STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

JOHN DOE 1, et al.

Plaintiffs,

Case No.: 20-CV-454
The Honorable Frank D. Remington

v.

MADISON METROPOLITAN SCHOOL DISTRICT,

Defendant.

DEFENDANT MADISON METROPOLITAN SCHOOL DISTRICT'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS

INTRODUCTION

Twelve parents of children in the Madison Metropolitan School District ("MMSD" or the "District") anonymously pursue this case to challenge a Guidance document that encourages tolerance and acceptance of students however they choose to self-identify, arguing that it violates their parental right to direct the upbringing of their children. Plaintiffs concede that none of their children have been diagnosed with gender dysphoria or are suffering with any gender-identity issues, but they insist this Court must "preemptively" decide their declaratory judgment action now to prevent MMSD from one day conducting a "psychosocial experiment" on one of their children, should they ever "begin to experience gender dysphoria or express a desire to adopt an alternate gender identity." (Pls.' Br. at 4.)

Plaintiffs' claims are built on a fundamental misunderstanding or mischaracterization of the Guidance and its impact. School officials do not diagnose or treat students without parental knowledge or consent—federal law expressly prohibits them from doing so. Plaintiffs simply fail to explain how the Guidance deprives them of their rights as parents. Plaintiffs' claims depend on

two fundamentally flawed premises: first, that gender nonconforming behavior is itself a disease or disorder; and second, that the District's approach of acceptance and tolerance of all students constitutes medical treatment. Both assumptions are indefensible. Gender dysphoria is a medical diagnosis; gender nonconformity is a social construct. It is not the job of teachers or other school officials to police gender norms or report any perceived "deviance" to parents. Parents undeniably have the right to seek diagnosis and treatment for their children, and MMSD does not interfere with that right in any way. But parents have no right to dictate how MMSD must run its schools.

ARGUMENT

Standing and ripeness are both fundamental prerequisites that must be satisfied in order to bring a declaratory judgment action under Wis. Stat. § 806.04. Plaintiff asserts that because the Uniform Declaratory Judgments Act is liberally construed, "declaratory relief is appropriate 'wherever it will serve a useful purpose,'" borrowing a phrase from the Wisconsin Supreme Court in *Lister v. Board of Regents of the University of Wisconsin System*, 72 Wis. 2d 282, 307, 240 N.W.2d 610 (1976) and repeated elsewhere. (Pls.' Br. at 7.) If Plaintiffs mean to suggest that this Court may sidestep the four-pronged justiciability test (discussed in MMSD's opening brief at 7) and simply ask whether the action would serve a useful purpose, then they are plainly mistaken. As the Court in *Lister* explained, the "basic requirement in asserting a claim for declaratory relief is that there be a 'justiciable controversy,'" and the four prerequisites "insure that a bona fide controversy exists and that the court, in resolving the questions raised, will not be acting in a merely advisory capacity." *Id.*, 72 Wis. 2d at 306.

Although declaratory judgment actions are to be liberally construed, "the claim asserted must be legally recognizable in Wisconsin jurisprudence." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n*, 2011 WI 36, ¶ 165, 333 Wis. 2d 402, 797 N.W.2d 2d 789 (citing *Krier v. Vilione*,

317 Wis. 2d 288, ¶ 22, 766 N.W.2d 517). Because the power to order declaratory relief is statutory "'and was unknown to the common law,'" the courts' power "to grant declaratory relief is circumscribed by the criteria contained in [the Act]," and the failure to satisfy any requirement "is fatal to a claim for declaratory relief." *Sipl v. Sentry Indem. Co.*, 146 Wis. 2d 459, 465, 431 N.W.2d 685 (Ct. App. 1988) (quoting *Miller v. Currie*, 208 Wis. 199, 203, 242 N.W.2d 570 (1932)).

I. Plaintiffs Lack Standing to Challenge MMSD's Guidance.

The "essence" of standing under Wisconsin law is that a plaintiff must show a legally protectable interest in the controversy that has been (or will be) adversely affected by the defendant's conduct. *Foley-Ciccantelli*, 2011 WI 36, ¶ 40. To determine whether an interest is legally protectable, courts must consider "the interests involved, applicable statutes, constitutional provisions, rules, and relevant common law principles." *Id.*, ¶ 57 (footnote omitted). *See also Waste Mgmt. of Wis., Inc. v. DNR*, 144 Wis. 2d 499, 506, 424 N.W.2d 685 (1988) (holding that standing requires that injury be "of a type recognized, regulated, or sought to be protected by the challenged law."). If the plaintiff's asserted interest is not "'arguably within the zone of interests'" protected by the law, then the plaintiff lacks standing to maintain a declaratory judgment action. *Id.*, ¶ 49 (quoting *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 16, 685 N.W.2d 573).

Plaintiffs have not identified a legally protected interest that is adversely affected by MMSD's Guidance. Plaintiffs concede that none of their children have been diagnosed with gender dysphoria or struggle with gender-identity issues, and thus the Guidance plainly does not apply to them. Notwithstanding that concession, Plaintiffs insist they "cannot wait to challenge this Policy[1]

[1] Plaintiffs continue to refer to MMSD's Guidance document as a "policy," notwithstanding that they admit it has not been adopted by the Madison School Board as would be required to establish a formal policy. MMSD noted that fact in its opening brief (*see* MMSD Br. at 2 n.1), and Plaintiffs failed to address it. The point should therefore be deemed conceded. *See, e.g., Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (holding that arguments not refuted are deemed conceded).

until one of their children experiences gender dysphoria," because "teachers or other school staff may be the first to learn that their child is dealing with gender dysphoria," and by the time Plaintiffs learn that fact, "it may be too late." (Pls.' Br. at 5.) Plaintiffs argue that they can "preemptively" challenge the Guidance because standing is not a "high bar" generally and that "standing is especially forgiving" for declaratory judgments. (*Id.* at 8.) Plaintiffs misconstrue standing law.

Plaintiffs are correct that standing rules in Wisconsin are generally derived from "sound judicial policy," not from Article III of the United States Constitution. (Pls.' Br. at 8 (quoting *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855).) But it is a mistake for Plaintiffs to infer that standing is therefore of no real significance in Wisconsin courts and that the state standard is generally much more lenient than in federal courts. (Pls.' Br. at 12.) To the contrary, "Wisconsin's standing formula is built in substantial part upon the foundation laid by the federal courts." *Munger v. Seehafer*, 2016 WI App 89, ¶ 53, 372 Wis. 2d 749, 890 N.W.2d 22 (citing *Wisconsin's Environmental Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 11, 230 N.W.2d 243 (1975); *Metropolitan Builders Ass'n of Greater Milwaukee v. Vill. of Germantown*, 2005 WI App 103, ¶¶ 13–14, 282 Wis. 2d 458, 698 N.W.2d 301). Furthermore, "in Wisconsin cases involving a constitutional challenge to legislative or executive action, to determine the personal interest, the adverse effect, and the judicial policy aspects of standing, the decisions frequently rely on language from federal cases governing standing in constitutional challenges." *Foley-Ciccantelli*, 2011 WI 36, ¶ 46 (collecting cases).

Plaintiffs contend that "[t]here is no question that [they] invoke an 'interest that is legally protectable," namely, their constitutional right as parents to direct the upbringing of their children. (Pls.' Br. at 8.) MMSD acknowledges that "'[t]he interest of parents in the care, custody, and control of their children [] is perhaps the oldest of the fundamental liberty interests'" embraced by

the United States Supreme Court. *Matter of Visitation of A.A.L.*, 2019 WI 57, ¶ 15, 387 Wis. 2d 1, 927 N.W.2d 486 (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000)). But Plaintiffs fail to explain how their rights as parents are or will be impaired by MMSD's Guidance, even assuming that it applied to their children. Although the United States Supreme Court "has never been called upon to define the precise boundaries of a parent's right to control a child's upbringing and education," it is clear "that the right is neither absolute nor unqualified." *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 182 (3d Cir. 2005) (citing *Lehr v. Robertson*, 463 U.S. 248, 256 (1983)). Parents have the right to control their child's upbringing, but that does not mean parents may direct every aspect of their child's experience at public school.

As the Wisconsin Court of Appeals explained in *Larson v. Burmaster*, 2006 WI App 142, 295 Wis. 2d 333, 720 N.W.2d 134, "numerous federal circuit courts of appeal have held that in certain circumstances the parental right to control the upbringing of a child must give way to a school's ability to control curriculum and the school environment." *Id.*, ¶ 36. In *C.N.*, for example, the Third Circuit concluded that a school did not violate parents' constitutional rights by giving anonymous surveys to students soliciting information about private activities such as drug use and sexual activity. *C.N.*, 430 F.3d at 185. In *Brown v. Hot, Sexy & Safer Productions, Inc.*, 68 F.3d 525, 533 (1st Cir. 1995), *abrograted on other grounds by County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the First Circuit held that a parent's right to choose a specific educational program for their children does not "encompass[] a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children." And in *Blau v. Fort Thomas Public School District*, 401 F.3d 381 (6th Cir. 2005), the Sixth Circuit concluded that "[w]hile parents may have a fundamental right to decide *whether* to send their child to a public school, they do not have a fundamental right generally to direct *how* a public school teaches their child." *Id.* at

395 (emphasis in original). *See also Fields v. Palmdale Sch. Dist.*, 447 F.3d 1187, 1190 (9th Cir. 2006) (per curiam) (holding that "parents do not have a fundamental due process right generally to direct how a public school teaches their child" or "to restrict the flow of information in the public schools") (citations omitted). Relying on those federal decisions, the court in *Larson* rejected the plaintiffs' claim that they had a constitutional right to opt their children out of summer homework, ruling that "parents simply do not have a constitutional right to control each and every aspect of their children's education and oust the state's authority over that subject." *Larson*, 2006 WI App 142, ¶ 39. The same holds true here.

Plaintiffs attempt to draw support from *Gruenke v. Seip*, 225 F.3d 290 (3d Cir. 2000), but that case is plainly distinguishable. (*See* Pls.' Br. at 9.) The Third Circuit in *Gruenke* held that a parent had sufficiently alleged a constitutional violation by asserting that a swim coach had pressured her child to take a pregnancy test without first consulting the parent. *Id.* at 306–07. As the Third Circuit later explained in *Anspach ex rel. Anspach v. City of Philadelphia*, 503 F.3d 256 (3d Cir. 2007), the court's recognition in *Gruenke* that some "school-sponsored counseling and psychological testing . . . can overstep the boundaries of school authority and impermissibly usurp the fundamental rights of parents to bring up their children" does not "extend to circumstances where there is no manipulative, coercive, or restraining conduct by the State." *Id.* at 266 (quoting *Gruenke*, 225 F.3d at 307). In this case, Plaintiffs do not and cannot allege that MMSD's Guidance manipulates, coerces, or restrains any of Plaintiffs' children. *Gruenke* therefore does not advance Plaintiffs' constitutional claims in this case.

Plaintiffs' theory of potential harm is predicated on two false assumptions. First, Plaintiffs incorrectly assume that all gender-nonconforming behavior is symptomatic of gender dysphoria. According to Plaintiffs, "[w]hile there may not be perfect overlap, a mismatch between a person's

biological sex and perceived or desired gender is 'often associated' with gender dysphoria, a 'serious mental-health condition,'" and "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." (Pls.' Br. at 2, 15.) The DSM-5 clearly states otherwise. It emphasizes that the diagnosis of gender dysphoria "is not meant to merely describe nonconformity to stereotypical gender role behavior," and it explains that "[g]iven the increased openness of atypical gender expressions by individuals across the entire range of the transgender spectrum, it is important that the clinical diagnoses be limited to those individuals whose distress and impairment meet the specified criteria." DSM-5 at 458.[2]

Second, Plaintiffs incorrectly assume that MMSD's approach of acceptance and tolerance is a form of medical treatment that involves "immediate transition for a child experiencing gender dysphoria." (Pls.' Br. at 10.) Plaintiffs repeatedly characterize the Guidance as a "psychosocial experiment on children experiencing gender dysphoria," (*Id.* at 1, 3, 6, 8, 15) and they contend that MMSD "require[s] teachers and other staff to secretly facilitate gender identity transitions at school." (*Id.* at 6.) Those arguments are baseless. The MMSD's Guidance does not involve any medical intervention; it simply encourages staff to affirm all students as they self-identify.

As MMSD explained in its opening brief, MMSD officials are prohibited by law from diagnosing a student's mental-health conditions or providing medical treatment without parental consent; and regardless, most teachers do not have the training or qualifications to diagnose or treat mental-health conditions. (*See* MMSD Br. at 11.) Thus, absent a clinical assessment and diagnosis by a medical professional (which would necessarily involve the student's parents), MMSD could not possibly know whether a student has gender dysphoria. Thus, Plaintiffs' "fear

[2] MMSD noted in its opening brief that this Court may take judicial notice of the DSM-5 pursuant to Wis. Stat. § 902.01. (*See* MMSD Br. at 3 n.4.) Plaintiffs do not address the issue at all in their brief and so presumably must agree with MMSD on that point. *Charolais Breeding Ranches, Ltd.*, 90 Wis.2d at 109.

and anxiety" that MMSD staff will "hide from them what is happening to their children at school" is entirely unfounded and should be disregarded. *See Larson*, 2006 WI App 142, ¶ 17 (recognizing that although courts must accept all well-pleaded facts and reasonable inferences that may be drawn from them, "'legal inferences and unreasonable inferences need not be accepted as true'") (quoting *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶ 17, 270 Wis. 2d 356, 677 N.W.2d 298)).

Plaintiffs argue that the Guidance "threatens to undermine Plaintiffs' ability to choose a treatment approach that does not involve an immediate transition for a child experiencing gender dysphoria" (Pls.' Br. at 10), but that is plainly not so. The Guidance does not prevent Plaintiffs from seeking medical care if they are sincerely concerned about their children's physical or mental health. Even if one of their children were diagnosed with gender dysphoria, nothing in the Guidance would interfere with Plaintiffs' right to control the medical treatment their child receives. And as MMSD noted in its opening brief, Plaintiffs cannot plausibly argue that they lack access to medical evaluation or treatment, considering that they retained the services of Dr. Stephen B. Levine, who asserts expertise in the diagnosis and treatment of gender dysphoria in children, to serve as a potential expert witness in this litigation. (*See* MMSD Br. at 11.)

If for any reason Plaintiffs do not want their children in the tolerant and accepting environment that MMSD promotes through its Guidance, then they may homeschool their children or send them to a private school that more closely aligns with their own views. But they may not dictate how MMSD teaches their children. Like the plaintiffs in *Larson*, Plaintiffs' attempt to interfere with MMSD's regulation of education "is nothing more than an attempt to impose their own personal preferences, based on precisely the type of 'secular considerations'" that the United States Supreme Court has warned against. *Larson*, 2006 WI App 142, ¶ 41 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972)). This Court cannot confer standing to Plaintiffs based solely on

allegations that they have children in the District and that they disagree with the Guidance. As the Wisconsin Court of Appeals made plain in *Lake Country Racquet & Athletic Club, Inc. v. Village of Hartland*, 2002 WI App 301, ¶ 23, 259 Wis. 2d 107, 655 N.W.2d 189, "simply registering [their] disagreement" with government action "is insufficient to confer standing."

II. Plaintiffs' Claims are Not Ripe.

Declaratory judgment actions must be ripe for judicial determination in order to be justiciable. *See Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175 (1982). Plaintiffs in this case concede that the Guidance does not presently apply to their children, but they purportedly fear that "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." (Pls.' Br. at 11.) The speculative and uncertain nature of Plaintiffs' claims, however, dooms them under the ripeness inquiry. *See State v. Armstead*, 220 Wis. 2d 626, 631, 583 N.W.2d 444 (Ct. App. 1998); *Tammi v. Porsche Cars N. Am., Inc.*, 2009 WI 83, ¶ 3, 320 Wis. 2d 45, 768 N.W.2d 783 (quoting *Armstead*).

Plaintiffs concede that in order for a declaratory judgment claim to be ripe, the facts must be "sufficiently developed to allow a conclusive adjudication." (Pls.' Br. at 13 (quoting *Milwaukee Dist. Council 48 v. Milwaukee County*, 2001 WI 65, ¶ 41, 244 Wis. 2d 333, 627 NW 2d 866).) Plaintiffs' legal theory is that one of their children might someday "begin to experience gender dysphoria," and if that ever happened, then MMSD staff would purportedly enable their children to change gender identity at school without their consent and prevent teachers from notifying Plaintiffs about it." (Compl., ¶¶ 64, 68.) Again, there is no plausible scenario where a school official could learn of a child's diagnosed of gender dysphoria where the parents or guardians are excluded. Plaintiffs' efforts to portray the Guidance as medical treatment or a "psychosocial experiment" do not square with reality and do not support a claim.

The series of events that must occur in order for the scenario that Plaintiffs envision actually to unfold is beyond unlikely. First, notwithstanding that Plaintiffs have not identified any concerns that their children are currently suffering from gender-identity issues, Plaintiffs imagine that someday a child suddenly develops gender dysphoria, which as MMSD noted in its opening brief requires clinically significant distress or impairment and a manifestation of at least six of eight identified factors *for a period of at least six months*. *See* DSM-5 at 452. They also posit that their children would not share any of their concerns with them but, instead, would tell a teacher or other school official of their diagnosis and request that the teacher not disclose that information to the parents. Further, because the Guidance is not formal policy and teachers are not required to follow it, Plaintiffs imagine a scenario where their child's teacher would choose to keep the parents in the dark while conspiring with the child to "transition" them to a different gender. These are plainly the sort of "remote, contingent, and uncertain events that may never happen," as compared to "imminent and practically certain" events that would support a justiciable claim. *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 46 (quoting *Loy*, 107 Wis. 2d at 414).

Justiciability requires that facts be more developed than what Plaintiff hypothesizes here. As the Wisconsin Supreme Court stated in *DSG Evergreen Family Ltd. P'ship v. Town of Perry*, 2020 WI 23, "'[c]ourts will not declare rights until they have become fixed under an existing state of facts.'" *Id.*, ¶ 42 (quoting *Voight v. Walters*, 262 Wis. 356, 359, 55 N.W.2d 399 (1952)). Plaintiffs incorrectly assert that none of those facts matter, because "the substance of the District's Policy is undisputed" and "[t]he only question is a legal one—does the Policy unconstitutionally interfere with the rights of the Plaintiffs to parent their children?" (Pls.' Br. at 14.) But the facts do matter, and Plaintiffs do in fact dispute how MMSD's Guidance would actually apply to their imagined scenario. This court lacks competency to resolve Plaintiffs' declaratory judgment action

without more concrete facts on which to decide the case. *See id.*, 2020 WI 23, ¶ 41 (holding that "although the Town's exercise of discretion may eventually resolve to a particular course of action, that undecided course of action cannot be ripe for adjudication at this time").

Plaintiffs argue that forcing them to wait until the facts actually develop "would defeat the purpose of the declaratory judgment statute." (Pls.' Br. at 1 (quoting *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 46, 244 Wis. 2d 333, 627 N.W.2d 866).) That is incorrect. Declaratory judgments exist not so that parties may obtain advisory rulings on hypothetical facts, but "to anticipate and resolve identifiable, certain disputes between adverse parties." *Putnam*, 2002 WI 108, ¶ 43 (citing Wis. Stat. § 806.04(12); *Lister*, 72 Wis. 2d at 307). To be sure, a party need not wait until the damage has already been done in order to seek declaratory relief—but that does not mean declaratory judgments may be brought by anyone, any time, to test any argument or legal theory they may have. Justiciability is always a fundamental prerequisite to bring such a claim. *Id.*

The cases that Plaintiffs cite in support of ripeness on these allegations do not support their cause. (See Pls.' Br. at 11–12.) In *Norquist v. Zeuske*, 211 Wis. 2d 241, 564 N.W.2d 748 (1997), the Wisconsin Supreme Court ruled that the plaintiff had adequately alleged an actual or threatened injury based on the implementation of Wis. Stat. § 70.32(2r) and its impact on the plaintiffs' property. Specifically, the Court observed that "*it is certain* that during the [assessment] freeze, the value of [plaintiff's] property will change by an amount different from other agricultural land," and thus even if his property values increased "he will not benefit the same amount as other owners of agricultural land." *Id.*, ¶ 11. Similarly, in *Putnam*, 2002 WI 108, the court observed that it "is an imminent and practical certainty" that the defendant would impose late-payment penalties on 10 to 15 percent of its customers. And in *State ex rel. Parker v. Fiedler*, 180 Wis. 2d 438, 509 N.W.2d 440 (Ct. App. 1993), *rev'd on other grounds sub nom. State ex rel. Parker v. Sullivan*, 184

Wis. 2d 668, 517 N.W.2d 448 (1994) the court ruled that the plaintiffs could challenge the placement of an ex-convict who had been found guilty of indecent acts of a child, even though "one cannot say for certain that [the ex-convict] will harm" the plaintiffs, because "the record is uncontradicted that his mere presence in the community has adversely affected their sense of safety and security . . . ." *Id.* at 453. The future events that Plaintiffs argue provide them the basis to pursue their claims, by contrast, are plainly not imminent or certain.

As MMSD noted in its opening brief, the DSM-5 states that the prevalence of gender dysphoria in adults is between 0.002% and 0.014% (in other words, 14 out of 100,000 people). (MMSD Br. at 10 (citing DSM-5 at 454).) Plaintiffs argue that fact is "irrelevant to either ripeness or standing, given the potential magnitude of harm if one of Plaintiffs' children does experience it." But again, Plaintiffs operate solely in the realm of speculation and conjecture. Plaintiffs also suggest that the DSM-5 numbers are "outdated and misleading," and instead point to a recent Dane County survey indicating that the percentage of students who self-identify as transgender is "roughly 100 times" the upper-bound estimate in the DSM-5. Again, Plaintiffs conflate different concepts. Gender nonconformity, or identifying as transgender, **is not a disorder or a disease**, as the DSM-5 clearly states. *See* DSM-5 at 458 ("[I]t is important that the clinical diagnosis be limited to those individuals whose distress and impairment meet the specified criteria.").

Plaintiffs argue this case is no different than if the District had a policy to administer unapproved drugs whenever a student gets stung by a bee, and a parent sought to challenge that policy preemptively rather than "wait until their child had been stung and the drug administered." (Pls.' Br. at 7.) Comparing gender-identity issues to a bee sting is problematic in itself, but regardless, the analogy completely misses the mark. MMSD officials obviously cannot administer drugs to students without parental consent. Further, bee stings randomly affect nearly all students,

whereas gender dysphoria is a very rare condition that requires a doctor to diagnose based on months of characteristic features. In any event, the more apt comparison would be if the District had an approach to dealing with bee-sting allergies, and Plaintiffs sought to challenge that approach even though their kids are not allergic. Plainly, they would not have standing and their claims would not be ripe. It would not be enough for Plaintiffs to argue that their children might someday develop such allergies.

In sum, a ruling on Plaintiffs' challenge, based only on a hypothetical future manifestation of gender dysphoria in one of Plaintiffs' children, would be advisory; and "[c]ourts will not render merely advisory opinions." *City of Janesville v. Rock County*, 107 Wis. 2d 187, 199, 319 N.W.2d 891 (Ct. App. 1982). *See also Waukesha Mem. Hosp. v. Baird*, 45 Wis. 2d 629, 643, 173 N.W.2d 700 ("We have not been given a set of facts, even of a hypothetical nature, to use as a basis for resolving the legal question. They ask us to pose our own hypothesis."). Plaintiffs' claims should be dismissed as unripe.

III. Plaintiffs' Anonymous Filing Violates Wisconsin Procedure.

In its opening brief, MMSD explained why Plaintiffs' anonymously filed complaint is procedurally defective under Wisconsin law even assuming that Plaintiffs satisfied the standing and ripeness requirements. MMSD identified clear statutory provisions that clearly prohibit the filing of an anonymous complaint and, instead, require the identification of the parties. (MMSD Br. at 12 (citing Wis. Stat. §§ 802.04, 802.06(2)(1)1, 802.06(2)(1)7, 803.01, and 803.03).) Plaintiffs' arguments in response do not overcome the plain and unambiguous statutory text.

Plaintiffs' lengthy citations to federal court practice are beside the point: This is not a federal court case. Instead, the Court and the parties must look to Wisconsin rules and precedent. The main point for purposes of MMSD's motion to dismiss is simply that Wisconsin law does not permit the filing of an anonymous complaint. Whether Plaintiffs may proceed anonymously *to the*

public is an entirely different question than whether Plaintiffs have met the basic requirements to initiate a lawsuit in state court, and Plaintiffs' failure to appreciate that distinction is fatal to its claims. As MMSD explained, this Court cannot adequately assess whether it may competently exercise jurisdiction over Plaintiffs' asserted claims unless it knows the identity of the parties. Plaintiffs have offered no reason whatsoever to justify keeping their identities shielded from everyone, particularly when Wis. Stat. § 801.21 permits parties to file such information temporarily under seal. Because Plaintiffs have not satisfied basic statutory requirements to initiate a lawsuit, the Complaint should be dismissed.

CONCLUSION

For the reasons set forth above and in MMSD's opening brief, Plaintiffs' claims should be dismissed on standing and ripeness grounds and because Plaintiffs have not satisfied the statutory requirements for initiating a lawsuit by failing to disclosure their names in the Complaint.

DATE: May 15, 2020

Respectfully submitted,

BOARDMAN & CLARK LLP
By

/s/ Electronically signed by Barry J. Blonien

Barry J. Blonien, State Bar No. 1078848
James E. Bartzen, State Bar No. 1003047
U.S. Bank Building, Suite 410
1 South Pinckney Street
P.O. Box 927
Madison, WI 53701-0927
Telephone: 608-257-9521
Email: bblonien@boardmanclark.com
jbartzen@boardmanclark.com

Attorneys for Madison Metropolitan School District, Defendant