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COURT OF APPEALS
DISTRICT IV

Dennis A. Teague,
Plaintiff - Appellant,

Case No. 2014AP002360

Linda Colvin and Curtis Williams,
Intervening Plaintiff-Appellants,

v.

J.B. Van Hollen, Walt Neverman, Dennis Fortunato,
and Brian O'Keefe,
Defendant - Respondents.

ON APPEAL FROM DANE COUNTY CIRCUIT COURT
THE HONORABLE JUAN COLAS PRESIDING

BRIEF OF PLAINTIFF-APPELLANTS

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The Circuit Court answered "yes."

ISSUE 2: Is CIB required by Wis. Stat. 19.70[1] either to correct the name-based record report it supplies to public requestors or to provide the opportunity to add a statement to those reports after a challenger proves he has no criminal history?

The Circuit Court answered "No."

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The Circuit Court answered "No."

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[1] 2013 Wisconsin Act 171, § 16 renumbered Wis. Stat. 19.356 as 19.70. This brief refers throughout to Wis. Stat. 19.70 although the summary judgment decision uses the old statute number. (A.App 9-11).

The Circuit Court answered "No."

ISSUE 5: Does CIB's alias name policy violate substantive due process?

The Circuit Court answered "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Court of Appeals should order oral argument. The factual record is long, complex, and technical. The legal issues to which those facts relate are novel. The Court of Appeals may have questions about CIB practices and procedures in producing criminal history record reports that have not been anticipated. The opportunity to address such questions is necessary to ensure a full presentation of the case.

The decision should be published. CIB produces approximately 800,000 criminal history reports annually. The search criteria "match" on criteria no more precise than an approximate name string and an approximate date of birth. As the record establishes, CIB knowingly distributes criminals' rap sheets in response to name-based record requests about people who have no criminal record. The volume of records produced, and the impact of CIB policies on employers and job-seekers, makes the legal questions in this case of substantial and continuing public interest. *See* Wis. Stat. 809.23(1)(a)5. Publication is also warranted because a decision will require this Court to apply the Open Records Act and the Fourteenth Amendment to factual situations significantly different than those previously addressed in any published decision. *See* Wis. Stat. 809.23(1)(a)2.

STATEMENT OF THE CASE

This is an official capacity action for declaratory and injunctive relief against the Wisconsin Department of Justice

(DOJ)/CIB's policy of knowingly associating innocent people with the criminal records of others. Dennis Teague, Linda Colvin, and Curtis Williams have never been convicted of a crime. Their fingerprints have never been submitted for inclusion in the CIB's criminal history databases. They have never been assigned a State Identification Number (SID), and, thus, literally have no criminal history in CIB's criminal history database. Yet, they are not treated by CIB like other innocent people. When a member of the general public requests a criminal history record report using plaintiffs' names and dates of birth, CIB does not respond, with a report that says "No criminal history found." Instead, the requestor receives a report of many pages.

Each of the plaintiffs attempted to correct their record through CIB's challenge process. When CIB refused to correct the reports, this lawsuit was initiated.

The first plaintiff, Teague, filed a complaint for declaratory and injunctive relief in Dane County on April 29, 2010. (R.2). On December 17, 2010, a motion to intervene was filed on behalf of Colvin and Williams (R.11). Decision on the motion to intervene was deferred pending discovery and dispositive motions.

On December 19, 2011, the circuit court denied Teague's motion for summary judgment and granted in part and denied in part CIB's motion for summary judgment. (A.App. 5-24). The decision dismissed Teague's statutory claims, including his open records act claims. It also dismissed Teague's Equal Protection challenge. (A.App. 12-14). The circuit court denied defendants' motion to dismiss the substantive and procedural Due Process Clause claims. The circuit court reasoned that there was a dispute of fact about the reasonable interference that can be drawn from the undisputed content of the reports. (A.App. 14-16).

On January 30, 2012, the circuit court granted the deferred motion to intervene. (R.54). The First Amended Complaint, including Teague's original claims and adding Colvin and Williams as intervening plaintiffs making the same claims was filed on March 19, 2012. (R.57). On March 23, 2012, the circuit court entered plaintiffs' proposed Order Applying Decision and Order on Motions for Summary Judgment Entered December 19, 2011 to the amended complaint. (A.App. 25-26).

The trial took place early in June, 2014. On July 2, 2014, the circuit court entered Findings of Fact and Conclusion of Law and Judgment dismissing the case. (A.App. 1-4). Timely Notice of Appeal was filed on September 30, 2014. (R.111).

STATEMENT OF UNCHALLENGED FACTS[2]

Data Gathering Facts

The CIB maintains a criminal history database of information provided by law enforcement agencies, the Department of Corrections, and the court system. (A.App. 1). The database contains information on about 1.3 million individuals. (A.App. 1). Every record in the database is associated with one set of fingerprints for each of those 1.3 million individuals. (A.App. 1). Each set of fingerprints is associated with a State Identification Number (SID). (A.App. 6). The SID is a unique number and all future submissions of fingerprints that match that SID's fingerprints, are associated with the same SID. (A.App. 6). Although each record is associated with one and only one set of fingerprints, and each set of fingerprints is associated with one and only one SID, an

[2] Most of the facts in this section reflect the circuit court's summary of facts in its summary judgment decision (A.App. 5-24) or in the post-trial "Findings of Fact and Conclusions of Law and Judgment (A.App 1-4).

individual (with the unique SID and the matching fingerprint sets) may be associated with many records, depending on the frequency of the fingerprint owner's contact with law enforcement. (A.App.1). CIB also associates each set of fingerprints and each SID with a master name. (A.App. 1).

CIB accepts information only from agencies authorized to submit the information and only via approved means that meet CIB's standards. (A.App.6). The information submitted may include names, aliases, dates of birth, and social security numbers, Arrest Tracking Number, SIDs, photos, and information about arrests, charges, and case disposition. (A.App.6). Each record includes information about the name or names and date or dates of birth the agency providing the information had for the person. (A.App.1). A person may have many names associated with them, because they have been known by various names, or had legal name changes or because of typographical errors or other reasons. (A.App. 1). Similarly, any given name may be associated with more than one person because, for example, the name is common, has been fraudulently used or because of a typographical error. (A.App 1-2). A date of birth may also be shared by many people, either correctly or because of fraud or error. *Id*. From these records, CIB creates alias name tables associated with master names. (A.App. 1).

Report Request and Report Generation Facts

This lawsuit is only about the records provided to members of the general public through the procedures described in this fact section and the record. This case is not about how records are generated and reported in response to law enforcement requests or about how other trained users access and interpret CIB criminal history record reports.

CIB receives requests for criminal background reports by paper and online. (A.App. 6). The only information required for either form of request is a first name, last name, and date of birth. (A.App.2). Other information may be submitted, but is not required. (A.App.2). These minimal information requests are referred to as "name-based" requests or queries. (A.App. 2). At the time this action was filed, DOJ charged the general public $13 for a name-based request. (R.42, Exh Y at p.7). In 2011, DOJ reduced the cost to $7 for a name-based request. (R.42, Ex AA, 4).

The computer system "matches" the name based request with names and dates of birth in the database by a search algorithm. (A. App. 2, 6). If there is no "match" within the "parameters," which "parameters" are not in the record, CIB responds "No Criminal History Found." (A.App. 2,7,150,167).

When the "match" is close enough, according to the "parameters," the system returns a report. What is a "match" that is close enough varies. (A.App. 2).[3]

Some "matches" trigger human intervention by CIB employees to decide whether to release a report. (A.App. 6). CIB employees have available to them the search criteria submitted and the names, dates of birth, race, sex, and (sometimes) Social Social Security numbers of the "matching"

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[3] For example, the search criteria Mary Meyer/DOB 08/17/1977 produced a seven page criminal history report on the database name Mary Elizabeth Myer/DOB 08/17/1977 or 08/18/1977. (A.App. 142-48). If the birth date is changed to 08/07/1977, CIB responds "No criminal history found." (A.App. 149-50). Christopher J. Peters/DOB 09/22/1967 is a "match" returning a fifteen page report; Christopher Peters 09/22/1967 returns "No criminal history." (A.App. 151-65, 166-167). The search criteria Dennis A Teague with Teague's date of birth returns a criminal history report (A.App 27-39, 40-50) even though his date of birth is six days different from one of the dates of birth of the criminal records returned.

database data, but do not know whether the "match" was on a master name or a name in an alias table. (A.App. 265-268).

With paper requests, the same matching process occurs, but a person must always be involved. The charge for paper requests was $18 for general public requests when this litigation started; at time of trial, it was $12. (R.106, Exhs. 23,36). Paper requests may include a fingerprint; Teague's paper request with his fingerprint returned a no record return. (R.106). A fingerprint identificantion technician averages approximately five minutes to make the fingerprint comparison. (R.33:3, ¶15).

Each of the plaintiffs, Dennis Teague, Linda Colvin, and Curtis Williams, is innocent. They have no criminal histories, no fingerprints in the database and no SID number. (A.App. 2,7). However, a member of the public making a name-based request for Teague, Colvin or Williams, using their dates of birth, receives a long criminal history report. (A.App. 2,7, 27-39, 40-50,51-103,104-141).[4] The content and format of these reports is not disputed. What impression these reports are capable of conveying to an average reader seeking criminal history information about Teague, Colvin, and Williams, using their dates of birth, is disputed.

The plaintiffs are challenging what has been referred to throughout this litigation as CIB's "alias name policy"— short-hand for the combination of system design, computer algorithm "parameters," and the conscious choices by CIB employees made on manual intervention.

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[4] See post-trial findings at A.App. 2. The three trial exhibits in Appellants' Appendix are the versions of the reports offered by the defendants, and referred to those findings.. The font in those is smaller than other versions.

The summary judgment record undisputedly establishes that a name-based request for Dennis A. Teague or Dennis Antonio Teague, using plaintiff Teague's date of birth, returns a "match" with the criminal record of Anthony Terrell Parker[5] because the database identifies "Dennis Antonio Teague" as an alias of Parker's; the database also associates the record with two dates of birth, one of which is six days different than Teague's date of birth. (A.App. 19-20, 22-23, 27-28). The trial record has a similar report returned on search criteria of "Dennis Teague" with Teague's date of birth (R.106;Exh. 5, at 1, 3), and of Dennis A. Teague with Teague's date of birth (A.App. 40-50). Another report, produced using the same search criteria returns "No criminal history found." (A.App. 236-237,238-239).[6]

The trial evidence on the alias name policy "match" for plaintiffs Colvin and Williams is similar. A name-based request using Colvin's name and date of birth returns a 53 page report because of a "match" on one of Lisa Bennett Hayes' 30 alias names and 12 different dates of birth. (A.App. 51-103). A name- based request using Curtis Williams' name and date of birth returns a 38 page report because of a "match" on the "Curt Williams" alias of Kirk Anthony Owens. (A.App. 104-141).

Challenge Procedure and Manual Intervention Facts

Since 2009, CIB has had a challenge process through which people adversely affected by the alias name policy can submit a fingerprint and obtain a notarized statement from CIB that the person does not, in fact, have a criminal record.

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[5] The circuit court refers to "Anthony Terrell Parker" as the "primary name" in the summary judgment decision and the "master" name in the trial decision. (A.App. 1,6).

[6] Cynthia Kolb, employed in CIB's record check unit, testified that the issuance of Trial Exh. 85, indicating "No Criminal History Found" was a mistake. (A.App. 231-234).

(A.App.2). Each of the plaintiffs used that procedure, established their innocence and obtained an "innocence letter." (A. App. 169-72). As of mid-2014, there have been approximately 250-60 successful challenges. (A. App. 3). Paper copies of successful challenges are kept in three to four linear feet of a file drawer in the same room (30 feet away) as the people doing the "manual intervention" to determine whether to release a criminal history. (A.App. 262-264). If the file drawer of successful challenges was organized alphabetically, it would possible to quickly check whether a name requested to be search had ever been a name for which a successful challenge had been made. A.App. 273).

STATEMENT OF CONTESTED FACTS

Plaintiff-Appellants challenge the circuit court's findings that the reports at issue in this case are not defamatory as contrary to the great weight of the evidence: (A.App. 3). Appellants also challenge what the circuit court describes as findings of fact 3-5, which are really either conclusions of law or conclusions about mixed questions of facts and law. (A.App. 3-4).

STANDARD OF REVIEW

Grants or denials of summary judgment are reviewed independently employing the same methodology as the circuit court. *See, e.g., Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 314-16, 401 N.W.2d 816 (1987). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Wis. Stat. 802.08(2).

Interpretation of statutes and the Wisconsin and United States Constitutions and their applications to undisputed facts

are also reviewed without deference. *See, e.g., County of Dane v. LIRC,* 2009 WI 9, ¶ 14, 315 Wis.2d 293, 759 N.W.2d 571

The findings of fact in the Findings of Fact, Conclusions of Law and Judgment are reviewed under the "clearly erroneous" standard and sustained unless against they are contrary to the great weight and clear preponderance of the evidence. *Phelp v. Physicians Insurance Company of Wisconsin*, 2009 WI 74, ¶ 39, 319 Wis. 2d 1, 768 N.W.2d 615.

Other relevant standards of review are discussed in the appropriate argument sections of the brief.

ARGUMENT

I. THE CIRCUIT COURT'S APPLICATION OF THE BALANCING TEST ON SUMMARY JUDGMENT IS REVERSIBLE ERROR UNDER THE OPEN RECORDS ACT.

A. The standard of review is *de novo.*

Application of the balancing test in open records cases is reviewed independently. *See, e.g., Milwaukee Journal Sentinel v. Wisconsin Department of Administration,* 2009 WI 79, ¶14, 319 Wis. 2d 439, 768 N.W.2d 700. That standard applies whether the plaintiff is seeking disclosure or non-disclosure of records. *Zellner v.Cedarburg School District,* 2007 WI 53, ¶17, 300 Wis. 2d 290, 731 N.W.2d 240.

B. The circuit court committed reversible error in accepting CIB's "global balancing" as a basis for disclosing the records in this case.

On summary judgment, CIB argued it was entitled to engage in "global" balancing and that, in its opinion, it is **always** a better balance to disseminate derogatory information that may be unresponsive to the requester's request than to determine the

identity of the person about whom the request is made. (R. 32:18, R32:19; R.41:4-5, ¶ 16.). Teague argued that such "global" balancing was prohibited. (R.44:16-17). Citing *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179, the circuit court concluded global balancing was proper because "the nature of these records do not vary from case to case." (A.App. 10).

The circuit court was wrong. *Newspapers Inc. v. Breier* does not authorize global balancing and common law balancing does not favor public disclosure of **potentially** defamatory information without any effort to determine if the defamatory information is responsive to the requester's request.

Five rules of law on the application of the balancing test are critical to the issues raised by this case.

1. "Common law limitations on the public's access to public records continue notwithstanding the open records law." *State Ex rel Young v. Shaw*, 165 Wis. 2d 276, 290, 477 N.W. 2d 340 (1991) (citations omitted).

2. A "balancing test must be applied in every case …" *Wisconsin Newspress, Inc. v. School Dist. of Sheboygan Falls*, 199 Wis. 2d 769, 781, 546 N.W. 2d 143 (1996).

3. "The balancing test must be applied to each individual record." *Milwaukee Journal Sentinel v. Wisconsin Department of Administration*, 2009 WI 79, ¶ 56, 319 Wis. 2d 439, 768 N.W.2d 700; *Wisconsin Newspress, Inc. v. School District of Sheboygan Falls*, 199 Wis. 2d 768, 546 N.W.2d 143; *Law Offices of William A. Pangman & Associates v. Stigler*, 181 Wis. 2d 828, 840, 468 N.W.2d 784 (Ct. App. 1996). *See also*, *Hempel v. City of Baraboo*, 2005 WI 120, ¶62, 284 Wis. 2d 162, 194, 699 N.W.2d 551.

4. The test is "whether permitting inspection would result in harm to the public interest which outweighs the legislative

policy recognizing the public interest in allowing inspection." *Woznicki v. Erickson*, 202 Wis. 2d 178, 184-5, 549 N.W. 2d 699, 701 (1996).

5. "[A]n individual whose privacy or reputational interests are implicated by the . . . release of his or her records has a right to have the circuit court review the . . . decision to release the records . . . ." *Woznicki*, 202 Wis. 2d at 193.

The circuit court reversible error is sanctioning CIB's "global balancing" conclusion that the balance is **always** to be struck in favor of disclosure, regardless of how defamatory the information, regardless of whether the requester is seeking information about the person whose records are being distributed, and regardless of whether the requester understands that the record produced is **not** about the person about whom the information was sought.

The circuit court's reliance on *Newspapers Inc. v. Breier* is misplaced for two reasons. First, the circuit court ignored the **public** policy interest in protecting the reputations of citizens explicitly recognized in *Breier.*[7] "One of these exceptions to the general rule of openness is when financial, medical, social or personal histories and disciplinary data **which may unduly damage reputations** are to be considered." *Breier,* 89 Wis. 2d at 430. "Hence we have concluded that there is a **public policy interest** in protecting the reputations of citizens." *Id.* at 430 (emphasis added). *See also Zellner,* 300 Wis. 2d 290 ¶ 50; *Linzmeyer,* 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811. The circuit court erred in ignoring that there is public interest in preserving innocent citizens' reputations.

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[7] Despite the contrary assertion in the summary judgment decision (A.App. 10), Teague's summary judgment brief cited *Woznicki* and *Breier* for the **public** interest of "citizens to privacy and protection of their reputations," (R.22:21), and argued the **public** interest was in receiving information about the person about whom the requester sought information, not information about someone else. (R.22:21-22).

Second, the circuit court failed to account for significant factual differences between the present case and *Breier*. In *Breier*, the requester requested "immediate access to the records which show on a chronological and daily basis the charges upon which persons were arrested." *Id.* at 421. "The only issue on appeal . . . is whether the Chief of Police is required . . . to make records available for routine inspection so the press and members of the public can ascertain the charge for which a person was arrested." *Id.* at 423. "Although the record is referred to as the "blotter," the actual title of the requested form is "Daily Arrest List." *Id.* at 424.

Breier did not involve a request for information about a specifically identified person; indeed, it explicitly recognized that police "blotters" are different from "rap sheets" of individuals.

> . . . . Nor do we decide whether the Chief of Police is required to make public the "rap sheet." The "rap sheet" must be distinguished from the "Daily Arrest List" or police "blotter." The police "blotter" is an approximately chronological listing of arrests, recorded at the time of booking at the police station. A "rap sheet" is a record which the police department keeps on each individual with an arrest record. "Rap sheets" …purport to show on a single document all arrests and police contacts of an individual. The public-policy reasons for the disclosure or nondisclosure of the "rap sheets" may differ markedly from the reasons which impel us to conclude that the arrest records showing the charges must be disclosed.

Id.

The present case is "the rap sheet" situation made worse because CIB associates one person's "rap sheet" with an innocent person's personal identifying information.

Through its global balancing, CIB purposefully, and **permanently** determines that this kind of highly defamatory information should be disclosed **even if** the information is not what the requester is seeking. That determination is contrary long-standing precedent that balancing must be done on case by case, document by document, request by request basis.

> Rather, the balancing test must be applied "on a case-by-case basis." …. The rule from these and the rest of this court's cases is that the balancing test must be applied in every case in order to determine whether a particular record should be released, and there are no blanket exceptions other than those provided by the common law or statute.

Wisconsin Newpress, Inc. v. Sch. Dist. of Sheboygan, 199 Wis. 2d 768, 780, 546 N.W.2d 143 (citations omitted); *see also Hempel* , 284 Wis. 2d at 194, ¶62. *Linzmeyer*, 254 Wis. 2d at 325 ¶25.

The "case-by-case" mandate is also a "document by document" mandate. *Milwaukee Journal Sentinel v. Wisconsin Department of Administration,* 2009 WI 78, ¶56, 319 Wis. 2d 439, 768 N.W.2d 700.

CIB's version of global balancing violates both these mandates.

C. Under the common law balancing test, rap sheet information about someone else should not be disclosed in response to requests for information about plaintiffs.

In exercising its independent review, the Court of Appeals should hold that CIB cannot turn over its balancing of

the public interests to a computer search algorithm when CIB knows the computer makes false positive matches.

Common law balancing considers several public interests. First and most significantly weighing against disclosure is, as discussed above, the recognized **public** interest in citizens' reputations. The public interest in fellow citizens not being wrongfully besmirched is especially weighty now that identity theft is a risk to which all are subject.

Second, while there is a public interest in reliable information, there is minimal public interest in unreliable information. A member of the public making a record request about a specific individual seeks information about that person. It is not a Google search. The requesters comes to the government for authoritative information about criminal history. That interest is not served by falsely associating Parker's criminal record with Teague, or Hayes' with Colvin, or Owens' with Williams. Information so unreliable it must be disclaimed adds minimal, if any, weight to the balance on the side of disclosure. Thus, this case is significantly different from cases like *Hempel*, *Zellner*, and *Linzmeyer* where a government employee suspected of improper conduct sought non-disclosure. Here, a known innocent, private, citizen seeks non-disclosure— in association with him/her self— of a known other person's criminal record.

The balancing might be different if CIB was releasing information it knew was about the person for whom information was requested. But CIB knows its name-based reports, based on an approximate name "match" and an approximate date of birth "match," do not reliably relate to the person about whom the internet based search string was submitted. CIB thus disclaims reliability.[8] In this case, CIB **knows** that each time it

[8] At summary judgment, the CIB disclaimer read: "search on name and non-unique identifiers are not fully reliable." (A.App. 19,22,27). Trial

receives a name-based criminal history record request for Teague's name and date of birth, it is responding with the wrong person's criminal history.

Third, this Court should also consider that the government may clarify requests before releasing records. Custodians need not guess about which documents are sought by ambiguous open record requests See, *e.g.*. *Siefert v. School District of Sheboygan Falls*, 2007 WI App 207 ¶¶ 42, 44, 305 Wis. 2d 582, 740 N.W.2d 177.

Fourth, the information sought is not about the operation of government. While there is certainly a public interest in deterring criminal behavior, public requesters are seeking government data for private decisions, and thus the "weight" on scale for disclosure is lighter than if the information was sought about government operation and decision-making.

Fifth, there is a reliable alternative. CIB could insure accuracy by requiring a fingerprint. At the time of the summary judgment motions, CIB itself observed, "[p]ositive fingerprint identification overcomes the problem of false identification and alias names. Fingerprint supported records can be used to confirm whether or not a criminal record in the file really belongs to a particular individual. (R.22, Exh. E 1 at ¶ 2). By the time of trial, caregiver background check required fingerprints. Wis. Stat. § 48.685(2)(br).

Enjoining CIB to release records only on positive fingerprint identification until it develops a more accurate electronic search method does not harm the public interest. CIB charges more for positive fingerprint identification ($15) than for unreliable, name-based record disclosure ($7.00). (R.22, Exh. C [DJ-LE-250]). *See also* (A.App. 245). Increased prices

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exhibits show that substantially more prefatory material, and an expanded explanation. (A.App. 40).

would simply pass the costs of increased accuracy on to the consumer of government information.

II. AFTER CONFIRMING THAT TEAGUE HAD SUCCESSFULLY CHALLENGED CIB'S ASSOCIATION OF PARKER'S CRIMINAL HISTORY WITH HIS NAME AND DATE OF BIRTH, CIB WAS REQUIRED BY WIS. STAT. § 19.70 EITHER TO CORRECT THE RECORD OR TO ALLOW A STATEMENT ADDED TO THE RECORD.

Teague argued that under Wis. Stat, § 19.70, CIB's continuing application of its alias name policy to him is unlawful. The circuit court granted summary judgment on this claim because (1) the data about Parker's record does not "pertain" to Teague. (A.App. 12) and (2) CIB does not keep the paper criminal history report generated by the database so there is no "record" a challenger can challenge. (A. App. 11). That decision must be reversed.

A. The plain language of Wis. Stat. 19.70 authorizes only two responses to written accuracy challenges.

Section 19.70 reads:

> (1) Except as provided under sub. (2), an individual . . . may challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority if the individual is authorized to inspect the record under s. 19.35(1)(a) or (am) and the individual notifies the authority, in writing, of the challenge. After receiving the notice, the authority shall do one of the following:
>
> (a) Concur with the challenge and correct the information.

> (b) Deny the challenge, notify the individual or person authorized by the individual of the denial and allow the individual or person authorized by the individual to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record. A state authority that denies a challenge shall also notify the individual or person authorized by the individual of the reasons for the denial…

Wis. Stat. Ann. 19.70.

The statute is plain: if the criminal history report is "a record containing personally identifiable information pertaining to the individual that is maintained" by CIB and there is a successful challenge, then CIB must "correct" the information. If the challenge is denied, CIB must "allow a concise statement" and notify the individual. The statute does not authorize any other options.

B. Parker's data is "personally identifiable information pertaining" to Teague when CIB associates Parker's data with Teague's name and date of birth.

The circuit court's decision that the record challenged by Teague "pertained" only to Parker ignores the statutory definition of "personally identifiable information." "Personally identifiable information" means information "**that can be** associated with a particular individual through one or more identifiers or other information or circumstances. "Wis. Stat. § 19.65(5)(emphasis added). CIB "can," and does, associate Parker's information with Teague's "identifiers".

The name "Dennis A Teague" is an "identifier" of Teague the plaintiff. It may also be an identifier of Parker because he once used it as an alias, but it remains an "identifier"

of Teague.[9] Teague's date of birth is "other information or circumstances" further associating the information with Teague's "identifiers."[10]

Further, the statutory definition language in Wis. Stat. § 19.65(5) is "can be associated," not "must be" or "may only be" or "only refers to." CIB "can" and does associate the information with the plaintiff when it responds to a request for information using Teague's name and Teague's date of birth. CIB may **sometimes** associate that felony record with the identifier "Anthonu (sic) T Parker" (A.App. 20). CIB may also **sometimes** associate the information with a different date of birth than Teague's , such as October 10 or April 5. (A.App. 20). However, the statutory language is "can be associated" and it is undisputed that CIB makes the association when it links Parker's data with Teague's identifiers.

The circuit court rejected that argument, observing "not every occurrence of [Teague's name] "pertains" to Teague." (A.App. 12). While true, the observation misses the point. The fact that Teague's name is in a CIB alias table is not what makes Parker's information "pertain" to Teague. If a requester requested a report on Anthony Parker, the fact that Parker's report includes Teague's name would not make the information "pertain" to Teague. But the reverse is also true. When the requester **does** request a report on Teague, with Teague's date of birth, the association of Parker's alias with Teague's "identifiers" makes Parker's information "pertain" to Teague.

Two Attorney General Opinions support Teague's argument, similarly concluding that the same information can

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[9] Parker and Haynes used the names and personally identifying information of real people, Teague and Colvin. Kirk used "Curt Williams" as one of his many the aliases. (A.App. 107).

[10] Teague's' date of birth on the search criteria for defendants' summary judgment exhibits (A.App 19, 27) differs from Parker's dates of birth in the database. (A.App.20,28).

"pertain" to more than one individual. 07 Wis. Op. Att'y Gen. (Oct. 15, 2014); 01 Wis. Op. Att'y Gen. (Jan. 1, 2006).

C. The Parker record produced in response to a request using Teague' s name and date of birth is "maintained" by CIB regardless of whether CIB keeps a paper copy.

The circuit court also concluded that Wis. Stat. § 19.70 does not apply to Teague because CIB does not "keep any electronic or paper copy" and "consequently, that report "is not a record that Teague can challenge or with which his challenge can be filed." (A.App. 11).

.The circuit court erroneously construed the "record" that record challenged under Wis. Stat. § 19.70 was **only** the printout of the returned record. There is no statutory authority for that conclusion.

Wisconsin's Open Records law defines "record" broadly, explicitly recognizing that authorities often store data in one format and generate it in other formats in response to records requests. "Records" thus include

> ….any material on which written, drawn, printed, spoken, visual, or electromagnetic information or electronically generated or stored data is recorded or preserved, *regardless of physical form or characteristics*, which has been created or is being kept by an authority. "Record" includes, but is not limited to, handwritten, typed or printed pages, maps, charts, photographs, films, recordings, tapes, optical disks, and any other medium on which electronically generated or *stored data is recorded or preserved*.

Wis. Stat. § 19.32(2)(emphasis added). This broad definition of "record" is specifically incorporated into the Personal Information Subchapter in which Wis. Stat. § 19.70 appears. *See* Wis. Stat. § 19.62(6).

The circuit court was wrong that there is no "record" under Wis. Stat. § 19.70 because the "record" includes CIB databases; the report printout is simply one format of the "record." *Wiredata, Inc. v. Town of Sussex,*2008 WI 69, ¶58, 310 Wis. 2d 397, 432-33, 751 N.W.2d 736, 753, As long as CIB "maintains" the criminal history database, therefore, it maintains the "record," even if the paper copy is printed over the internet offsite.

D. Teague's successful challenge put CIB on notice that its association of Parker's data with Teague's name and date of birth triggered a statutory duty to correct.

Teague has undisputedly, under Wis. Stat. § 19.70, successfully challenged the association of Parker's history with his name and date of birth. (A.App. 168-169). CIB knows exactly what the "problem" is after the challenge: CIB's own fingerprint analysis confirms Dennis Teague has no criminal history record in Wisconsin yet CIB continues to associate Parker's felony record with Teague's personally identifying information. (A.App. 169).

Under Wis. Stat. § 19.70, CIB is required either to stop disseminating Parker's rap sheet in response to a request for information using Teague's name and birth date or otherwise comply with the law. Wisconsin Stat. § 19.70 is not made inapplicable merely because it might create some difficulty for CIB to add the capacity to comply with the law. *See* Wis. Admin. Admin 15.05(13)(entities must maintain information systems that allow record to be masked to "exclude confidential or exempt information").

This Court should thus reverse the circuit court, grant Teague's motion for summary judgment on this issue and remand for a remedial order.

III. CIB'S ALIAS NAME POLICY VIOLATES EQUAL PROTECTION BECAUSE IT DISCRIMINAES IRRATIONALLY AGAINST ONE CLASS OF INNOCENT PEOPLE.

A. The standard of review is "rational basis," but it is applied to a presumptively invalid unpromulgated agency policy.

Statutes are presumed constitutional; challengers have the burden of proving a statute is unconstitutional beyond a reasonable doubt. *See, e.g., Metropolitan Associates v. City of Milwaukee,* 2011 WI 20, ¶ 21, 332 Wis.2d 85, 796 N.W.2d 717. Administrative regulations adopted by an agency carry the same presumption. *LeClair v. Natural Resources Board,* 166 Wis.2d 227, 236. 483 N.W.2d 278 (Ct. App. 1992). Whether that presumption applies to sub-regulatory practices such as the CIB alias name policy is less certain.

In administrative law, unpromulgated policies are presumptively **invalid.** *See*, *Wisconsin Telephone v. Department of Industry, Labor & Human Relations,* 68 Wis. 2d 345, 364, 228 N.W.2d 649 (1975)(sex discrimination "guidelines" invalid because not promulgated); *Frankenthal v. Wisconsin Real Estate Board,* 3, Wis. 2d 249, 88 N.W.2d 352 (1958)(mimeographed "instructions" requiring inactive real estate broker partners to be licensed invalid to change existing agency interpretation). Giving unpromulgated policies no deference makes sense in both the administrative and constitutional realms because it the "rational, public process" required to make rules that tends to ensure that policies of general application will not be arbitrary, capricious, or oppressive, *See, e.g. Mack v. Wis. Dep't of Health & Family Servs.,* 231 Wis. 2d 644, 649. 605 N.W.2d 651, 654(Ct. App. 1999).

Under the rational basis tier[11] of equal protection analysis, classifications must be rationally related to a legitimate governmental purpose. *State v. Smith*, 2010 WI 16, ¶¶ 12-13, 323 Wis. 2d 377, 388-89, 780 N.W.2d 90 (2010). "Rational basis" review can be more or less careful, depending on the nature of the interests implicated or the kind of discrimination involved. For example, discrimination against criminals is often upheld on the most cursory inquiry. *See, e.g., Baer v. Wauwatosa*, 716 F.2d 1117, 1125 (7th Cir. 1983)(relationship of felony conviction to qualification for license to sell guns is self-evident). However, even "rational basis" requires consideration of reasonability. *See, e.g., Milwaukee Brewers Baseball Club v. Wisconsin Dep't of Health & Soc. Servs.*, 130 Wis. 2d 79, 103-04, 387 N.W.2d 254, 265 (1986) (E]qual protection cannot be interpreted so as to allow the legislature to exercise its will … so long as there is any rationale to do so, regardless of how remote, fanciful, or speculative the rationale …To be rational for the purpose of equal protection analysis, the legislative rationale must be reasonable.... in application to policies, projects).

The more unusual the classification, the more likely courts are to scrutinize rationales with care. In this case, CIB applies its policy to innocent people – persons who have proven they are victims of identity theft– without any justification based on *their* conduct. Such a policy has no precedent in state or federal law. *Romer v. Evans*, 57 U.S. 620, 632-33 (1996)(*citing Louisville Gas & Elec. Co.* 277 U.S. 32, 37-38 (1928) ("discriminations of an *unusual character* especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision")(emphasis added).

In applying the rational basis standard, this Court should consider that CIB's alias name policy is an unusual

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[11] Teague does not contest that the standard of review is rational basis.

unpromulgated subregulatory policy known to harm innocent people.

B. CIB criminal history reports are part of a state created credentialing system relied upon by innocent people to produce a clean background check.

Although CIB is not a consumer reporting agency, it has become the authoritative source for an increasingly important credential: the "clean" criminal record.

CIB criminal history record reports are prima facie evidence of any conviction reported therein in a variety of contexts *See, e.g.*, Wis. Stat. §§ 973.12; 48.685 (requiring DCF, counties and agencies conduct a criminal history search of DOJ records); 50.065 (identical provision for caregiver employment and licensure); 48.88 (same for adoption); 85.21 (similar provision governing specialized transportation service funds); Wis. Adm. Code s DHS 175.01 (advising camp owners and operators to obtain name-based background checks through the DOJ); Wis. Adm. Code SPS 305.20, 305.9905 (similar requirements for blaster's licenses).

Even when the credential of a clean CIB report is not statutorily mandated, its use is widespread. The circuit court found that approximately 800,000 are issued annually. It is prima facie evidence of non-disqualification, and even state regulators rely on a "clean" CIB record as evidence of the absence of a criminal record. (A.App. 198-199, 278).

C. CIB treats similarly situated innocent citizens significantly differently with respect to that critical credential.

In analyzing a rational basis equal protection claim, courts make three determinations: is there a "distinct classification" of citizens; is that class treated differently; and is

there, applying the five-factor test, a rational basis for the significantly different treatment. *See, e.g., Aicher v. Wisconsin Patients Comp. Fund*, 2000 WI 98, ¶58, 237 Wis.2d 99, 613 N.W.2d 849. See also, *Metropolitan Associates v. City of Milwaukee*, 332 Wis.2d 85, ¶¶ 23,64.

The first two determinations are easy to make here. All individuals who have no arrest or conviction history are similarly situated with respect to CIB. They are all innocent, meaning they have never had fingerprint information sent to CIB with an arrest record and have no SID numbers.

Unlike all other innocent people, however, Teague and his cohort cannot force CIB to respond to name-based requests about them with a "no criminal history found" return. By statute, innocent people who are arrested but not charged, or charged but acquitted may, through Wis. Stat. § 165.84(1), have the arrest removed from their record; they have a right to have information removed from the CIB's database when that information is NOT linked to a conviction so requesters checking on them will receive a "no criminal history found" return. Teague and his cohort, however, cannot use this statutory mechanism. Nor, under the circuit court's reasoning, can they use Wis. Stat. § 19.70 to correct the response associating their names and dates of birth with arrest and conviction records even when they establish their innocence.

D. The classifications created have no rational basis.

Under the five-factor test, a classification such as the one created by CIB does not satisfy the rational basis test if it fails to meet **any** the following five criteria:

> (1) All classification[s] must be based upon substantial distinctions which make one class really different from another.

(2) The classification adopted must be germane to the purpose of the law.

(3) The classification must not be based upon existing circumstances only.

(4) To whatever class a law may apply, it must apply equally to each member thereof.

(5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.

Aicher v. Wisconsin Patients Comp. Fund, 237 Wis.2d 99, ¶ 58.

CIB's alias name policy does not satisfy the first criteria because there is no substantial distinction in the Teague cohort that makes them different from other innocent citizens. For the purposes of the criminal history archive, which maintains actual criminal histories, verified by the powerful certainty of fingerprints, with unique SID identity numbers, innocent people are all the same. None of them have fingerprints or SIDs or arrests or conviction information in the database.

The distinction between the classes of innocent people, evidenced by the different responses they receive to name-based background checks, is not based on any quality that makes one innocent person different from another innocent person. It is based on whether a computer algorithm "thinks" some combination of "close enough" name and "close enough" date of birth is close enough. The fact that a criminal may have used a name that may be matched through algorithms or individual choice with the name of an innocent person does not substantially distinguish that innocent individual from other innocent individuals.

In *Nankin v. Village of Shorewood*, 2001 WI 92, ¶¶ 13-15, 245 Wis. 2d 86, 99-100, 630 N.W.2d 141, 146-47 and *Metropolitan Associates*, 332 Wis. 2d 85, ¶68, the Wisconsin Supreme Court held unconstitutional the legislature's different treatment of property owners depending on either the population of the community or whether the community's legislative body voted to opt out. In both cases the Court could not find actual characteristics of the class that justified the discrimination. *See, e.g. Nankin*, 245 Wis. 2d, ¶ 41 ("populous counties do not present any special problems or concerns such that it is rational to restrict such circuit court actions in populous counties.") Populous counties have more people, but that is not a difference among property owners. Similarly, the fact that some innocent people have their names or dates of birth used by a criminal does not mean they present any special problem or concern.

Using logic analogous to that employed in *Nankin*, the United States Supreme Court has noted the peculiar problem with discriminating against children because of their parents' conduct or status. *See, e.g. Trimble v. Gordon*, 430 U.S. 762, 770 (1997)(invalidating an Illinois probate statute disfavoring illegitimate children, noting that "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."). That same logic applies to innocent record subjects like Teague. They do not become different from other innocent citizens because of the conduct of criminals in using a phony name the computer deems "close enough."

CIB's alias name policy also fails the second factor of the test: it is not is not germane to a permissible government end or goal. Black's Law Dictionary defines germane as "In close relationship, appropriate, relevant, pertinent." (5th Ed. 618)(1977). The relationship between a permissible goal and the challenged classification must be one that is "close" and appropriate.

According to the circuit court, the purpose of CIB's alias name policy is to alert requestors to the "possible existence of a criminal history involving a person whose name has been submitted." (A.App 13). While that end is permissible, the classification is not germane (in close relationship or appropriate) to it. The alias name policy attaches the rap sheets of criminals to the names and dates of birth of innocent citizens without attempting to determine whose name the requester has submitted. That does not alert to the possibility of a record involving someone who might be using a false name; it rather associates a detailed, particular, and extensive list of arrests and convictions with the personally identifiable information of someone who is innocent. A policy of providing requestors with the opportunity to verify the identity of the subject they seek information about might be germane. CIB's policy is not.

The policy is not germane to the other imaginable permissible ends of accuracy in criminal history records or assisting law enforcement.. The policy increases inaccuracy through the fuzziness of the "match" and does not affect law enforcement because it does not apply to the records they receive (in a different format) from CIB.

On the fourth of the five factors, CIB's alias policy does not apply equally to each member of Teague's class. Because matches are not made on the precise name and date of birth used by the criminal during an initial police contact, application of the policy will depend on what information the requestor submits, how broadly the algorithm "sweeps," and how individual employees resolve possible matches during manual intervention. Those variables, established in the summary judgment record and given greater detail in trial testimony, mean that not all innocent victims will always receive a report attaching someone else's rap sheet. The policy thus does not "apply equally" to all to whom it is applied (which makes it arbitrary by definition).

Finally, the characteristics of the two classes of innocent people are not so different as to suggest the propriety of substantially different treatment. The fact that one group of innocent people once had their names and dates of birth, or something like their names and dates of birth, used by a criminal is not a characteristic that suggests the propriety of treating that class differently than all other innocent people. First, the characteristic is associated with one context (police contact) while the substantially different treatment occurs in the context of employment and other potentially long term relationships in which false identities are difficult to maintain. Second, the distinguishing characteristic could be one-time use decades ago or a pattern of very recent use which does not suggest the propriety of a policy that applies equally and forever to all victims of identity theft.

IV. THE CIRCUIT COURT'S PROCEDURAL DUE PROCESS DECISION DEPENDED ON A CLEARLY ERRONEOUS FACTUAL DETERMINATION AND A MISAPPLICATION OF RELEVANT LAW.

Plaintiffs argued that CIB policy deprives them of a constitutionally protected interest without due process of law by disseminating stigmatizing information about them in response to name-based background checks. "To prevail on that claim, plaintiffs must show (1) public disclosure of a stigmatizing statement by the government, the accuracy of which is contested; plus (2) the denial of some more tangible interest such as employment, or the alteration or a right or status recognized by state law." *Ulrich v. City & County of San Francisco*, 308 F.3d 968, 982 (9th Cir. 2002) (*citing Paul v. Davis*, 424 U.S. 693, 701, 711 (1976)).

After trial, the circuit court found, as a matter of fact that there was no "stigma" because the reports in question:

> are not defamatory" [of plaintiff] and "[t]hey are not literally false and when taken as a whole and fairly and reasonably read do not convey a false and defamatory meaning to their intended audience (the public making a records request)."

(A.App. 3). The circuit court also "found" no "plus." (A.App. 3). The circuit court was wrong on both counts.

A. The finding that CIB reports do not convey a false and defamatory meaning about plaintiffs to their intended audience is clearly erroneous.

A trial court finding of fact is "clearly erroneous" when it is "contrary to the great weight and clear preponderance of the evidence." *Phelps v. Physicians Insurance Company of Wisconsin*, 319 Wis. 2d 1, ¶ 39. *See, also, PHH Mortgage v. Mattfield*, 2011 WI. App. 62, ¶ 11, 333 Wis. 2d 129, 799 N.W.2d 455.

The clearly erroneous standard is less deferential to a judge's finding of fact than a jury's verdict because a finding may be contrary to the great weight and clear preponderance of the evidence even though credible evidence supports the finding and even though it cannot be held as a matter of law that the finding is wrong. *Sievert v. American Family Mutual Ins.*, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993).

The circuit court's finding that the reports did not defame appellants to the intended audience is against the great weight of the evidence. The **only** evidence about what the reports convey to the "intended audience" came from plaintiffs, and consisted of three types: (1) expert testimony from Dr. Sam Racine, and Janet Ohene-Frempong, (2) "user" testimony from Tom Koehn and Laurie Sheets, and (3) Linda Colvin's testimony about how employers and other entities actual read the reports. The defendants presented neither any expert testimony nor any

testimony from any member of the public about making requests or interpreting reports.

Dr. Racine has a Ph.D in Rhetoric and Scientific and Technical Communication, and is the Director of the Sales Preparedness Program for Unisys Corporation where her responsibilities include "Computer Mediated Communication," "User Interface Design", and "Data Presentation." (R.120:13-17; A.App. 174-183) summarizes her testimony. Briefly, her evidence about CIB's reports in their format at the time of summary judgment and at the time of trial was this:

> i. The format and language of the report communicate to the average reader through common conventions and language that the report is authoritatively about a person in the world about whom the information was requested.
>
> ii. Mixing the search string with the document design convention of labeling used here – category items with specific detail – communicates a single unique entity in which one and only item meets the criteria.
>
> iii. The priority position of "Convicted Felon" as the first headline in the report followed by paragraphs and paragraphs of information that are visually signaled to be supporting data about that label communicates visually that the subject is a convicted fellow.
>
> iv. The physical weight of the printed report and the number of pages returned indicate the subject has a criminal record.

(A.App. 176) Dr. Racine testified about the ineffectiveness of CIB's disclaimers and reading instructions, identifying specific characteristics of average readers, including:

> i. the "disclaimer" portion of the information in [the CIB website] is not easily identified or extracted. The explanation that "multiple persons to share a name" first appears in the fourth paragraph, line 21. The suggestion to "read ALL information" does not appear until the eighth paragraph, line 38. The headings used where these disclaimers exist do not signify that the content is involved. The first disclaimer occurs in the "Information" section and the second occurs in the "Requesting" section. The former section is essentially background information and the latter is a description of a process.

ii. Neither of the sections identified above is likely be read because they do not align to the requester's intention. The requester is coming to the site to do something – to take an action – not to read. The requestor will only be interested in topics that are identified and directly related to her/his goal. Because obtaining information about background check is not her/his goal, "you will find information on the following topics" does not align with to her/his purpose.

(A.App. 176-77).

Dr. Racine provided a similar analysis of why other portions of the CIB interface and the returned report were ineffective at communicating the disclaimers and instructions. (A.App. 178-79). The defense did not impeach or contradict this evidence.

Dr. Racine also explained the science of **why** the reports authoritatively communicate that they are about the person about whom the requester seeks the information, including the standard conventions of centered subject block, labels of name and date of birth, and a horizontal rule, the influence of electronic media on the reading methods of scanning and skipping large blocks of text to pinpoint "the salient point of information that corresponds to the purpose for which we visit a text." (A.App. 180). She testified that, based on data, "on the average web page users have time to read at most 28% of the words during an average visit; 20% is more likely." (A.App. 181).

Plaintiff's other expert was Janet Ohene-Frempong, a national consultant on plain language writing. She provided evidence about the reading practices of "average readers," of criminal history reports. She assumed the "target" audience to be persons using the report to make decisions, such as employment decisions, "who are not legally savvy, are busy, are risk averse, can be selective in the decision and basically want to know, for sure, whether the person they are interested in has a criminal record." (A.App. 184, ¶2).

Her evidence, confirming Dr. Racine's, covered the professional literature about how readers reading for information skim, skip, and scan, and often give up reading if they do not find information quickly or the most important information does not stand out visually. (A.App. 184, ¶2). The unsavy general reader of CIB reports, she opined, is "likely to conclude that the report might or does provide vital information about the actual person for whom the report was requested, even if it does not," and "take action with adverse consequences to the person for whom the report was requested." (A.App. 184, ¶2).

Ohene-Frempong's testimony identified a number of report design features and language, and the supporting professional standards, that caused CIB criminal history record report reports **to fail to communicate** to average readers that the trial exhibit reports on plaintiffs Teague, Colvin, and Williams were .not about them. (A.App. 186-188).

The expert evidence was confirmed by the "real life" evidence of users. Two actual requesters of CIB reports testified that, after reviewing Teague's criminal history report, the believed he had a criminal record. (A.App. 219-227; 251-257). Plaintiff Linda Colvin testified that her name-based report had been misunderstood by an employer-who believed she had lied about her criminal history; by MATC employees-who told her she could not continue taking a class she was enrolled in until she proved Lisa Haynes' record was not her record; and by the IRIS program, a non-profit which regularly uses criminal background checks to insure compliance with state and federal law. (A.App. 200-214).

The defense presented current or former Department of Justice employees, Neverman, O'Keefe, Collins, Gries, Meyer, Hujet, Streeksa, and Kolb. None claimed knowledge or training on how average readers read or comprehend. Some testified about how they understood CIB reports and about how they believed the reports **should be read** or about how responsible

readers **should** read them, but none testified about how average readers requesting public records understand the reports. None claimed that they had any education, training, or experience in communication, technical writing, document design, web interface design, or reading comprehension.

A defense witness, Sheryl Busse, the Deputy Administrator of the Division of Quality Assurance of the Department of Health Services, the division enforcing state statutes on mandatory criminal background checks of some caregivers, testified that she had been trained to read CIB reports by the Department's Legal Counsel and DOJ and had read "thousands" of reports. (A.App 191,192,195). She testified that Colvin's report, (A.App. 51-103), would require a prospective employer to investigate the "discrepancy" in the licensing context, but offered no evidence about how the general public would understand the report. She also confirmed the value of a "clean" record: a "No criminal history found" report like Exhibit 22 (A.App. 197-198) does not require the prospective employer to investigate. (A.App. 199).

Defense witness Jason Wutt, an employee of Department of Children and Families, who has reviewed CIB reports more than 500 times, does not find CIB reports confusing (A.App. 275,276-277). He also testified that anytime the CIB report is anything other than no record found, his agency does a "close review of any arrest record that would be on the DOJ." (A.App. 278). Mr. Wutt testified that he was **not** qualified to testify how employer's might interpret CIB reports (A.App. 279,280-281).

The question of "historical" fact to be decided is whether some of the general public reasonably interprets the CIB reports in question, including the rap sheets, as referring to plaintiffs. The publisher of derogatory content has no right to insist that the defamatory content be interpreted as the publisher does. *Frinzi v. Hanson,* 30 Wis. 2d 271, 277, 140 N.W.2d 259 (1966)("One may not dissect the alleged defamatory statement into

nondefamatory parts and thus lose the vital overall meaning.") See also, *Restatement (Second) of Torts*, 554 (A defamatory communication is made concerning the person to whom it's recipient correctly, **or mistakenly but reasonably**, understands that it was intended to refer.)

Plaintiffs' evidence established how average requesters could, mistakenly but reasonably, understand the defamatory reports to refer to plaintiffs. The opinions of law enforcement personnel about how they understand CIB reports, or the understanding of state agency enforcement personal who have read literally hundreds of such reports is not a scintilla of evidence of how the general public requester understands the reports. The uncontroverted testimony of plaintiffs' witnesses, and a clear preponderance of all other evidence, is that the CIB reports at issue in this case are understood (by at least some of the general public) to be about the innocent plaintiffs—and are thus defamatory and stigmatizing.

B. The widespread, and statutorily required, use of government databases produces a change in status under the "stigma plus" doctrine.

The second prong of the "stigma plus" test requires that a plaintiff demonstrate that the challenged policy, law, or action does something more than "merely" harm his reputation. Increasingly, government databases provide the "plus" because prospective employers, private agencies, or public agencies can access that database. The "plus" is satisfied if the false information either changes one legal status, or would change it if the information were true, or creates some burden to pursuing employment opportunities, even if the burdens are not mandatory. *See e.g.*, *Dupuy v. Samuels*, 397 F.3d 493, 511 (7th Cir. 2005))(database disclosure of "indicated" child abuse information to prospective employers and state agencies is "plus")(affirming preliminary injunction), 465 F. 3d 767 (7th Cir. 2006)(affirming permanent injunction); *Doyle v. Camelot Care*

Centers, Inc., 305 F.3d 603, 605 (7th Cir. 2002)(disclosure of information to private employers of child abuse registry listing is "plus" even though employers cannot be held liable for acting on the disclosed information). *See also, Smith v. Doe,* 538 U.S. 84, (Stevens, J., concurring) ("[T]here can be no doubt that the widespread public access to this personal and constantly updated information has a severe stigmatizing effect. In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty."); *Doe v. Department of Public Safety,* 271 F.3d 38, 55 (2d Cir.2001), *rev'd on other grounds,* 538 U.S. 1 (2003)(sex offender database inclusion is "plus" because it is "some material indicium of government involvement beyond the mere presence of a state defendant to distinguish his or her grievance from the garden-variety defamation claim"); *Valmonte v. Bane*, 18 F.3d 992, 1000 (2d Cir. 1994)(child abuse database registry is stigma plus where some employers must consult database); *Humphries v. County of Los Angeles,* 554 F.3d 1170, 1188 (9th Cir. 2008), *rev'd on other grounds Los Angeles, Cal. v. Humphries*, 562 U.S. 29 (2010)*; Brown v. Montonya*, 662 F.2d 1152, 1167-68 (11th Cir. 2011)(allegedly incorrect requirement to register as sex offender triggers protected interest); *Kirby v. Siegelman* 195 F.3d 1285, 1291-92 (11th Cir. 1999)(falsely labeling a convicted prisoner a sex offender is "stigma plus).

The law of the "plus" caused by government database information published to private employers continues to develop. In *Kelley v. Mayhew,* 973 F.Supp.2d 31 (D. Me. 2013), the government informing plaintiff's private employer that she did not qualify to be counted in the staff-to-child ratio was enough of a change in Kelley's status to satisfy the "plus." *Kelley* reasoned that *de facto* licensing status changes tend to meld with protected property interest analysis, but that the fuzziness of the line between whether one has a property interest in a "license" or a "liberty" interest in the status of *de facto* licensee is not material. 973 F. Supp.3d at 43-44.

The "plus" in this case is satisfied because CIB operates a *de facto* credentialing program that provides "clean" records in response to some of the 800,000 annual requests, but stigmatizes those known to be innocent by incorrectly associated then with a criminal record.

The circuit court's finding that the reports did not "per se" alter plaintiffs' legal status (A.App. 3) thus misses the point. Inclusion in sex offender or child abuse register did not "per se" alter the litigant's status in *Duprey, Doyle, Valmonte, Brown, Kirby, Burns,* or *Kelley.* It is the fact that state law requires or allows reliance on CIB's credentialing system that satisfies the "plus."

Remand is necessary because the Circuit Court has made no findings of fact or conclusions of law that would allow this Court to answer that question in an appellate opinion.

V. CIB'S ALIAS NAME POLICY VIOLATES SUBSTANTIVE DUE PROCESS.

The Fourteenth Amendment includes a substantive component that prohibits the government from infringing "fundamental" liberty interests *at all* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest. *See,* e.g., *Collins v. Harker Heights,* 503 U.S. 115, 125 (1992); *see also Reno v. Flores,* 567 U.S. 292, 301 (1993). If no fundamental interest is involved, the infringement must still be rationally related to a legitimate government end. *See, e.g., Heller v. Doe,* 509 U.S. 312, 319-20(1993).

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A. Individuals have a fundamental right not to be identified by the government with a conviction record unless they have actually been convicted of a crime.

The fundamental right not to be convicted of a crime until proven guilty in a fair proceeding has a necessary corollary in today's world : the right not to be intentionally associated by the government with a conviction record that is not yours.

Until the advent of modern internet technology, the government's ability to identify individuals as criminal was effectively limited to judicial determinations of guilt. That ability was constrained, through various provisions of the Constitution, by prohibitions against self-incrimination and double-jeopardy and requirements for a formal charging process, speedy and fundamentally fair trials, an impartial jury, and the rights to confront witnesses and to counsel. These constitutional rights provide procedural limits on the government's power to turn unoffending citizens into criminals through the judicial system, safeguarding a liberty deeply rooted in our most fundamental traditions.

As governments have gone into the business of selling criminal histories, however, technology has facilitated the development of a new, extra-judicial power to falsely identify an individual with a criminal record. The technology has created a new government power: guilt by (database) association.

CIB's alias policy infringes on plaintiffs' liberty interest in not being falsely identified as criminals and it does so through a policy that is self-evidentially not narrowly tailored.. There is no time limit on the false association, no risk assessment before the association is made, and no method for internally reviewing the association.

B. Even under rational basis review, CIB policy is, by definition arbitrary.

The trial record evidences just how arbitrary CIB's so-called "matches" are. Dennis A. Teague is a "match." "Dennis Teague" is not, except when it is. Christopher Peters is a "match." Christopher J. Peters is not. Mary Meyer with one

date of birth is a "match," but a minor change in the data of birth means no match. CIB matches search strings of names—without knowing whether the "match" is on an alias or master name, and without trying to determine if it has **already** determined that there has been a successful challenge of that "match"— through algorithms and individual discretion. CIB employees sometimes consult a requestor if they are uncertain about a request. but sometimes do not. CIB employees may return two records and an explanatory letter in response to problematic matches if the request was made on paper but will only return one record in response to internet requests.

This system incorporates so much uncertainty and reflects so little reasoned policy (as opposed to choices based on system design and individual preference) that it is arbitrary by definition. *See, e.g.*, *http://www.merriam-webster.com/dictionary/arbitrary*. *Merriam Webster's Dictionary* (linking arbitrary to individual preference, convenience, power exercised with out restraint).

CONCLUSION

For the reasons argued here and in plaintiff-appellants' summary judgment briefs, this Court should reverse the circuity court's decision/s and remand to the circuit court for appropriate action.

Dated at Milwaukee, Wisconsin this 4th day of May, 2015.

s/Jeffery R. Myer

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I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) as modified by the court's order for a brief and appendix produced with a proportional serif font. The length of this brief is 10,891words.

Dated this 4th day of May, 2015, in Milwaukee, Wisconsin.

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