appeal is not whether they may proceed without disclosing their identities *to the public*, but whether they are entitled to sue and litigate *anonymously as to the court*. The circuit court correctly rejected Plaintiffs' request as unfounded and contrary to law.

B. Anonymous Litigation Is Never in the Interests of Justice.

Because the law strongly favors public access to court records, a party faces a heavy burden when it tries to draw on the inherent power of the circuit court in order to limit such access. *See, e.g.*, *Krier*, 2005 WI App 256, ¶ 23 (citing *Estates of Zimmer v. Mewis*, 151 Wis. 2d 122, 134–35, 442 N.W.2d 578 (Ct. App. 1989)). Plaintiffs have not met their burden here. The inherent authority of circuit courts is undeniably broad; but it is not so expansive as to allow a court to disregard the unambiguous statutory requirement that a complaint must include the names of all known parties. Even if courts had the power to disregard Wis. Stat. § 802.04(1), the administration of justice would never call for it; and it certainly was not a misuse of discretion for the circuit court to reject Plaintiffs' request to do so in this case. *See* Section II, *infra.*

A fundamental tenet of democracy is that the people have the right to know what is happening in their government; and that principle applies with equal force to the court system. *See Bilder*, 112 Wis. 2d at 553 ("The courts, whose obligation it is to ensure that the executive and legislative

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that a particular document or portion of a document be filed confidentially or from an analysis of the facts of the case and the applicable law.

And see Sup. Ct. Order No. 14-04, 2015 WI 89 ("Comments to Wis. Stat. . . . [§] 801.21 are not adopted, but will be published and may be consulted for guidance in interpreting and applying the statute.").

branches of government remain open to public scrutiny, must abide by the same high standards they prescribe for others."). By bringing this lawsuit, Plaintiffs exposed themselves and their claims to some scrutiny, just as with any litigant. Indeed, as the Supreme Court observed, "[a]ny use of the judicial process opens information about a party's life to the public's scrutiny . . . ." *Id.* at 557. While courts in Wisconsin undoubtedly have inherent power to seal or redact court records (including party names) where justice requires, they do not have authority to allow anonymous litigation, which would not only undermine judicial transparency, but entirely frustrate the adversarial judicial process.

Even assuming for argument's sake that Plaintiffs have adequately shown that some protection of their identities were warranted, the circuit court properly denied Plaintiffs' request for complete anonymity because Plaintiffs failed to explain why the administration of justice requires their names to be omitted in all court records. A court may impose only "the least restrictive means that will achieve the purposes of this rule and the needs of the requester," Wis. Stat. § 801.21(4), and affording Plaintiffs complete anonymity is far broader than necessary to protect the public from learning their identities. For example, if Plaintiffs were given complete anonymity as they requested, then neither the District nor the public would know if these parents really exist or whether their children have actually been impacted by the Guidance. It is unfair and unrealistic to require the District to defend against speculative harms that have no factual basis, and Plaintiffs' proposal to omit this information is clearly not the least restrictive method to protect Plaintiffs' asserted interests.

Plaintiffs acknowledge that a protective order would "provide some protection" from the harms they contemplate (Pls.' Br. at 41), but they argue that "[t]he protective order contemplated by the circuit court, which is still not in place, would expose Plaintiffs' identities to an unreasonably large group of people." (*Id.*) But that argument is clearly speculative and premature; plaintiffs cannot challenge the terms of a protective order that has not even been entered yet. And regardless, appellate review of that protective order would be limited to whether the circuit court properly exercised its discretion. *See State v. Beloit Concrete Stone Co.*, 103 Wis. 2d 506, 511, 309 N.W.2d 28 (Ct. App. 1981).

Whatever Plaintiffs' interest may be in concealing their names from public disclosure, those concerns do not outweigh everyone's interest in

a fair and impartial judicial process. Disclosure of party names is necessary for the court to determine whether recusal is necessary and for counsel to ensure compliance with the conflicts-of-interest provisions in the Wisconsin Rules of Professional Conduct. *See, e.g.*, SCR 20:1.7(a) (instructing lawyers to assess whether representation involves concurrent conflict of interest). Furthermore, Plaintiffs' refusal to disclose their real identities, even under seal, would interfere with fundamental due-process rights, including the right of Defendants-Respondents to explore the particular facts and circumstances surrounding Plaintiffs' claims. *See, e.g.*, *Sands v. Whitnall Sch. Dist.*, 2008 WI 89, ¶ 18, 312 Wis. 2d 1, 754 N.W.2d 439 ("The right to discovery is an essential element of our adversary system."); *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶ 13, 243 Wis. 2d 119, 625 N.W.2d 876 (observing that broad discovery is essential "because the purpose of discovery is identical to the purpose of our trial system—the ascertainment of truth."). The circuit court correctly ruled that the administration of justice does not require complete anonymity here.

C. Plaintiffs Misconstrue and Overstate the Significance of Federal Cases Applying Federal Procedural Law.

Plaintiffs repeatedly assert that federal courts "uniformly apply" a balancing test to evaluate requests for complete anonymity. (*See, e.g.*, Pls.' Br. at 2, 8, 14, 19, and 20.) Plaintiffs then argue that the circuit court erred by failing to adopt or apply the federal standard to their request in this case, in state court. (*See, e.g.*, *id.* at 3, 14, and 40.) Plaintiffs are mistaken at every turn. The actual state of federal law on the use of pseudonyms is not dissimilar to *Bilder*, though it is muddied by the lack of uniform standards. Plaintiffs identify a very small number of federal cases where it appears that plaintiffs have been allowed to proceed without identifying themselves to the defendant, based on the specific factual circumstances of those cases. Those cases present quite different circumstances from the present case. In *Doe ex rel. Doe v. Elmbrook School District*, 658 F.3d 710 (7th Cir. 2011), for example, the school district never challenged plaintiffs request, and there was "no indication that litigating anonymously [would] have an adverse effect on the District or on its ability to defend itself in this or future actions." *Id.* at 721, 724*, vacated on other grounds*, 687 F.3d 840 (7th Cir. 2012). The parties also agreed to negotiate in good faith the terms of a protective order in the event that the parties sought information in discovery about plaintiffs' identities. The same is not true here. And, in any event,

Wisconsin law controls, and *Bilder* sets the standard for evaluating requests in state court to close court records from public scrutiny. Federal law is not binding even if it compelled a different result. *See, e.g.*, *State v. Muckerheide*, 2007 WI 5, ¶ 7, 298 Wis. 2d 553, 725 N.W.2d 930 ("Although a Wisconsin court may consider case law from such other jurisdictions, obviously such case law is not binding precedent in Wisconsin, and a Wisconsin court is not required to follow it.").

Plaintiffs state that "nearly every federal circuit has recognized that plaintiffs may sue anonymously in appropriate circumstances." (Pls.' Br. at 20.) That is simply false.[6] Plaintiffs stoke confusion and undermine their own arguments by repeatedly conflating the use of pseudonyms (which the circuit court allowed in this case) with anonymous litigation (which the circuit court denied). Federal court practices are actually quite varied with respect to the use of pseudonyms; and Plaintiffs do not cite any decision that addresses complete anonymity and endorses the notion that a plaintiff may pursue federal litigation without ever disclosing their identity in the court record.

Contrary to Plaintiffs' arguments, federal courts have not brushed aside as a mere technicality the requirement reflected in Federal Rule of Civil Procedure 10(a) to disclose party names in the complaint. For example, the Eleventh Circuit explained in *Doe v. Frank*, 951 F.2d 320, 322 (11th Cir. 1992), that Rule 10(a) "serves more than administrative convenience. It protects the public's legitimate interest in knowing all of the facts involved, including the identities of the parties." The Fourth Circuit observed that pseudonyms "undermine[] the public's right of access to judicial proceedings" and held that the public "has an interest in knowing the names of the litigants." *Doe v. Public Citizen*, 749 F.3d 246, 273 (4th Cir. 2014). And the Tenth Circuit ruled that courts lack jurisdiction over fictitious parties unless the party first gets permission from the court to use pseudonyms. *See Nat'l Comm. & Barter Ass'n, Nat'l Comm. Exchange v. Gibbs*, 886 F.2d 1240, 1245 (10th Cir. 1989).

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[6] It is also untrue that the United States Supreme Court "has also endorsed the practice" of pseudonymous litigation, as Plaintiffs contend. (Pls.' Br. at 21.) To be sure, the Supreme Court has taken and ruled on cases involving pseudonymous parties, but the Court has never addressed the propriety of that practice. Of course, as a cardinal rule, issues that "lurk in the record," but that have not been "brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

The Seventh Circuit, for its part, has stated that "[i]dentifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts." *Doe v. Blue Cross & Blue Shield United of Wis.*, 112 F.3d 869, 872 (7th Cir. 1997). Indeed, the Seventh Circuit has repeatedly and consistently expressed disfavor for pseudonymous litigation. *See, e.g.*, *id.* ("The use of fictitious names is disfavored."); *Doe v. Smith*, 429 F.3d 706, 710 (7th Cir. 2005) (noting that the circuit "disfavor[s] anonymous litigation" and that public interest in transparency is "frustrated when any part of litigation is conducted in secret"); *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) ("The concealment of a party's name impedes public access to the facts of the case, which include the parties' identity."); *Coe v. County of Cook*, 162 F.3d 491, 498 (7th Cir. 1998) ("We have criticized the overuse of pseudonyms in federal litigation, pointing out that the public has a right to know who is utilizing the federal courts that its tax dollars support."); *Doe v. Sheriff of DuPage County*, 128 F.3d 586, 587 (7th Cir. 1997) ("We hope we will not see too many more John or Jane Does in the future.").

II. EVEN IF WISCONSIN LAW WERE TO PERMIT ANONYMOUS LITIGATION, THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION.

The first issue presented is, "Are Plaintiffs entitled to proceed anonymously in this matter"? (Pls.' Br. at 1.) As explained in greater detail in Section I, *supra*, Plaintiffs are *not* entitled to proceed anonymously as a matter of law. Neither Wisconsin law, nor even the federal case law Plaintiffs relies on, says this. Entitlement to anonymity as a matter of law is directly contrary to the presumption of public access. Thus, this Court cannot instruct the circuit court to allow Plaintiffs to proceed anonymously. Even if the Plaintiffs are correct that these particular circumstances could allow them to proceed anonymously, this Court can only remand the case.

However, even if the circuit court could grant anonymity here, the circuit court properly exercised its discretion in denying Plaintiffs' request. Whether Plaintiffs' request is viewed under the supposed federal standard or applies the framework set forth in *Bilder* and Wis. Stat. § 801.21(4), the circuit court concluded that even if it had the authority to grant Plaintiffs' request, it would not exercise its discretion in that manner. Both Wis. Stat. § 801.21(4) and *Bilder* require the circuit court deciding a motion to seal to consider the need for protection and, if

it determines a need exists, apply the least restrictive means to meet that need. Wis. Stat. § 801.21(4); *Bilder*, 112 Wis. 2d 539, 334 N.W.2d 252. Federal courts agree that it is within the trial court's discretion whether to allow a party to proceed using pseudonyms. *See, e.g.*, *Vill. of Deerfield*, 819 F.3d at 376. Because the circuit court did not misuse its discretion in weighing the evidence and needs of the parties in this case, the circuit court's decision must stand.

The circuit court's discretion is no different under any of these standards. In Wisconsin, the circuit court must examine the relevant facts, apply a proper standard of law, and use a demonstrative rational process, to reach a conclusion that a reasonable judge could reach. *Lane v. Sharp Packaging Systems, Inc.*, 2002 WI 28, ¶ 19, 251 Wis. 2d 68, 640 N.W.2d 788. Plaintiffs have the burden of showing that the circuit court misused its discretion and this Court should not reverse unless misuse is clearly shown. *Lane*, 2002 WI 28, ¶ 19; *Konle*, 205 Wis. 2d at 393. The analysis would be the same under federal law. *See Elmbrook School District*, 658 F.3d at 721.

Here, the circuit court properly applied Wisconsin law in determining that although Plaintiffs had a need for protection from public disclosure, the least restrictive means to protect their interests was to protect their names from the public and parties, but to list them in an amended complaint filed under seal and disclosed only pursuant to a protective order. Plaintiffs would have this Court apply the *de novo* standard of review by ignoring the fact that the applicable Wisconsin law requires the circuit court to use "the least restrictive means that will achieve the purposes of this rule and the needs of the requestor." Wis. Stat. § 801.21(4). The circuit court properly exercised its discretion in denying Plaintiffs' specific request and finding that "a more appropriate course of conduct [i]s to require disclosure of the names under seal with a protective order for attorneys' eyes only." (R-App. at 13.)

Plaintiffs fail to explain how the circuit court misused its discretion by fashioning a narrowly tailored remedy, as required by the statute. Wis. Stat. § 801.21(4) (court must use "least restrictive means" of achieving purpose of sealing rule). Narrow tailoring serves to protect the "absolute right" of public access to court records, ensuring that information would be restricted only under extraordinary circumstances. *Bilder*, 112 Wis. 2d 539; Wis. Stat. § 801.21(4). The circuit court did not err in deciding that broader restrictions were unjustified here.

Because the circuit court had the discretion to determine whether to provide Plaintiffs with any protection and, if so, how much protection to provide, this Court must accept those findings of fact unless they are against the great weight and clear preponderance of the evidence. *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 249, 274 N.W.2d 647, 650 (1979). Here, Plaintiffs take issue with two findings: (1) that Defendants-Respondents will be prejudiced if limited in discovery as Plaintiffs propose, and (2) that the order allowing Plaintiffs to conceal their identities from the public and the parties did not go far enough.

Plaintiffs disagree that the circuit court's order adequately protected their privacy interests. Specifically, Plaintiffs now argue that every additional person with access to the information creates an additional risk of exposure to them. While Plaintiffs propose disclosing their identities only to the circuit court and one attorney for Defendants-Respondents, they strenuously object to other attorneys learning of their identities. Plaintiffs contend that even with an attorneys-eyes-only protective order, there remains a risk that their identities will be leaked. The circuit court considered that risk, however, and ruled that an attorneys-eyes-only protective order was appropriate. That decision was not in error but was an appropriate exercise of discretion.

Plaintiffs fail to show that this decision was a misuse of discretion. Plaintiffs argue that their concern is validated by a few extraordinary cases in which a protective order was violated, but fail to explain why these exceptions should make the rule of this case. Plaintiffs discount Defendants-Respondents' need for discovery here, a due process right of a party being sued, but the circuit court was not required to do so.

The circuit court did not misuse its discretion when it disagreed that Plaintiffs' identities are "completely immaterial to everything that follows in this case." (Pet. App. at 126–27.) Instead, the circuit court found that allowing Plaintiffs to proceed anonymously would limit the Defendants-Respondents' ability to obtain discovery and defend against Plaintiffs' claims. (*Id.* at 127.) Thus, Plaintiffs are wrong to suggest that the circuit court failed to apply a balancing test. (*See* Pls.' Br. at 40.) In fact, the circuit court explicitly stated that, "in balancing the considerations sought by the plaintiff, a more appropriate course of conduct was to require disclosure of the names under seal with a protective order for attorneys' eyes only," and it took into account both the need for discovery and Plaintiffs' concerns. (R-App. at 13–14.)

Moreover, Plaintiffs are wrong to argue that the circuit court needed to consider whether their identities are relevant. (*See* Pls.' Br. at 40.) Relevancy is *not* a factor the circuit court needs to consider under either *Bilder* or the federal standard Plaintiffs argue.

Nor can Plaintiffs support their argument by suggesting Defendants-Respondents had the burden of bringing forth evidence of the discovery they would seek. Plaintiffs had the burden on their motion. Wis. Stat. § 801.21(4). Plaintiffs provide no authority for why Defense counsel was required to disclose its work product here. *See State ex rel. Dudek v. Circuit Court for Milwaukee County*, 34 Wis. 2d 559, 588-89, 150 N.W.2d 387, 403-04 (1967) (adopting work product protection).

Plaintiffs brush aside the need for discovery to challenge their standing to pursue the declaratory relief they seek, but Defendants-Respondents need not accept their preferred version of the facts. Every civil litigant in Wisconsin has "an absolute right to discovery, using any statutory method." Melinda A. Bialzik et al., *Wisconsin Discovery Law and Practice*, § 1.3 (5th ed. 2017). Defendants-Respondents have the right to seek discovery to test any of the allegations or statements asserted by any of the Plaintiffs here. Even accepting Plaintiffs' allegations as true, they do not have standing to pursue these claims.

Plaintiffs contend that the individual facts don't matter because they "intentionally brought claims that do not depend on any disputable facts about them." (Pls.' Br. at 36.) But Plaintiffs do not get to determine for themselves the scope of discovery. Plaintiffs imply that their challenge is a facial one that does not turn on any individual facts, but that is not true. Under the well-established law in Wisconsin, "a facial challenge succeeds only when *every single application* of a challenged provision is unconstitutional." *SEIU v. Vos*, 2020 WI 67, ¶ 4 (emphasis added). Furthermore, Plaintiffs have failed to show standing to bring these claims and have not met the bare minimum to show that their declaratory judgment claims are justiciable. Defendants-Respondents must be given the opportunity to explore the facts surrounding Plaintiffs' claims.

The circuit court properly exercised its discretion by allowing Plaintiffs to keep their identities sealed from the public but also permitting Defendants-Respondents to seek discovery here. Plaintiffs' counsel agreed that with this solution, the risk of disclosure "is small." (App. at 121.) Indeed, whatever risk remains is purely speculative. Therefore, none of the federal-court factors supports Plaintiffs' request.

III. THE ORDER IS NOT APPEALABLE AS OF RIGHT.

When this Court accepted jurisdiction over this appeal, it ordered the parties to address in their briefs whether the circuit court's order under review is a final appealable order. (*See* Order, July 10, 2020.) Plaintiffs argue that the denial of its request is immediately appealable under the collateral-order doctrine, which Plaintiffs describe as the "federal equivalent to Wisconsin's statutory provision for final orders from a 'special proceeding." (Pls.' Br. at 46.) Plaintiffs are mistaken. The test that Wisconsin courts apply in determining whether an order was rendered in an action or a special proceeding is fundamentally different than the test federal courts apply in connection with the collateral order doctrine. Regardless, the circuit court's order under review is not final because it did not dispose of the entire matter in controversy. Plaintiffs' request for anonymity did not initiate a "special proceeding," and the circuit court's order requiring Plaintiffs to list their names in an amended complaint filed under seal is not a "final order." Therefore, Wis. Stat. § 808.03(2)[7] may allow for permissive appeal in these circumstances, but Plaintiffs may not appeal the order as a matter of right under § 808.03(1).[8]

In *L.G. by Chippewa Family Services, Inc. v. Aurora Residential Alternatives, Inc.*, 2019 WI 79, 387 Wis. 2d 724, 929 N.W.2d 590, the Wisconsin Supreme Court recently considered finality and the meaning

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[7] Wis. Stat. § 808.03(2) states:

> A judgment or order is not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that at appeal will:
> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
> (b) Protect the petitioner from substantial or irreparable injury; or
> (c) Clarify an issue of general importance in the administration of justice.

[8] Wis. Stat. § 808.03(1) states:

> A final judgment or a final order of a circuit court or county may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

of "special proceeding" in the context of Wis. Stat. § 808.03(1). The Court explained that "finality" has two components:

> Our statutes say that "[a] final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether [it is] rendered in an action or special proceeding . . ." Wis. Stat. § 808.03(1). The first component, therefore, relates to whether the order in question is part of an "action," or, instead, a "special proceeding." The second component relates to whether the order disposed of the entire matter in dispute between the parties.

Id. at ¶ 10. Applying the standards the Court laid out in *Aurora Residential Alternatives*, the only reasonable conclusion is that the circuit court's order denying Plaintiffs anonymity was issued as part of an "action," and it is a non-final order because it did not dispose of the entire matter in dispute between the parties.

A. The Order under Review Was Rendered in an "Action."

The Court in *Aurora Residential Alternatives* recognized that the distinction between an "action" and a "special proceeding" is important "because it will define the 'matter in litigation' that must be resolved before we may consider whether the order was final." *Aurora Res. Alternatives*, 2019 WI 79, ¶ 11. That case involved a motion to stay proceedings and compel arbitration under Wis. Stat. § 788.02. The Court reaffirmed a test adopted more than 100 years earlier, in *Voss v. Stoll*, 141 Wis. 267, 124 N.W.2d 89 (1910):

> [T]he test to be applied in determining the nature of any judicial remedy, as regards whether it is a special proceeding, is whether it is a mere proceeding in an action, or one independently thereof or merely connected therewith. The latter two belong to the special class and the other does not.

Aurora Res. Alternatives, 2019 WI 79, ¶ 18 (quoting *Voss*, 141 Wis. at 271). The Court concluded that a motion to stay proceedings and compel arbitration under Wis. Stat. § 788.02 was a "special proceeding" in part because the "circuit court's resolution of the application is entirely self-contained, inasmuch as it simply determines the forum for resolution of the dispute without addressing the dispute's merits." *Id.*, ¶ 17.

The circuit court's order here was in response to a typical pretrial motion in the Plaintiffs' civil action. Although any pretrial motion can be decided separately, that does not make every such motion an independent "special proceeding." A request under Wis. Stat. § 801.21 that certain information be protected from public disclosure is similar in kind to a decision imposing terms of a protective order, which is intertwined with the underlying action and cannot be construed as a standalone "special proceeding."

Plaintiffs argue that the Supreme Court "recently held that involuntary medication orders . . . are immediately appealable as of right for essentially the same reasons the federal cases invoke for orders pertaining to anonymity requests," citing *State v. Scott*, 2018 WI 74, ¶ 27, 382 Wis. 2d 476, 914 N.W.2d 141. (Pls.' Br. at 46.) *Scott* involved a determination of incompetency, which the Court determined was not part of the defendant's underlying criminal proceeding but "merely connected" to it and resolving "an issue separate and distinct from the issues presented in the defendant's underlying criminal proceeding." *Id.*, ¶ 33. Plaintiffs' attempt to draw comparisons between a competency determination and a ruling on whether Plaintiffs may protect their names from public disclosure, but the two are not remotely the same.

The order under review is inextricably intertwined with the underlying proceedings that Plaintiffs initiated against the District, and cannot reasonably be viewed as a separate "special proceeding." And the existence of this case on appeal belies Plaintiffs' contention that such an order would be "effectively unreviewable" if Plaintiffs could not seek immediate appeal. (Pls.' Br. at 47.) In any event, *Voss* does not allow courts to consider whether an order is "effectively unreviewable"; the critical question is whether the decision is self-contained and separate from the main judicial proceeding. In this case, the *Voss* test demonstrates that the court's decision denying Plaintiffs complete anonymity is an order issued in an "action," not a "special proceeding."

B. The Circuit Court's Decision under Review is Not Final.

Because the order under review was rendered in the underlying civil action and not a "special proceeding," it is plain that the circuit court's order is not final in that does not dispose of "the entire matter in litigation as to one or more of the parties." Wis. Stat. § 808.03(1). Even assuming that Plaintiffs' request for anonymity constituted a "special proceeding," the circuit court's order cannot be construed as final.

The circuit court denied Plaintiffs' request for complete anonymity but granted Plaintiffs' request to withhold their identities in publicly filed documents. The circuit court also ordered the parties to negotiate the terms of a protective order. But Plaintiffs did not submit a proposed protective order and chose instead to pursue this appeal. Therefore, issues remain between the parties even with respect to the issue of whether and to what extent Plaintiffs' identities must be disclosed.

Plaintiffs contend that because an order denying the request to use pseudonyms is immediately appealable as of right in federal court under the collateral-order doctrine, it must also be immediately appealable as of right as a final order in a special proceeding. That argument fails. The standards that federal courts apply to determine whether a non-final order is nevertheless reviewable as a matter of right have no analog in Wisconsin law. In order to fall within the collateral-order doctrine, a non-final order must (1) conclusively resolve the issue presented; (2) resolve an important issue separate from the merits; and (3) be "effectively unreviewable" on appeal from final judgment. *See, e.g.*, *Doe v. Village of Deerfield*, 819 F.3d 372, 375 (7th Cir. 2016) (citing *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)). Wisconsin law, by contrast, requires a final order in all circumstances in order to be qualify for an appeal as a matter of right under Wis. Stat. § 808.03(1).

The circuit court's order denying Plaintiffs' motion for complete anonymity and requiring them to submit an amended complaint listing their identities under seal is a non-final order in the civil proceedings Plaintiffs initiated against the District. If this Court were to conclude otherwise, it may be difficult to draw reasonable lines that do not altogether vitiate the requirement of finality. The order under review is indistinguishable from other court orders addressing terms of protective orders or motions to seal and redact information from court records. Further proceedings are required before the circuit court on this particular issue, including the entry of a protective order. Permitting Plaintiffs to appeal the order as a matter of right would undoubtedly open the floodgates to countless interlocutory appeals, which in turn would disrupt the orderly administration of justice. *Cf. Deerfield*, 819 F.3d at 375 (noting that factors for collateral review must be stringently applied, "lest the collateral order doctrine exception swallow the whole of the final order doctrine"). Plaintiffs and similar parties seeking immediate review of such orders may still petition for permissive appeal, but they have no right to an immediate appeal.

CONCLUSION

For all of these reasons set, Defendants-Respondents respectfully urge this Court to affirm the circuit court's decision under review.

DATE: October 5, 2020

Respectfully submitted,

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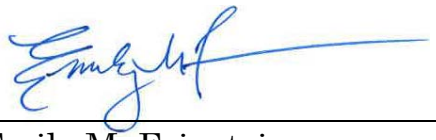
CERTIFICATION AS TO FORM AND LENGTH

In accordance with Wis. Stat. § 809.19, I certify that this Joint Response Brief of Defendants-Respondents conforms to the rules specified in Wis. Stat. § 809.19(8)(b) and (c), as to form and length for a brief and appendix produced with a proportional serif font. The length of this submission is **9,334** words.

DATE: October 5, 2020



Emily M. Feinstein

STATEMENT OF MAILING AND SERVICE

I certify that I caused this Joint Response Brief of Defendants-Respondents to be placed in a U.S. mailbox on October 5, 2020. An original and 9 copies, along with an additional copy to be authenticated and returned, were mailed with a self-addressed stamped envelope to the Clerk of the Wisconsin Court of Appeals, 110 East Main Street, Suite 215, PO Box 1688, Madison, WI 53701-1688. Copies were also sent to counsel at the following addresses:

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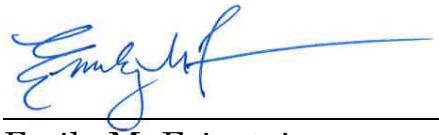

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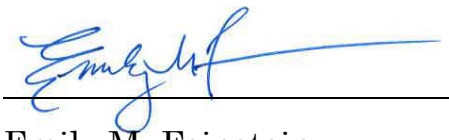
I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.



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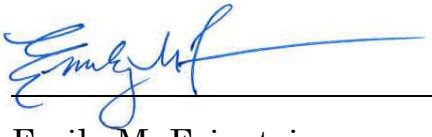
APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. This is not an appeal taken from a circuit court order or judgment entered in a judicial review of an administrative decision, and no portion of the record is required by law to be confidential.



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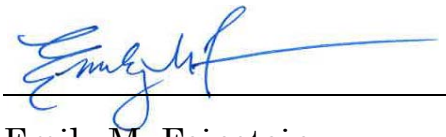
I hereby certify that I have submitted an electronic copy of the appendix which complies with the requirements of Wis. Stat. § 809.19(13). I further certify that the content of the electronic copy of the appendix is identical to the content of the paper copy of the appendix filed as of this date.



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