IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN K. MACIVER INSTITUTE
FOR PUBLIC POLICY and
WILLIAM OSMULSKI,

Plaintiffs,

v. Case No. 19-CV-0649

TONY EVERS, in his official capacity as
Governor of the State of Wisconsin,

Defendant.

JOINT REPORT PURSUANT TO FED. R. CIV. P. 26(f)

Pursuant to Fed. R. Civ. P. 26(f) and this Court's Standing Order Governing Preliminary Pretrial Conferences, Plaintiffs John K. MacIver Institute for Public Policy and William Osmulski, by their attorney Daniel Suhr, and Defendant Tony Evers, in his official capacity as Governor of the State of Wisconsin, by his attorneys Karla Z. Keckhaver and Gabe Johnson-Karp, Assistant Attorneys General, conferred via teleconference on November 12, 2019, to discuss the topics required under the rules and the Court's order. Based on that conference, the parties jointly submit the following report.

I. Nature of the case.

This case involves First and Fourteenth Amendment claims against Wisconsin Governor Tony Evers. Plaintiffs allege that Governor Evers violated their First Amendment rights to freedom of the press and free speech "[b]y targeting [Plaintiffs] for exclusion from generally available press information and events." (Compl. 7, 8.) Plaintiffs also allege that Governor Evers violated the Fourteenth Amendment's equal protection guarantee by "targeting [Plaintiffs] for exclusion from generally available press information and events." (*Id*. at 9.)

Governor Evers denies that he violated Plaintiffs' constitutional rights.

II. Related cases.

The parties are not aware of any related cases.

III. Material factual and legal issues to be resolved at trial.

The parties believe that no trial will be necessary because there will be no disputed material facts, and that the case may be resolved on dispositive motions. The legal issues to be resolved at trial would depend on the issues remaining after resolution of dispositive motions. These issues include:

(A) Whether the First or Fourteenth Amendment requires the Governor to invite Plaintiffs to every press event whenever any members of the media are invited?

IV. Amendments to pleadings.

The parties do not expect any amendments to the pleadings.

V. New parties to be added.

The parties do not expect adding any parties.

VI. Estimated trial length.

The parties estimate that, if a trial is required, it could be completed in two to three days.

VII. Other matters relevant to Fed. R. Civ. P. 1.

A. Electronic discovery.

The parties agree to discuss and seek agreement on protocols relating to the identification, review, and production of electronically stored information (ESI). Unless and until the parties agree otherwise, all documents shall be produced in an electronic format as set forth in the appendix to this agreement. (Exhibit A.)

B. Discovery—subjects; timing; limitations.

Subjects for discovery will include the Plaintiffs' factual allegations and claims.

The parties anticipate that discovery can be completed in accordance with this Court's typical schedule. Although the parties do not currently expect calling experts, the parties ask that the Court's scheduling order include time

for expert disclosures with responses and rebuttals, along with time for depositions of experts, before the deadline for dispositive motions.

The parties do not currently anticipate limitations on discovery beyond those provided by the Federal Rules of Civil Procedure, and do not believe that discovery should be conducted in phases.

Pursuant to this Court's standing order and Fed. R. Civ. P. 26(a)(1)(A), the parties stipulate and agree to forgo exchanging the initial disclosures otherwise required under that rule.

C. Service by email.

The parties agree that service by email shall be allowed as set forth in Fed. R. Civ. P. 5(b)(2)(E), and that such service shall be considered personal service under the federal rules. The parties further agree that, for purposes of computing time under Fed. R. Civ. P. 6(a), materials served via email sent after 5:00 p.m. central time shall be deemed served the next business day; and that three days shall not be added to any time for response or other action under Fed. R. Civ. P. 6(d).

Service on Plaintiffs shall be made to at least the following counsel and staff: Daniel Suhr (dsuhr@libertyjusticecenter.org) and Jeff Schwab (jschwab@libertyjusticecenter.org).

Service on Defendants shall be made to at least the following counsel and staff: Karla Keckhaver (keckhaverkz@doj.state.wi.us), Gabe Johnson-Karp (johnsonkarpg@doj.state.wi.us), and Amanda Welte (welteaj@doj.state.wi.us).

D. Electronic copies.

The parties agree to provide electronic copies (e.g. Microsoft Word) of any written discovery requests and responses thereto, as well as any proposed findings of fact and responses thereto.

E. Claims of privilege and work product; non-waiver; notification and clawback.

Pursuant to Fed. R. Evid. 502(e), the parties agree that paragraphs VII.E.1.–7., below, shall govern the production or disclosure of privileged or otherwise protected materials.

1. No waiver by disclosure.

If a party (the "Disclosing Party") discloses information or produces documents in connection with this litigation that the Disclosing Party thereafter claims to be privileged or protected by the work-product doctrine or any other protection ("Protected Information"), the disclosure of that Protected Information will not constitute or be deemed a waiver or forfeiture—in this or any other action—of any claim of privilege or work-product protection that the Disclosing Party would otherwise be entitled to assert with respect to the Protected Information and its subject matter.

2. Notification requirements; best efforts of receiving party.

Within 14 days of learning that Protected Information was disclosed, the Disclosing Party must notify the party receiving the Protected Information ("the Receiving Party"), in writing, that the Protected Information was disclosed without intending a waiver of any privilege or protection by the disclosure. The Disclosing Party must explain in the notification as specifically as possible why the Protected Information is privileged or protected. Unless the Receiving Party contests the claim of privilege or work-product protection in accordance with paragraph VII.E.3., upon receiving notification the Receiving Party must promptly (a) confirm, in writing, that the Receiving Party will take all reasonable efforts to identify and return, sequester, or destroy (or in the case of electronically stored information, irretrievably delete) the Protected Information and any reasonably accessible copies the Receiving Party has; and (b) provide a certification, in writing, that it will cease further review, dissemination, and use of the Protected Information. For purposes of this agreement, Protected Information that has been stored on a source of electronically stored information that is not reasonably accessible, such as backup storage media, is sequestered. If data on such media are retrieved or otherwise made reasonably accessible, the Receiving Party must promptly take steps to delete or sequester the restored Protected Information.

3. Contesting claims of privilege or work-product protection.

Any challenge to the Disclosing Party's claim of privilege or work-product protection shall be made, in writing, by the Receiving Party within five business days after being notified of the Disclosing Party's request to clawback the Protected Information. The parties shall promptly meet and confer, in person or by telephone, to determine if the challenge can be resolved without judicial intervention. If the parties are unable to resolve the dispute, the Disclosing Party shall move the Court for a protective order compelling the return or destruction of the information claimed to be Protected Information. The motion for a protective order, response to the motion, and reply memorandum may be filed under seal, if appropriate. The Receiving Party may not assert as a ground for compelling disclosure of the information the fact or circumstance of its disclosure. Pending resolution of the motion for a protective order, the Receiving Party must not use the challenged information in any way or disclose it to any person other than those required by law to be served with a copy of the sealed motion for protective order.

4. Attorney's ethical responsibilities.

Nothing in this agreement overrides or otherwise alters any attorney's ethical responsibilities, including to refrain from examining or disclosing

materials that the attorney knows or reasonably should know to be privileged and to inform the Disclosing Party that such materials have been produced.

5. Burden of proving privilege or work-product protection.

Upon a challenge pursuant to paragraph VII.E.3., the Disclosing Party retains the burden of establishing the privileged or protected nature of the Protected Information.

6. *In camera* review.

Nothing in this order limits the right of any party to petition the Court for an *in camera* review of the Protected Information.

7. Federal Rule of Evidence 502(b)(2).

The provisions of Fed. R. Evid. 502(b)(2) are inapplicable to the production of Protected Information under this agreement.

8. Court approval.

Pursuant to Fed R. Civ. P. 16(b)(3)(B)(iv) and Fed. R. Evid. 502(d), the parties request that the Court incorporate paragraphs VII.E.1.–7. of this agreement into the Court's scheduling order.

F. Privilege logs.

The parties agree that communications and documents generated after the commencement of the litigation on August 6, 2019, if privileged or protected as work product, need not be included on any privilege log otherwise

required under Fed. R. Civ. P. 26(b)(5). All other privileged or work-product protected communications and documents shall be identified on a privilege log pursuant to Fed. R. Civ. P. 26(b)(5).

G. Draft expert reports and communications with experts.

The parties agree that Fed. R. Civ. P. 26(b)(4) governs the application of the work-product protection to a testifying expert's draft reports and communications between the testifying expert and counsel for a party. The foregoing does not preclude opposing counsel from obtaining any facts, data, or assumptions on which the expert relies in forming his or her opinion (including those which the expert obtained from counsel); or from otherwise inquiring fully of an expert as to what facts, data, or assumptions the expert considered, or the bases and validity of the expert's opinions. All other materials and information that an expert considered and/or relied upon will be discoverable.

H. Proposed schedule.

The parties have conferred and agree to a proposed schedule as set forth below:

DEADLINE	PROPOSED DATE
Initial Disclosures under Rule 26(a)(1)	N/A per § VII.B.
Disclosure of experts Proponent: Respondent: Rebuttal experts:	 April 1, 2020 May 1, 2020 May 22, 2020
Deadline for filing dispositive motions	August 31, 2020
Deadline for discovery	November 2, 2020
Rule 26(a)(3) disclosures and motions in limine: Objections:	 December 14, 2020 December 28, 2020
Trial:	December 2020/January 2021

[signature page follows]

Dated this 15th day of November, 2019.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Assistant Attorney General
State Bar #1084731

KARLA Z. KECKHAVER
Assistant Attorney General
State Bar #1028242

Attorneys for Defendant

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8904 (GJK)
(608) 264-6365 (KZK)
(608) 267-2223 (Fax)
johnsonkarpg@doj.state.wi.us
keckhaverkz@doj.state.wi.us

Dated this 15th day of November, 2019.

Respectfully submitted,

LIBERTY JUSTICE CENTER

Electronically signed by:

s/ Daniel R. Suhr
DANIEL R. SUHR
State Bar #6321108

Attorney for Plaintiffs

190 South LaSalle Street, Suite 1500
Chicago, Illinois 60603
(312) 263-7668
dsuhr@libertyjusticecenter.org

CERTIFICATE OF SERVICE

I certify that on November 15, 2019, I electronically filed the foregoing Joint Report Pursuant to Fed. R. Civ. P. 26(f) with the clerk of court using the CM/ECF system, which will accomplish electronic notice and service for all participants who are registered CM/ECF users.

Dated this 15th day of November, 2019.

s/ Gabe Johnson-Karp
GABE JOHNSON-KARP
Assistant Attorney General