STATE OF WISCONSIN CIRCUIT COURT BRANCH 8 DANE COUNTY

JOHN and JANE DOE 1, et al.,

Plaintiffs,

v. Case No. 20-CV-454

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS AND REPLY IN SUPPORT OF MOTION TO PROCEED USING PSEUDONYMS

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* *Pro hac vice* motion granted.

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INTRODUCTION

The Madison Metropolitan School District has adopted a policy allowing its schools to conduct a psychosocial experiment on children experiencing gender dysphoria and to keep this a secret from their parents. Plaintiffs, parents of children in the District, challenged this policy both to protect their children from harm and to ensure that the District respects their constitutional right to participate in major decisions involving their children. The District has filed a motion to dismiss, the gist of which is that parents cannot preemptively challenge this policy, but must wait until some unspecified point in the future when the threat of harm to their children and their rights is more imminent. But the District's policy of secrecy prevents parents from knowing when harm is imminent, or worse, realized. Were the District's arguments to prevail, Plaintiffs may have no recourse until after their rights have been violated and irreparable harm done to their children. The District's position cannot be correct, and, fortunately, it is not. Declaratory relief and temporary injunctions exist precisely to anticipate and prevent harm. Forcing Plaintiffs to "wait[ ] until [harm] actually occur[s] would defeat the purpose of the declaratory judgment statute." *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 46, 244 Wis. 2d 333, 627 N.W.2d 866.

The District also opposes Plaintiffs' request to proceed anonymously, but it has no persuasive response to the four well-recognized grounds for anonymity Plaintiffs put forth, nor does it have an answer to on-point cases from the Fifth, Sixth, Seventh, and Ninth Circuits, as well as various district courts, allowing parents to anonymously challenge controversial school policies. The District downplays Plaintiffs' evidence of a serious risk of retaliation against them or their minor children, but the reaction to this case post-filing has only confirmed Plaintiffs' concerns. And the District cannot come up with any good reason for needing to know who the Plaintiffs are, so this Court should grant Plaintiffs' reasonable request to use pseudonyms.

BACKGROUND ON PLAINTIFFS' CLAIMS

As described in detail in Plaintiffs' complaint,[1] the Madison Metropolitan School District (the "District") has adopted a policy that enables children, of *any age*, to socially transition to a different gender identity at school without parental notice or consent, prohibits teachers from communicating with parents about this life-altering choice without the child's consent, and even directs teachers and staff to actively deceive parents by reverting to the child's birth name and corresponding pronouns whenever the child's parents are nearby. Compl. ¶¶ 1, 39–44. Worse yet, the District has directed teachers to keep records of this out of the child's file to circumvent the state law giving parents access to their children's records. Compl. ¶ 51; Wis. Stat. § 118.125.

Plaintiffs challenged this Policy because gender identity transitions during childhood are highly controversial, may have long-lasting effect, and may even do significant harm. Compl. ¶¶ 21–30; 65. As the complaint notes, many mental-health professionals believe that transitions during childhood can "becom[e] self-reinforcing," causing a child to continue to experience gender dysphoria[2] when the dysphoria might otherwise have resolved itself, as it does for the vast majority of children who do not transition. Compl. ¶¶ 21, 25–26 (noting studies showing roughly 80-90% desistance rates). Dr. Kenneth Zucker, for example, who led "one of the most well-known clinics

[1] All of the allegations in the complaint must be accepted as true, and inferences drawn in Plaintiffs' favor, for purposes of the motion to dismiss. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 14 n.5, 326 Wis. 2d 1, 783 N.W.2d 855.

[2] The District argues that "gender nonconformity is not the same as gender dysphoria." Defs. Br. 4, 10. While there may not be perfect overlap, a mismatch between a person's biological sex and perceived or desired gender identity is "often associated" with gender dysphoria, a "serious mental-health condition." Compl. ¶¶ 16, 17. The District concedes that it is not equipped to determine whether a child who wants to transition is dealing with gender dysphoria, Defs. Br. 10–11, which is partially why parents need to be involved—to obtain professional assistance, Compl. ¶¶ 30–31, 66, 81; *see also infra* p. 15.

in the world for children and adolescents with gender dysphoria,"[3] has publicly argued that "support[ing], implement[ing], or encourag[ing] a gender social transition … [is a form of] psychosocial treatment that will increase the odds of long-term persistence." Compl. ¶ 26 (quoting Kenneth J. Zucker, *The Myth of Persistence: Response to "A Critical Commentary on Follow-Up Studies & 'Desistance' Theories about Transgender & Gender Non-Conforming Children" by Temple Newhook et al.*, 19:2 Int'l J. of Transgenderism 231 (2018)[4]). Even WPATH, an advocacy organization that generally promotes transitioning, acknowledges that "[s]ocial transitions in early childhood" are "controversial," that "health professionals" have "divergent views" on whether a transition is helpful or harmful, and that there is insufficient evidence at this point "to predict the long-term outcomes of completing a gender role transition during early childhood." Compl. ¶¶ 28–29 (quoting WPATH Guidelines). WPATH recommends that health professionals *defer to parents* "as they work through the options and implications." Compl. ¶¶ 30–31.

The potential harms from transitioning are fleshed out in much greater detail in a 50-page affidavit (attached to Plaintiffs' temporary injunction motion) from Dr. Stephen Levine, who has over 40 years of experience treating gender-identity issues and who was the *court-appointed* expert in the leading case in the country on sex-reassignment surgery. *See* Levine Aff. ¶¶ 4–5; *Kosilek v. Spencer*, 774 F.3d 63 (1st Cir. 2014). Dr. Levine explains that a social transition during childhood "is a major, experimental, and controversial psychotherapeutic intervention that substantially changes outcomes," Levine Aff. ¶¶ 60–69, and he surveyed various physical, social, and mental-health risks associated with transitioning, Levine Aff. ¶¶ 98–120.

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[3] *See* Jesse Singal, *How the Fight Over Transgender Kids Got a Leading Sex Researcher Fired*, The Cut (Feb. 7, 2016), https://www.thecut.com/2016/02/fight-over-trans-kids-got-a-researcher-fired.html.

[4] https://www.researchgate.net/publication/325443416

Plaintiffs' complaint also shows that transitioning is not the only therapeutic option for children questioning their biological sex. Compl. ¶¶ 22–23. Rather, "many medical and psychiatric professionals believe that children experiencing gender dysphoria can learn to embrace their biological sex and therefore support psychotherapy to help identify and address the underlying causes of the dysphoria." Compl. ¶ 23. Dr. Levine describes the various treatment approaches in much greater detail. Levine Aff. ¶¶ 29–44; 54–59. It is important to emphasize that these alternate approaches are mutually exclusive; "affirming" and encouraging a child's transition to a different gender identity is directly at odds with seeking to help a child learn to embrace his or her biological sex. *See* Compl. ¶¶ 22–25.

Given that transitioning is controversial and experimental, that it has the potential to alter a child's life trajectory and even cause harm, and that there are alternatives to transitioning, Plaintiffs naturally want to be involved in any decision about whether their child will transition, should their child begin to experience gender dysphoria or express a desire to adopt an alternate gender identity. Compl. ¶¶ 63–66.

As Plaintiffs have shown in their complaint, they have a constitutional right to participate in decisions of this magnitude. Compl. ¶¶ 70–97. A long line of cases recognizes that parents are the primary decision-makers with respect to their minor children and that their decision-making role is constitutionally protected, by both Article 1, Section 1, and Article 1, Section 18 of the Wisconsin Constitution. *Jackson v. Benson*, 218 Wis. 2d 835, 879, 578 N.W.2d 602 (1998) ("Wisconsin has traditionally accorded parents the *primary* role in decisions regarding the education and upbringing of their children."); *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486; *City of Milwaukee v. K.F.*, 145 Wis. 2d 24, 42–43, 426 N.W.2d 329 (1988); *Barstad v. Frazier*, 118 Wis. 2d 549, 567, 348 N.W.2d 479 (1984); *In Interest of*

D.L.S., 112 Wis. 2d 180, 184, 332 N.W.2d 293 (1983); *State v. Yoder*, 49 Wis. 2d 430, 438, 182 N.W.2d 539 (1971); *State v. Kasuboski*, 87 Wis. 2d 407, 416, 275 N.W.2d 101 (Ct. App. 1978). Parental decision-making authority is especially critical—and therefore most protected—on "matters of the greatest importance," such as medical care and decisions "rais[ing] profound moral and religious concerns." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 184 (3d Cir. 2005); *Bellotti v. Baird*, 443 U.S. 622, 640 (1979); *Parham v. J. R.*, 442 U.S. 584, 603 (1979) ("Most children, even in adolescence, simply are not able to make sound judgments concerning … their need for medical care or treatment. Parents can and must make those judgments.").

Plaintiffs brought a preemptive challenge to the District's policy because they "have no way to know in advance whether their children will experience gender dysphoria," Compl. ¶ 67, and, if any of their children begin to question their sex at school (perhaps as a direct result of what the District is teaching them, *see* Compl. ¶¶ 35–38), the District's Policy "enable[s] their children to change gender identity at school without their consent and prevent[s] teachers from notifying Plaintiffs about it," Compl. ¶ 68. Plaintiffs explained that they "cannot wait to challenge this Policy" because teachers or other school staff may be the first to learn that their child is dealing with gender dysphoria, and if so the District's Policy requires staff to facilitate a transition and to "keep this information secret from [the parents]." Compl. ¶ 69. By the time they "learn the truth," it may be too late to prevent the harms described above. Compl. ¶ 69.

Plaintiffs' temporary injunction filings provide further evidence to support these concerns. Dr. Levine's affidavit explains that "an individual's [gender] identity [can] evolve—often markedly—across the individual's lifetime," that "childhood gender identity is not inherently stable in either direction," and that "the sudden increase in incidence of child and adolescent gender dysphoria over the last twenty years … strongly suggest[s] cultural factors" are at play. Levine

Aff. ¶¶ 26, 61–62 and n.17. Plaintiffs also provided the personal testimony of a parent whose daughter suddenly became convinced she was transgender and transitioned at school, all without her parents knowing about it, because she had never previously shown any "discomfort with being a girl or any interest in being a boy." Keck Aff. ¶¶ 1–19.

The District *concedes* that "[i]t is fundamentally the parents' role to seek diagnosis and treatment for their children," Def. Br. 10, that "'[t]he teaching profession is not ordinarily associated with psychotherapy,' and it is not part of most teachers' training, education, or experience," Def. Br. 11 (quoting *State v. Ambrose*, 196 Wis. 2d 768, 778 & n.3, 540 N.W.2d 208 (Ct. App. 1995), and that "federal law prohibits [teachers] from" "diagnos[ing] students' mental-health conditions or provid[ing] treatment without parental consent," Def. Br. 11 (citing 20 U.S.C. § 1232h(b)). Yet, notwithstanding these concessions, the District has filed a motion to dismiss arguing that parents may not preemptively challenge a policy requiring teachers and other staff to secretly facilitate gender identity transitions at school—which many mental-health professionals consider to be a controversial, experimental, and potentially life-altering form of "psychosocial treatment" for children questioning their biological sex. Compl. ¶ 26.

ARGUMENT

I. Parents Can Preemptively Challenge a Policy That Allows Schools to Secretly Conduct a Psychosocial Experiment on Their Children

It is well established that "a plaintiff seeking declaratory judgment need not actually suffer an injury before seeking relief." *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626. The Declaratory Judgment Act's stated purpose is "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Wis. Stat. § 806.04(12). In other words, the Act "is *primarily* anticipatory or preventative in nature." *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307,

240 N.W.2d 610 (1976) (emphasis added). It is expressly designed to "allow courts to … resolve identifiable, certain disputes between adverse parties … *prior to the time that a wrong has been threatened or committed*." *Putnam* 2002 WI 108, ¶ 43 (citations omitted, emphasis in original).

Moreover, the Act itself says that it "is to be liberally construed and administered," Wis. Stat. § 806.04(12), prompting the Wisconsin Supreme Court to observe, on more than one occasion, that declaratory relief is appropriate "wherever it will serve a useful purpose." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42, 309 Wis. 2d 365, 386, 749 N.W.2d 211 (quoting *Lister*, 72 Wis. 2d at 307); *Putnam*, 2002 WI 108, ¶ 43 (same).

The Court has identified four basic requirements for a declaratory judgment, only two of which are at issue here: first, "[t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest" (as the District notes, this requirement has frequently been equated with standing) and second, "[t]he issue involved in the controversy must be ripe for judicial determination." *E.g.*, *DSG Evergreen Family Ltd. P'ship v. Town of Perry*, 2020 WI 23, ¶ 39, 390 Wis. 2d 533, 939 N.W.2d 564.

The District argues that Plaintiffs do not meet either of these requirements, Def. Br. 8–11, but it is wrong on both counts. To draw a simple analogy, if the District's policy toward bee stings (or any other condition) were to administer an experimental drug unapproved by the FDA, without parental notice or consent, parents would surely have standing to challenge that policy preemptively and would not have to wait until their child had been stung and the drug administered. That hypothetical is equivalent to Plaintiffs' claim here: Gender dysphoria can be a "serious mental-health condition that requires professional help," Compl. ¶ 17, the first manifestation of it could come at school, without the parents' awareness, Compl. ¶ 67, and the District's policy allows

schools to secretly facilitate a controversial and experimental form of "psychosocial treatment" with, at best, unknown long-term implications and, at worst, significant harm. Compl. ¶¶ 25–29.

A. Parents Have Standing to Challenge a Threatened Infringement of Their Parental Role and to Prevent Potential Harm to Their Children

Standing is not a high bar in Wisconsin courts, in part because they are not subject to the federal constitution's jurisdictional "cases" or "controversies" requirement. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855 (citing U.S. Const. art. III, § 2, cl. 1). The Wisconsin Supreme Court has repeated time and again that standing "should be construed liberally," not "narrowly or restrictively." *E.g.*, *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 38, 333 Wis. 2d 402, 797 N.W.2d 789. Even a "trifling interest" can suffice. *McConkey*, 2010 WI 57, ¶ 15 (citations omitted). And for declaratory judgment actions in particular, standing is especially forgiving, because a declaratory judgment action by definition "affords relief from an uncertain infringement of a party's rights." *See State ex rel. Vill. of Newburg v. Town of Trenton*, 2009 WI App 139, ¶ 10, 321 Wis. 2d 424, 773 N.W.2d 500.

As indicated, unlike in federal courts, standing is "not a matter of jurisdiction, but of sound judicial policy." *McConkey*, 2010 WI 57, ¶ 15. The purpose of the standing inquiry is simply to ensure that the "the issues and arguments presented will be carefully developed and zealously argued." *Id.* ¶ 16 (citations omitted). There are only two basic requirements for standing—"plaintiffs must show [1] that they suffered or were threatened with an injury [2] to an interest that is legally protectable." *Marx v. Morris*, 2019 WI 34, ¶ 35, 386 Wis. 2d 122, 925 N.W.2d 112.

There is no question that Plaintiffs invoke an "interest that is legally protectable." *Id.* Plaintiffs assert their constitutional right to be the primary decision-makers with respect to their minor children, *Jackson*, 218 Wis. 2d at 879; *A.A.L.*, 2019 WI 57, ¶ 15; *K.F.*, 145 Wis. 2d at 42–43; *Barstad*, 118 Wis. at 567; *In Interest of D.L.S.*, 112 Wis. 2d at 184; *Yoder*, 49 Wis. 2d at 438;

Kasuboski, 87 Wis. 2d at 416, and courts have recognized that a school violates parents' constitutional rights if it attempts to usurp their role in significant decisions. In *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), for example, a high school swim coach suspected that a team member was pregnant, and, rather than notifying her parents, discussed the matter with other coaches, guidance counselors, and teammates, and eventually pressured her into taking a pregnancy test. *Id*. at 295–97, 306. The mother sued the coach for a violation of parental rights, explaining that, had she been notified, she would have "quietly withdrawn [her daughter] from school" and sent her to live with her sister until the baby was born. *Id*. at 306. "[M]anagement of this teenage pregnancy was a family crisis," she argued, and the coach's "failure to notify her" "obstructed the parental right to choose the proper method of resolution." *Id*. at 306. The court found that the mother had "sufficiently alleged a constitutional violation" against the coach and condemned his "arrogation of the parental role": "It is not educators, but parents who have primary rights in the upbringing of children. School officials have only a secondary responsibility and must respect these rights." *Id.* at 307.

The District's Policy also "threaten[s]" Plaintiffs with at least four types of "injury." *Marx*, 2019 WI 34, ¶ 35. First, and most importantly, the District's policy directly threatens to harm Plaintiffs' children. As explained in more detail above, many mental-health professionals believe that transitioning during childhood can do lasting harm by causing gender dysphoria to "become self-reinforcing," Compl. ¶¶ 21, 25–26, which, in turn, can have "long-lasting negative ramifications on a child's physical, mental, and spiritual well-being," Compl. ¶ 65, ramifications that are described extensively in Dr. Levine's affidavit, *supra* p. 3.

Second, the District's Policy threatens to undermine Plaintiffs' ability to choose a treatment approach that does not involve an immediate transition for a child experiencing gender dysphoria. Compl. ¶¶ 23–25; 63–64; 79.

Third, the District's secrecy policy may prevent Plaintiffs from learning that a child of theirs is dealing with gender dysphoria and "provid[ing] professional assistance their child[ ] may urgently need," Compl. ¶ 81, given that "[g]ender dysphoria can be a serious mental-health condition that requires professional help," Compl. ¶ 17.

And finally, the Policy's facial infringement of Plaintiffs' constitutional right to participate in major decisions involving their children is an injury in itself, as courts have regularly found. Compl. ¶ 79; *see Wright & Miller*, 11A Fed. Prac. & Proc. § 2948.1 (3d. ed.) ("When an alleged deprivation of a constitutional right is involved … most courts hold that no further showing of irreparable injury is necessary.").

Not only does the District's Policy threaten significant harm, it has *already* harmed the Plaintiffs by creating fear and anxiety that the District will do what its Policy says and hide from them what is happening to their children at school. Compl. ¶ 68; *E.g.*, John Doe 1 Aff. ¶ 22. The Declaratory Judgment Act exists "to afford relief from uncertainty and insecurity," Wis. Stat. § 806.04(12), and Wisconsin courts have recognized that a threat affecting a person's present "sense of safety and security" can be sufficient for standing. *See State ex rel. Parker v. Fiedler*, 180 Wis. 2d 438, 453, 509 N.W.2d 440 (Ct. App. 1993) (holding that the neighbor of a halfway house had standing to challenge the early release of a parolee because "the statutes regulating criminal conduct were designed to protect" the community's interests in "safety and security"), *reversed on other grounds by* 184 Wis. 2d 668, 517 N.W.2d 449 (1994).

The standing analysis is even more apparent when framed in terms of its underlying purpose—Plaintiffs unquestionably have a sufficient "personal stake" such that "the issues and arguments presented will be carefully developed and zealously argued." *McConkey*, 2010 WI 57, ¶ 16. Plaintiffs are all parents of children in District schools who are deeply concerned, for good reason, *see supra* pp. 2–4, that, if one of their children begins to experience gender dysphoria, the District's Policy will harm their child and interfere with their ability to decide what is best for their child. Compl. ¶¶ 63–69.

The District has no real response to any of this, but instead asserts that Plaintiffs "do not have a personal stake" in this case and "are not directly affected" because they do not "allege that any of their children have been diagnosed with gender dysphoria or are struggling with gender-identity issues." Def. Br. 8–9. The District's gambit is obvious. As the complaint explains, because of the way the District has designed its policy, Plaintiffs "have no way to know in advance whether their children will experience gender dysphoria," Compl. ¶ 67, and if their children do begin to deal with this and tell someone at their school first, the District's policy allows the school to secretly take their child down a path that may be very hard to un-walk, Compl. ¶¶ 26, 69. And, given the secrecy, Plaintiffs have no recourse but to challenge the Policy now, before harm has been done. This is more than sufficient for standing, especially for a declaratory judgment action, which exists to "afford[ ] relief from an uncertain infringement of a party's rights." *State ex rel. Vill. of Newburg*, 2009 WI App 139, ¶ 10. The District cannot be allowed to simply immunize its policy from challenge.

Wisconsin courts have regularly found standing even though the threatened injury depends upon some future event that may not occur. In *Norquist v. Zeuske*, 211 Wis. 2d 241, 249, 564 N.W.2d 748 (1997), the Court held that an agricultural land-owner had standing to bring a

uniformity-clause challenge to a freeze on property assessments because his "property values *may* decrease resulting in higher real property taxes relative to other agricultural land." *Id.* ¶ 12 (emphasis added). In *Putnam*, 2002 WI 108, the Court held that Time Warner customers had standing to challenge a late-fee provision even though "the late-payment fees might never be imposed on these customers, because the customers themselves control whether they will be late in paying their monthly cable bills." *Id.* ¶¶ 44–46. And in *State ex rel. Parker v. Fiedler*, the Court of Appeals held that a neighbor to a halfway house had standing to challenge the early release of a parolee even though "one cannot say for certain that [the parolee] will harm either the individual relators or others in the community." 180 Wis. 2d 438.

Federal courts—where standing is jurisdictional and generally much stricter, *see McConkey*, 2010 WI 57, ¶ 15—have also found standing in cases involving a threat of injury that may or may not occur. In *Village of Elk Grove Village v. Evans*, for example, the Seventh Circuit found that a village had standing to challenge a permit for construction of a radio tower because the tower would "increase the risk of flooding." 997 F.2d 328, 329 (7th Cir. 1993). "The injury is of course probabilistic," observed the Court, "but even a small probability of injury is sufficient to create a case or controversy—to take a suit out of the category of the hypothetical—provided of course that the relief sought would, if granted, reduce the probability." *Id.* at 329 (7th Cir. 1993) (listing cases); *Sierra Club v. Franklin Cty. Power of Illinois, LLC*, 546 F.3d 918, 928 (7th Cir. 2008) (favorably quoting this portion of *Elk Grove Village*); *Mountain States Legal Found. v. Glickman*, 92 F.3d 1228, 1234 (D.C. Cir. 1996) (same); *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 160 (4th Cir. 2000) (same); *see also Pisciotta v. Old Nat. Bancorp*, 499 F.3d 629, 634 (7th Cir. 2007) ("As many of our sister circuits have noted, the injury-in-fact requirement can be satisfied by a threat of future harm or by an act which harms the plaintiff

only by increasing the risk of future harm that the plaintiff would have otherwise faced, absent the defendant's actions.")

Finally, there is no merit whatsoever to the District's argument that Plaintiffs have no further interest than mere "disagree[ment] with the District's approach." Def. Br. 9. The Plaintiffs have children in schools within the District, Compl. ¶¶ 2–8, and rightfully want to direct any major decision affecting their children's health and well-being, Compl. ¶¶ 63–69.

B. Plaintiffs' Claim for Declaratory and Injunctive Relief is Ripe Before the District's Policy Causes Harm to Them or Their Children

Given that a declaratory judgment "is primarily anticipatory or preventative in nature," *Lister*, 72 Wis. 2d at 307, the ripeness required in a declaratory action is, "[b]y definition," "different from the ripeness required in other actions." *Milwaukee Dist. Council 48*, 2001 WI 65, ¶ 41; *Putnam*, 2002 WI 108, ¶ 44. The facts must be "sufficiently developed to allow a conclusive adjudication," *Milwaukee Dist. Council 48*, 2001 WI 65, ¶ 41, but "this does not mean that all adjudicatory facts must be resolved as a prerequisite to a declaratory judgment." *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 694–95, 470 N.W.2d 290 (1991). Instead, what matters is whether the facts *relevant to the legal question* are so "shifting and nebulous," or "so contingent and uncertain," that the dispute is effectively an "abstract disagreement[ ]." *Miller Brands*, 162 Wis. 2d at 694–95, 697; *Putnam*, 2002 WI 108, ¶ 44.

Milwaukee District Council 48 illustrates how ripeness should be applied in declaratory judgment actions. In that case, a union sought a preemptive declaration that employees were entitled to a due-process hearing before Milwaukee County could deny vested pension benefits if an employee were to be terminated for cause. 2001 WI 65, ¶¶ 2–3. The Court held that the union's claim was ripe, and would be ripe for "the vast majority of individual employees," even though "[v]ery few individuals [were] in a position to assert that their termination for 'cause' [was]

imminent and that their loss of pension [was] imminent." *Id*. ¶¶ 45–46. "Waiting until both events actually occur," the Court explained, "would defeat the purpose of the declaratory judgment statute." *Id*. ¶ 46. The union's goal was to provide "'relief from uncertainty and insecurity with respect to rights, status and other legal relations' of its members on … a broad and important legal issue," *id*. ¶ 45 (quoting the Declaratory Judgment Act), and both "judicial economy and common sense dictate[d]" that the union could seek a declaration preemptively to avoid the "*potential* denial of [its members'] pensions," *id*. ¶¶ 45, 47 (emphasis added).

Here, there is no ripeness problem whatsoever. The substance of the District's Policy is undisputed. It is neither shifting nor nebulous. The only question is the legal one—does the Policy unconstitutionally interfere with the rights of the Plaintiffs to parent their children? There is nothing abstract about this dispute; schools either can or cannot exclude parents from decisions of this magnitude.

The District's ripeness argument is essentially the same as its standing argument—that Plaintiffs cannot bring this challenge now because they do not allege that their children are presently experiencing gender dysphoria. Def. Br. 9–10. But neither were the employees in *Milwaukee District Council 48* "in a position to assert that their termination for 'cause' [was] imminent [or] that their loss of pension [was] imminent," and yet the Court held that they could "seek[ ] a declaration of their due process rights" to give them some assurance in advance in case they *were* terminated for cause. 2001 WI 65, ¶¶ 44–45. Likewise, Plaintiffs want "a declaration about the decision-making process" now, *id*. ¶ 44, so that if their children begin to experience gender dysphoria and consider transitioning to a different gender identity, they will be notified and will be able to direct the care and treatment of their child, as the Constitution requires. And, unlike

in *Milwaukee District Council 48*, Plaintiffs *cannot* wait because the District's secrecy policy may prevent them from learning when the risk of harm to them and their children is imminent.

The District repeatedly emphasizes that "gender nonconformity is not the same as gender dysphoria," as though that proves that facilitating a transition at school in secret is not that big of a deal. Def. Br. 4, 10. But even if the District is correct, the fact that a child wants to present as a different gender is a strong indication that the child may be dealing with gender dysphoria, a serious issue. Compl. ¶¶ 16, 17; *supra* p. 2 n.2. As Dr. Levine explains, "a child who exhibits or expresses an interest in a transgender identity should," "[a]t the very least," "be evaluated for psychiatric co-morbidities." Levine Aff. ¶ 79. Moreover, regardless of whether a child wanting to transition also has gender dysphoria, the fact remains that many mental-health professionals view "support[ing], implement[ing], or encourag[ing] a gender social transition … [as a form of] psychosocial treatment" with potentially long-lasting effects. Compl. ¶ 26. Thus, even if the District's Policy is applied to a child that does not meet the diagnosis for gender dysphoria, the District is still providing a form of psychosocial treatment without the knowledge or consent of the parents. The District's concession that teachers are ill-equipped "to diagnose a child with gender dysphoria," Def. Br. 11, provides all the more reason for parents to be involved, so that they can decide whether to seek "professional assistance," Compl. ¶ 66.

The District also briefly mentions the prevalence of gender dysphoria, Def. Br. 10, which is irrelevant to either ripeness or standing, given the potential magnitude of harm if one of Plaintiffs' children does experience it, *supra* pp. 2–4, and given the Wisconsin Supreme Court's frequent admonition that even a "trifling interest" can suffice, *e.g.*, *McConkey*, 2010 WI 57, ¶ 15. However, to the extent this Court believes that the prevalence of gender dysphoria is relevant, the numbers the District cites from the DSM-5 are outdated and misleading. Recent statistics have

shown a dramatic increase in the number of children seeking help with gender identity issues in the past few years. *See* Levine Aff. ¶ 26. The UK government, for example, reported a "4,400 per cent increase in girls being referred for transitioning treatment in the past decade." Gordon Rayner, *Minister orders inquiry into 4,000 per cent rise in children wanting to change sex*, The Telegraph (Sept. 16, 2018),[5] Clinics in Canada have seen similar "exponential growth in demand." Jen Beard, *Spike in demand for treatment of transgender teens*, CBC (Mar. 4, 2019).[6] In the United States, "solid numbers are harder to come by," but "clinicians are reporting large upticks in new referrals." Jesse Singal, *When Children Say They're Trans*, The Atlantic (July 2018).[7] Consistent with these global trends, a recent survey of Dane County middle and high school students found that 1.3 percent of students self-identified as transgender (roughly 100 times the higher estimate in the DSM-5). Dane County Youth Commission, *2018 Dane County Youth Assessment*, at 8 (Sept. 2018).[8]

Finally, although it is not particularly relevant to either standing or ripeness, Plaintiffs are not, as the District argues, asking the court to impose a duty on teachers and other staff "to warn parents about any gender-nonconforming behavior that students engage in at school." Def. Br. 10. Rather, Plaintiffs' argument is that parental notice and consent is required before schools affirmatively facilitate a gender identity transition in which teachers and staff members are directed to call the child by a different name and treat him or her as the opposite sex. That is very different than imposing a *duty* to warn parents about any gender nonconforming behavior, no matter how

[5] https://www.telegraph.co.uk/politics/2018/09/16/minister-orders-inquiry-4000-per-cent-rise-children-wanting/

[6] https://www.cbc.ca/news/canada/ottawa/trans-teens-ottawa-cheo-demand-1.5026034

[7] https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/

[8] https://danecountyhumanservices.org/yth/dox/asmt_survey/2018/2018_exec_sum.pdf

insignificant. Gender nonconforming behavior should be addressed like the other issues the District mentions (depression, anxiety, etc.). If teachers see behavior that is out of the ordinary, they should have the ability to discuss it with parents, and the District may not take the significant step of facilitating a child's transition without parental consent.

II. Plaintiffs Have a Substantial Legal and Factual Basis for Proceeding Anonymously, to Which the District Has No Persuasive Response

Plaintiffs' anonymity motion 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); Anonymity Br. 7–8. 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" (and filing this case has only confirmed this risk, as shown below). *E.g.*, *Doe v. City of Chicago*, 360 F.3d 667, 669 (7th Cir. 2004) (listing cases); Anonymity Br. 8–13. 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); Anonymity Br. 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); Anonymity Br. 14. In addition to these four well-recognized justifications for anonymity, Plaintiffs also cited cases from the Fifth, Sixth, Seventh, and Ninth Circuits, as well as multiple district courts, allowing parents to proceed anonymously in nearly identical circumstances to this case: constitutional challenges, brought by parents, to a controversial school policy. Anonymity Br. 5–7.

The District does not respond to most of this, failing to even discuss three of the four compelling justifications Plaintiffs pointed to. *See* Def. Br. 19–20. Most significantly, the District does not explain why it is necessary to "expose the identities of [Plaintiffs'] children." *Elmbrook Sch. Dist.*, 658 F.3d at 724.

The District responds only to the threat of harassment, arguing that Plaintiffs "have not substantiated those concerns." Def. Br. 20, 23. That is simply not true. Plaintiffs identified multiple harassing comments and tweets about them or their counsel *before this lawsuit was even filed*. Anonymity Br. 12–13 (tweets calling Plaintiffs "transphobic" and "religious bigots," and calling Plaintiffs' counsel "fuckers" and "sacks of fucking shit"). They also provided the affidavit testimony of an attorney who was fired from a job and has been threatened with violence for her advocacy on related issues. Dansky Aff. ¶¶ 1–12. Finally, Plaintiffs surveyed many other well-documented examples of people who have been harassed, threatened, or retaliated against for taking similar positions. Anonymity Br. 9–12. Since filing, Plaintiffs' counsel became aware of yet another example of retaliation, against *someone who lives in Madison*, by the Madison community. Feminist singer-songwriter, Thistle Pettersen, recently published a lengthy piece explaining how, as a result of her speech on related issues, she has been "ostracized in [her] community, forced out of [her] job, and banned from playing music at various venues in [Madison]." Thistle Pettersen, *How I Became the Most Hated Folk Singer in Madison*, Uncommon Ground (Nov. 10, 2019).[9]

The only reason Plaintiffs did not have more examples targeted at them is because their motion was drafted *before the case was filed*. Since filing, Plaintiffs and their counsel have

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

received many additional harassing calls, emails, and comments, including threatening comments. A day after the lawsuit was filed, for example, Scott Gordon, editor of Tone Madison,[10] tweeted, "Where do WILL staff eat, stay, etc. when they're in town to work on their lawsuit in Dane County Court? I want to know who's doing business with a malicious, transphobic organization." Berg Suppl. Aff. Ex. 1. Someone named "Belinda Davenport" commented on an article about this case that "History shows you can push a[n] oppressed group ever so far that they will have no recourse but resort to violence to solve the problem. … The time will come to drop the protest signs and pick up the gun or even the WMD. Street gangs and assassins would be the only way to stop the bigots." Berg Suppl. Aff. Ex. 13 at 5–6. Even some current government officials made harassing comments. Scot Ross, who has since been appointed to the Wisconsin Ethics Commission,[11] tweeted, "Transphobes are going to transphobe. Dear god, the Republican Party is an overflowing hate-filled cesspool of white guys who can only sprout erections by bullying and shaming children." Berg Suppl. Aff. Ex. 2. Multiple articles by local papers have accused Plaintiffs of being "transphobic" or "bigots." *See* Alice Herman, *The Wisconsin Institute for Law and Liberty litigates for hate*, Tone Madison (Mar. 3, 2020)[12]; Alan Talaga, *Trust the students*, Isthmus (Feb. 27, 2020).[13] Plaintiffs' counsel has also directly received harassing calls and emails. On February 20, someone sent a message to WILL through its online form stating, "Your going after children. … I

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

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

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

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

hope your secrets come out before your ready." Berg Suppl. Aff. Ex. 12. And Plaintiffs' counsel received a voicemail stating, "You guys really have nothing better to do than harass kids? You guys suck." Berg. Suppl. Aff. ¶ 2. There are many other harassing comments or tweets online:

- "DanRShafer" tweeted, "they filed and publicized an anti-LGBT culture war lawsuit." Berg Suppl. Aff. Ex. 3.
- "Sissifuss2" tweeted, "Of course these Nazis are nameless and anonymous cuz they're cowards and fear being called out for being Nazis." Berg Suppl. Aff. Ex. 4.
- "LundoCalrossian" tweeted, "REPORTED. For being transphobic and targeting a protected group of people." Berg Suppl. Aff. Ex. 5.
- "CorningJane" tweeted, "Unnamed parents?? Cowards." Berg Suppl. Aff. Ex. 6.
- "JoshAndHisJokes" tweeted, "Sounds pretty transphobic." Berg Suppl. Aff. Ex. 7.
- "ChetAgni" tweeted, "in other news, @WILawLiberty continues to be the trashiest of trash." Berg Suppl. Aff. Ex. 8.
- "CourteBeyer" tweeted, "This is just needlessly cruel." Berg Suppl. Aff. Ex. 9.
- "Firmly_Ordinary" tweeted, "What dicks, honestly it's none of their business any fuckin way." Berg Suppl. Aff. Ex. 10.
- "BlueMouseEeek" tweeted, "Makes the UK look like trans utopia. I don't get how the us can be so biggoted." Berg Suppl. Aff. Ex. 11.
- "Spaghettimonsterfan" commented, "Those adults need to be committed to a mental institution." Berg Suppl. Aff. Ex. 13 at 9.
- "HHenry" commented, "Pull your kids, home school your hatred into them, and leave the rest of us alone." Berg Suppl. Aff. Ex. 13 at 5.

- "Caitlyn Haiku" commented, "If that bigoted lawsuit goes through, as soon as any transgender child or teen in that school district commits suicide, charge each and everyone of those parents and their lawyers with manslaughter, and apply it as a hate-crime. They are directly culpable." Berg Suppl. Aff. Ex. 13 at 9–10.
- "Floyd Foont" commented, "With the 'religious' right, the cruelty is the point." Berg Suppl. Aff. Ex. 14 at 8.
- "itwasntedited" commented, "These parents are cowards, every single one of them. … This is the pinnacle of disgrace. These parents deserve every single bad name hurled at them." Berg Suppl. Aff. Ex. 15 at 2.
- "Wisco47" commented, "What's with the right wing nuts' obsessive transphobia? Are they that insecure about their own sexual identity? On a mission from God? Trying to promote more of Trump's puss-grabbing version of heterosexual itsy?" Berg Suppl. Aff. Ex. 15 at 3.
- "DrSaurusRex" commented, "Gross. Get a real job, parents, and let your kids live their lives." Berg Suppl. Aff. Ex. 15 at 4.
- "Wolfwalk47" tweeted, "These unnamed ie 'cowardly' so-called Christians want their kids to be able to bully transgendered kids." Berg Suppl. Aff. Ex. 16.
- "TouchTheFloof" tweeted, "Fuck WILL, Seriously." Berg Suppl. Aff. Ex. 17.
- "According2Robyn" tweeted, "Religious freedom means we can abuse our children, parent group claims." Berg Suppl. Aff. Ex. 18.
- "e1ais" tweeted, "It takes being a Christian to be this disgusting, immoral and nasty to kids trying to get an education Wisconsin." Berg Suppl. Aff. Ex. 19.

These comments decisively illustrate that the issue in this case incites people's passions and creates a serious risk that Plaintiffs or their children will be harassed, retaliated against, threatened with violence, or even physically harmed if their identities become known, risks that can be entirely avoided by allowing them to use pseudonyms.

The District also fails to confront the on-point cases Plaintiffs cited, opting instead to brush these aside based on minor distinctions, *see* Def. Br. 15–16, distinctions that are either not dispositive or irrelevant to this case. For example, the District distinguishes *Harlan County School District* on the ground that "the litigants themselves were minor children," but the Seventh Circuit in *Elmbrook* also allowed *parents* to proceed anonymously because "[i]dentifying [them] also would expose the identities of their children." *Elmbrook*, 658 F.3d at 724. The District distinguishes *Madison School Dist. No. 321* on the ground that the district court "met with the plaintiff in chambers before allowing her to proceed anonymously," but Plaintiffs could follow that procedure as well if this Court thinks it necessary. *See infra* p. 24. The District distinguishes *Porter* on the ground that the court allowed the defendant to conduct discovery under a protective order, but there was no such order in *Elmbrook*, and the District has not explained why it needs to know Plaintiffs' identities to conduct discovery in this case. *See infra* pp. 24–25 (discussing discovery in more detail). The District distinguishes *Stegall* on the ground that there was "specific documentary evidence showing a risk of harassment or violence," but that evidence was "the public reaction to the lawsuit," *see* 653 F.2d at 182 n.6, and similar evidence is present in this case, Anonymity Br. 12–13, *supra* pp. 18–22. Finally, the District distinguishes *Elmbrook* on the ground that the plaintiffs there had experienced "retaliation in the past for their beliefs," but the Court also relied heavily on online comments and the common-sense recognition that "[l]awsuits involving

religion can implicate deeply held beliefs and provoke intense emotional responses," 658 F.3d at 723 (7th Cir. 2011), both of which are present here.

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." Anonymity Br. 15; *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008); *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. Anonymity Br. 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. Anonymity Br. 15–16; *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979).

Again, the District does not respond to this case law or engage with the multi-factor balancing test that courts around the county have adopted for analyzing requests to proceed anonymously. *See* Anonymity Br. 5. Instead, the District claims that anonymity *will* "harm MMSD, the court system, and the public," Def. Br. 21–23, but none of its arguments hold up.

The District suggests various reasons *the Court* might need to know the Plaintiffs' identities, as though this provides grounds for denying in whole Plaintiffs' request to proceed anonymously. *See* Def. Br. 12 (competence); Def. Br. 22 (recusal). Yet many other courts, including the United States Supreme Court, have had little reservation deciding important legal questions without knowing the identity of an anonymous plaintiff. *See, 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."). Even if this Court believes it needs to know who the Plaintiffs are for any of the reasons the District suggests, the Plaintiffs can provide their names and addresses *to the Court* for in camera review or even meet with the Court in chambers without the District's counsel present, as the District concedes courts have done in other cases.[14] *See Doe v. Madison School Dist. No. 321*, 147 F.3d 832, 834 n.1 (9th Cir. 1998); Def. Br. 15 (citing, among others, *James v. Jacobson*, 6 F.3d 233, 235 (4th Cir. 1993)); Def. Br. 16.

The District then argues that it needs to know the Plaintiffs' identities to conduct discovery, but it does not explain what it is hoping to discover that cannot be accomplished through other means. Def. Br. 21–22. Plaintiffs have already offered to provide any additional facts about themselves (other than their identities) that the District believes it needs, either by "stipulat[ing] to [those facts] or work[ing] with the District's counsel to allow limited discovery without disclosing the Plaintiffs' identities, such as written interrogatories." Anonymity Br. 16 n. 6. Yet the District has not identified *a single fact* about the Plaintiffs that it needs, or even might need, to defend this lawsuit. That the District could not come up with anything is not surprising; after all, once this

[14] If this Court does wish to see the Plaintiffs in-person, Plaintiffs respectfully request that they be allowed to do so one-by-one, because even the Plaintiffs are not aware of the other Plaintiffs' identities.

case moves past the District's standing challenge, the "entire case turns on the constitutionality of the District's policy," not on anything to do with the Plaintiffs. Anonymity Br. 16.

At the very least, the District's hand-waving about the *potential* for discovery challenges—without identifying any *actual* difficulty—does not justify denying or limiting Plaintiffs' anonymity motion *now*. If, later in this case, the District actually encounters a real issue with discovery that cannot be resolved in other ways, it can come back to this Court to explain, and, if necessary, the Court can then enter a protective order allowing the specific discovery the District seeks. This procedure has been used in other cases with anonymous plaintiffs. *See* Proposed Anonymity Order, Dkt. 19-4, *Doe v. Elmbrook Sch. Dist.*, No. 2:09-cv-409 (May 12, 2009) (proposing 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."); Order Granting Motion to Proceed Anonymously, Dkt. 34, *Doe v. Elmbrook Sch. Dist.*, No. 2:09-cv-409 (May 29, 2009) (granting anonymity motion without *any* conditions).

The *only* concrete reason the District gives for identifying the Plaintiffs is that it needs to "assess whether their representation involves a concurrent conflict of interest." Def. Br. 22. Yet there is a simple solution to this that does not require exposing the Plaintiffs. After the District filed its brief, undersigned counsel contacted each of the Plaintiffs and asked them whether they are "a current or former client of Barry J. Blonien, Jim Bartzen, Boardman & Clark, or any other attorney at Boardman & Clark" (with a link to all of the attorneys at Boardman). Berg Suppl. Aff. ¶ 23. Twelve of the fourteen plaintiffs confirmed that they have never been a client of Mr. Blonien, Mr. Bartzen, Boardman, or any other attorney at Boardman. Berg Suppl. Aff. ¶ 24. If undersigned counsel's affidavit about this is insufficient for some reason, Plaintiffs can submit short, redacted affidavits to that effect, as they have already done once. Two of the fourteen plaintiffs *are* current

clients of different attorneys at Boardman on a completely unrelated matter, and could waive the conflict (the conflict issue is *Boardman*'s, after all), but, to keep this as simple as possible, these two Plaintiffs have agreed to withdraw from the case. Berg Suppl. Aff. ¶ 25. This simple solution shows that any challenges with Plaintiffs' anonymity can be resolved when they come up. Besides checking for conflicts—which has now been resolved—the District does not identify any other reason why it needs to know who the Plaintiffs are.

Rather than fully engaging with Plaintiffs' justifications for anonymity and on-point precedents, the District instead spends most of its energy arguing that this Court has no authority to grant Plaintiffs' request. *See* Def. Br. 12–23. Yet the District's concessions prove otherwise. As Plaintiffs demonstrated and the District acknowledges, Wisconsin courts have allowed plaintiffs to sue anonymously in a number of cases, establishing beyond dispute that Wisconsin courts *do* have authority to allow this, including inherent judicial authority. Anonymity Br. 3 (listing cases). The District attempts to distinguish those cases on the facts, Def. Br. 19, but that goes to when anonymity is appropriate, not *whether this Court has authority to permit it*. If there is any doubt about the Court's ability to allow this, shortly after this case was filed, another branch of the Dane County Circuit Court allowed a plaintiff to sue anonymously in an open-records case, and *against the District no less*. *See* Order Granting Petitioner's Motion to Proceed Anonymously, *Doe v. Madison Metropolitan School District*, No. 19-cv-3166 (Feb. 20, 2020, Judge Anderson Presiding).

Relatedly, the District argues that Plaintiffs' request violates three separate statutes, Def. Br. 12, but the District is wrong about all three. The District says Plaintiffs violated Wis. Stat. § 806.02(2)(a) because "pseudonyms have no capacity to sue." Def. Br. 12. This is quite obviously beside the point; the question is not whether pseudonyms can sue, but whether real people can sue

using pseudonyms. To repeat, if this Court feels the need to verify that Plaintiffs are real people, it can do so in a variety of ways while preserving their anonymity. *See supra* p. 24. The District's argument that Plaintiffs "failed to join the real parties in interest" dies on the same sword; as parents of children in the district, *e.g.*, John Doe 1 Aff. ¶¶ 1–2, they are of course "real parties in interest," they just want to proceed anonymously. The only rule that Plaintiffs' approach has even arguably violated is the general requirement that a complaint "include the names and addresses of all the parties." Wis. Stat. § 802.04. That rule has not prevented prior Wisconsin courts from allowing anonymous plaintiffs, *supra* p. 26, nor has the analogous federal rule, Fed. R. Civ. P. 10 ("the complaint must name all the parties"), been deemed by *any federal court of appeals* to be an insurmountable roadblock, *see* Anonymity Br. 4 (listing cases from nearly every federal circuit recognizing the viability of anonymous litigation).

Plaintiffs identified at least two sources of authority by which this Court can permit Plaintiffs to sue anonymously. Anonymity Br. 2. First, Wisconsin Statute § 801.21 gives courts broad authority to "seal part … of a document or to redact specific information in a document" and to rely on "common law" grounds for doing so, Wis. Stat. § 801.21(2), (4), Anonymity Br. 2, directly refuting the District's assertion that "no Wisconsin statute authorizes Plaintiffs to seal their identities." Def. Br. 17. The District's primary response to § 801.21 is that Plaintiffs "did not follow th[e] procedure" in that section because they did not supply their identities under a temporary seal. Def. Br. 17. But § 801.21 does not require that—it says instead that "[t]he information to be sealed or redacted *may* be filed under a temporary seal." Wis. Stat. § 801.21(2) (emphasis added). The only actual requirements are that the party seeking to protect information must "file a motion," serve the motion on all parties, and "specify the authority for asserting that the information should be restricted from public access." *Id.* Plaintiffs have done all of that.

The District also argues that § 801.21 "is a rule of procedure, not substance," and therefore it does not provide any independent authority for sealing a party's identity. Def. Br. 17–18. Even if that is correct (the District cites only an un-adopted comment to the section), § 801.21(4) clearly incorporates the "common law" as a substantive ground for protecting otherwise unprotected information, and Plaintiffs have flagged multiple federal cases allowing anonymous plaintiffs in nearly identical circumstances to this case. Anonymity Br. 4–7; *supra* pp. 17, 22–23.

Even if this Court concludes that § 801.21 does not give it authority to grant Plaintiffs' request, Plaintiffs identified a second source of authority, namely the Court's "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); Anonymity Br. 2. The District concedes that courts have this authority, Def. Br. 19, and that the ultimate test under *Bilder* is functionally equivalent to the test applied in federal courts (i.e., "exceptional circumstances," *compare* Def. Br. 20 *with* Def. Br. 15), but argues only that Plaintiffs "have not shown a sufficient need for anonymity," Def. Br. 20. For the reasons already explained, that is incorrect.

None of the state cases the District cites are particularly relevant, and they are certainly nowhere near as relevant as the on-point federal cases Plaintiffs cite. The question in *State v. Melton* was "whether a circuit court has inherent authority to order the physical destruction of a presentence investigation report." 2013 WI 345, ¶ 54, 349 Wis. 2d 48, 834 N.W.2d 345. *Local 2489, AFSCME, AFL-CIO v. Rock Cty.* and *Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay* are open-records cases, neither of which presented the significant privacy concerns when parents challenge a controversial school policy. 2004 WI App 210, 277 Wis. 2d 208, 689 N.W.2d 644; 116 Wis. 2d 388, 342 N.W.2d 682 (1984). Finally, *C.L. v. Edson*, the closest case to being relevant, actually *supports* the Plaintiffs. The courts there held that a settlement agreement could be publicly

released, but only "after the deletion of any identifying references to the plaintiffs," to "respect[ ] their privacy." 140 Wis. 2d 168, 174, 185, 409 N.W.2d 417 (Ct. App. 1987).[15]

CONCLUSION

Plaintiffs respectfully request that this Court deny the District's motion to dismiss and grant Plaintiffs' motion to proceed using pseudonyms.

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[15] The District argues that Plaintiffs' request to proceed anonymously will be moot if this Court grants its motion to dismiss on standing or ripeness. Def. Br. 6. Plaintiffs respectfully request that this Court decide both issues. If this Court concludes that Plaintiffs do not have standing to challenge a Policy that may harm to their children, Plaintiffs will likely seek to amend their complaint to assert taxpayer standing. Wis. Stat. § 802.09(1). The District has clearly spent taxpayer funds to develop its Policy and to train its staff, *see* Compl. ¶¶ 32, 53, and any illegal expenditure, even if "infinitesimal," is sufficient for taxpayer standing, *e.g.*, *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877–83, 419 N.W.2d 249 (1988).