

FILED  
06-24-2020  
CIRCUIT COURT  
DANE COUNTY, WI  
2020CV000454

STATE OF WISCONSIN

CIRCUIT COURT  
BRANCH 8

DANE COUNTY

JOHN DOE 1, et al.,

Plaintiffs,

vs.

MADISON METROPOLITAN  
SCHOOL DISTRICT,

Defendant,

And

Case No. 20-CV-454

GENDER EQUITY ASSOCIATION OF  
JAMES MADISON MEMORIAL HIGH  
SCHOOL,

Honorable Frank D. Remington

GENDER SEXUALITY ALLIANCE OF  
MADISON WEST HIGH SCHOOL, and

GENDER SEXUALITY ALLIANCE OF  
ROBERT M. LA FOLLETTE HIGH SCHOOL,

Defendant Intervenors.

**DEFENDANT MADISON METROPOLITAN SCHOOL DISTRICT’S AND  
DEFENDANT INTERVENORS’ JOINT RESPONSE TO PLAINTIFFS’  
MOTION TO STAY PENDING APPEAL**

Plaintiffs do not need what is in effect a stay of judgment, as this case should not proceed in this Court while Plaintiffs simultaneously pursue both an appeal as of right and a permissive appeal. This Court is only permitted to take certain, enumerated actions while Plaintiffs' appeal as of right is pending. Wis. Stat. § 808.075. That said, Defendant Madison Metropolitan School District and Defendant Intervenors (collectively “Defendants”) disagree that the order at issue is a final judgment and disagree that the Court's order effects a “special proceeding” allowing Plaintiffs the right to appeal from the order. A possible solution would be for Plaintiffs to

withdraw their notice of appeal and for this Court to dismiss the case and enter judgment against Plaintiffs. Then, Plaintiffs could file a notice of appeal as of right from that final judgment.

Moreover, even if this Court ignores the fact that Plaintiffs filed an appeal as of right, this Court should stay the entire case pending the resolution of Plaintiffs' various attempts to appeal because Defendants will be unable to respond to Plaintiffs' motion for a preliminary injunction or move for and respond to summary judgment without discovery from the individual plaintiffs.

### FACTS

On June 12, 2020, Plaintiffs filed a Notice of Appeal pursuant to Wis. Stat. § 808.03(1), "Appeals As Of Right" on a final judgment or order. (*See* Doc. 111, Motion to Stay Pending Appeal ¶ 1; *see also* Doc. 110, Notice of Appeal.). They did so to avoid the need to comply with this Court's order to disclose their identities to opposing counsel and this Court by noon on June 12, 2020.

Perhaps because Plaintiffs were concerned that they were not entitled to an appeal as of right, Plaintiffs also filed a petition for interlocutory review of this same order on June 17, 2020. Plaintiffs ask this Court to stay its order requiring them to disclose their identities to opposing counsel and this Court by noon on June 12, 2020.

### ANALYSIS

#### **I. THIS CASE CANNOT PROCEED IN THE CIRCUIT COURT WHILE PLAINTIFFS' APPEAL AS OF RIGHT IS PENDING.**

While this Court technically retains jurisdiction to proceed until the record has been transmitted to the court of appeals per Wis. Stat. § 808.075(3), that procedural step is likely to be completed soon. Plaintiffs have not explained why any proceedings in this case should continue pending the outcome of their appeal as of right and permissive appeal.

To the extent Plaintiffs are concerned that Defendants may seek to “enforce” this Court’s order requiring them to disclose their identities to the Court and opposing counsel, that concern is misplaced. The appropriate next step is for this Court to enter judgment against Plaintiffs, from which they may seek appellate review as a final, appealable order. Defendants fundamentally disagree that this Court has entered a final judgment and that this is a “special proceeding” from which Plaintiffs may immediately seek appeal. A possible solution is for Plaintiffs to withdraw their notice of appeal and for this Court to dismiss the case and enter judgment against Plaintiffs. Then, Plaintiffs could file a notice of appeal as of right from that final judgment.

**II. EVEN IGNORING THESE JURISDICTIONAL PROBLEMS, DEFENDANTS WILL BE PREJUDICED BY NOT BEING ALLOWED TO OBTAIN DISCOVERY ON THE INDIVIDUAL PLAINTIFFS IN ORDER TO OPPOSE THE PRELIMINARY INJUNCTION OR TO PROCEED ON SUMMARY JUDGMENT.**

Even if this Court had the jurisdiction to continue this case pending the outcome of Plaintiffs’ attempted appeal as of right, the only action this Court should take is either to enter judgment against Plaintiffs or to stay the entire matter pending the outcome of Plaintiffs’ petition for permission to appeal. Defendants will obviously be prejudiced if they cannot obtain discovery from the individual plaintiffs prior to the scheduled dispositive motion deadline and preliminary injunction hearing. Although Plaintiffs repeatedly argued that they do not believe Defendants need to know any Plaintiff-specific facts, this Court rejected that position and stated that it was unwilling to prohibit Defendants from proceeding with discovery. Plaintiffs should not be allowed to use a “motion to stay” as a procedural technique to force Defendants to defend against Plaintiffs’ claims on the merits without access to discovery about Plaintiffs.

Plaintiffs propose a solution where Defendants can make up facts about Plaintiffs and Plaintiffs will confirm whether they will agree to those made-up facts in response to summary

judgment. But, Defendants do not believe that Plaintiffs can properly obtain a declaratory judgment based on hypothetical facts. *Putnam v. Time Warner Cable of Se. Wis., Ltd. P'ship*, 2002 WI 108, ¶ 43, 255 Wis. 2d 447, 649 N.W.2d 626 (holding that declaratory judgment actions exist not so that parties may obtain advisory rulings on hypothetical facts, but “to anticipate and resolve identifiable, certain disputes between adverse parties.”) (citing Wis. Stat. § 806.04(12)). And, Defendants have the right to obtain discovery about the actual facts Plaintiffs put forward to support their claims.

Plaintiffs’ counsel tries again to argue that Plaintiffs’ identities are immaterial, but in order to respond to Plaintiffs’ motion for a preliminary injunction or move for and respond to summary judgment, Defendants need to know the identities of the Plaintiffs. Perhaps Plaintiffs wrongly assume that standing and ripeness are no longer issues in this case because the Court denied the Madison Metropolitan School District’s motion to dismiss, but Defendants disagree and take the position that standing and ripeness remain as issues for summary judgment. *See Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 688, 470 N.W.2d 290 (1991) (holding that the issue presented to the circuit court was not ripe for declaratory judgment at the summary judgment stage). The Court acknowledged this by refusing to allow Plaintiffs to proceed anonymously and stated, “it’s not for me to say as to how I would control what the lawyers do in defending the policy of the school district or in the discovery that may follow.” (*Id.* at 24:23–25:4.)

The remedies sought by Plaintiffs require the Court to find actual harm. This is an action for declaratory judgment, which is governed by Wis. Stat. § 806.03. A court may entertain a complaint seeking declaratory judgment only if a justiciable controversy exists. In other words, standing and ripeness are legislatively required in order for the Court to have the authority to

grant summary judgment. Allowing Plaintiffs to proceed anonymously while their appeal is pending would deprive Defendants' ability to conduct discovery to show that no justiciable controversy exists.

### CONCLUSION

In sum, Plaintiffs cannot have their cake and eat it too. If they wanted to proceed with the action in the circuit court, then they needed to abide by this Court's order requiring that they disclose their identities to the Court and opposing counsel. Instead, they appealed and it would be a waste of time and judicial resources to move forward until the Court of Appeals issues a decision on Plaintiffs' appeal, whether it be their appeal as of right or their permissive appeal.

Respectfully submitted,

*Counsel for Defendant Intervenors Gender Equity Association of James Madison Memorial High School, Gender Sexuality Alliance of Madison West High School, and Gender Sexuality Alliance of Robert M. La Follette High School*

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