STATE OF WISCONSIN
IN SUPREME COURT

No. 2014AP2360

Dennis A. Teague,

Plaintiff-Appellant-Petitioner,

Linda Colvin and Curtis Williams,

Intervening Plaintiffs-Appellants-Petitioners,

v.

Brad D. Schimel, Walt Neverman,
Dennis Fortunato, and Brian Keefe,

Defendants-Respondents-Respondents

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

PLAINTIFFS-APPELLANTS-PETITIONERS' BRIEF

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ISSUES PRESENTED

I. **Does Wis. Stat. § 19.356 bar a civil action for declaratory and injunctive relief that the "global balancing" central to DOJ's alias name policy violates Wisconsin's public records law?**

The circuit court held that DOJ's global balancing was permitted. (App. 50) [1] It did not decide whether Wis. Stat. § 19.356 bars relief because DOJ did not raise the issue until oral argument in the court of appeals. The court of appeals did not address the global balancing issue because it concluded that Wis. Stat. § 19.356 barred all civil actions, including actions for declaratory or prospective injunctive relief.

II. **Does Wis. Stat. § 19.70 require DOJ to correct or supplement the reports it produces in response to background check requests about innocent subjects once those subjects demonstrate they have no criminal history?**

The circuit court dismissed this claim on summary judgment, reasoning that the records about the real criminal did not "pertain," within the meaning of Wis. Stats.19.70,[2] when associated in reports with the name and date of birth of innocent persons and that criminal history reports are not "records" because DOJ does not retain copies of individual reports.

The court of appeals lead opinion did not adopt or reject either of the circuit court's grounds. Rather, it concluded Petitioners could obtain no relief under § 19.70 because they did not challenge "any record maintained by DOJ that is susceptible to "correct[ion]." (App 23, ¶41) Judge

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[1] "App" indicates the separate Appellants' Appendix (in two parts) filed with this brief, distinguishing it from Petitioners' Appendix. The Record on Appeal citations have been added to each page of the documents in Appellants' Appendix.

[2] When this litigation began, the statute that is currently numbered § 19.70 was numbered § 19.365. The current numbering is used in this brief.

Higginbotham, with Judge Sherman concurring, deemed Petitioners' Wis. Stat. 19.70 argument insufficiently developed. (App. 35, ¶72)

III. **Does DOJ's alias name policy violate equal protection by discriminating irrationally against one class of innocent persons?**

The court of appeals answered "no." (App. 29, ¶59)

IV. **Are innocent persons associated by DOJ with criminal records not their own being deprived of a protected liberty interest without due process of law?**

The circuit court answered "no" because it found that the criminal history reports "do not convey a false and defamatory meaning to their intended audience (the public making a records request)." (App. 43) The circuit court also concluded that the reports did not "alter the legal status for any plaintiff or prevented their employment or deprived them of any other right or privilege." (App. 43)

Although the court of appeals appears to have assumed stigma was established, it found no due process violation because Teague, Colvin, and Williams failed to prove the reports made it "virtually impossible" for them to find employment. (App. 33, ¶68)

V. **Does DOJ's alias name policy violate substantive due process by knowingly identifying innocent people with criminal records that are not their own?**

The court of appeals declined to address this question on the grounds Teague did not cite "useful legal authority" for this "apparently novel substantive due process" argument. (App. 30, ¶63)

STATEMENT OF THE CASE

A. NATURE OF THE CASE

Each year, the DOJ runs almost 800,000 criminal background checks on private citizens for non-justice system entities. (R.109, Trial Exh. 95) Some of these reports come back clean, reporting "No Criminal History Found." (App. 189-93) Other reports show a criminal record.

Dennis Teague, Linda Colvin, and Curtis Williams discovered that DOJ was not producing "no criminal history found" reports in response to criminal background checks on their names and with their dates of birth. DOJ does this because it "matches" their name with an alias used at some time by the criminal. In this litigation this matching is referred to as DOJ's alias name policy.

Teague, Colvin, and Williams attempted to correct their reports through DOJ's existing challenge process by submitting fingerprints, and DOJ confirmed that they are, in fact, innocent. (App. 2-3, 42-43, 194-203). Rather than changing the reports, however, DOJ sent them a to whom it may concern "innocence letter" confirming they had no criminal records and that the reports using their names and dates of birth were, in fact, about other people. (App.2-3, 188-197). DOJ continues to send out the same report each time it runs new background check on one of them. DOJ does not include in that report copies of the "innocence letters" nor does it inform requestors that the real Teague, Colvin, and Williams have no criminal records. (App. 6, 44-45).

Petitioners seek declaratory and injunctive relief on two state law and three constitutional claims. On the state law public record claim, they seek a declaration that DOJ's alias policy violates the open records law and

an order enjoining DOJ from continuing their practice because under the common law balancing test, the public interest in protecting private reputations outweighs the public interest in attaching criminal records to the names and dates of birth of person known to be innocent. On the second state law claim they seek a declaration that Wis. Stat. §19.70 was triggered when they requested DOJ to correct their reports and an order enjoining DOJ to comply with the law by either correcting the reports or allowing supplementation. On the procedural due process claim, they ask this Court to remand to the circuit court to determine what process is due. On the equal protection and substantive due process claims, DOJ should be enjoined from using its alias name policy to associate individuals who have proved they are innocent with criminal records not their own.

B. PROCEDURAL HISTORY

Dennis Teague filed a complaint for declaratory and injunctive relief in Dane County on April 29, 2010. (R.2) Colvin and Williams moved to intervene. (App. 2, n.1) Decision on the motion to intervene was deferred pending discovery and dispositive motions. On December 19, 2011, the circuit court denied Teague's summary judgment motion and granted in part and denied in part DOJ's summary judgment motion. (App. 45-64) The decision dismissed all Teague's statutory claims. (App. 57) It also dismissed Teague's Equal Protection challenge. (App. 57) The circuit court denied defendants' motion to dismiss the substantive and procedural Due Process Clause claims, (App. 057), because of a dispute of material fact over what reasonable inferences could be drawn from the undisputed content of the reports. (App. 55-56)

The circuit court granted the deferred motion to intervene. (R.54) The First Amended Complaint included all of Teague's original claims and intervened Colvin and Williams making exactly the same claims. (R.57) On March 23, 2012, the circuit court applied the Decision and Order on Motions for Summary Judgment, previously entered December 19, 2011, to the amended complaint. (R. 61)

The trial occurred in early June, 2014. On July 2, 2014, the circuit court entered Findings of Fact and Conclusions of Law and Judgment dismissing the case. (App. 41-44). Timely Notice of Appeal was filed on September 30, 2014.

After appellate briefing was completed, the court of appeals held oral argument. During oral argument, DOJ claimed for the first time that Wis. Stat. § 19.356 barred the public records claim. The court of appeals allowed both parties to file a five page letter brief with no reply.

On February 11, 2016, the court of appeals issued a decision, with two concurrences. (App. 1-40) Judge Blanchard's lead opinion concluded (1) Wis. Stat.19.356(1) barred litigating whether DOJ's global balancing violated the public records law; (2) Wis. Stat. § 19.70 provided no mechanism for relief for the kind of dispute at issue in this case; (3) DOJ's alias name policy did not violate the Equal Protection Clause; (4) that there was no "clear" error in the trial courts finding that petitioners did not establish the necessary "stigma plus" for the procedural due process claim; and (5) DOJ's alias policy did not violate the substantive component of the Due Process Clause. (App. 20; 25-26; 29-30; 34-35; 30-31)

STATEMENT OF FACTS

The court of appeals decision summarizes most of the relevant facts about the DOJ's criminal history database, the procedure by which fingerprints, master names, and alias names become part of the criminal history database, and the DOJ's alias policy of "matching" the name and date of birth of the person about whom a criminal background check is sought with the database. (App. 3-7)

The court of appeals decision does not, however, clearly state two relevant facts. First, DOJ's methods of "matching" alias names to master names are so imprecise they encourage inaccuracy in the form both of false positives and false negatives. Second, DOJ could easily correct the situation.

DOJ associates Dennis Teague with Anthony Parker's criminal record because, on June 11, 2004, the Milwaukee Police Department submitted a fingerprint card for Anthony Terrel Parker which identified Dennis Antonio Teague as an alias Parker initially used with police. (App. 59-69, Trial Exhibit 40; App. 205, Trial Exh. 49; R.118:119-120)[3] MPD lists Parker's date of birth on the June 11, 2004 submission as April 5, 1981. (App. 205, Trial Exhibit 49) DOJ thus "matches" Parker to Teague, despite the fact that Teague's birth date is October 4, 1982. DOJ then responds to a request for a report on Teague's real name and real date of birth, with Parker's history. (App. 59-69, Trial Exh. 40)

The report of a July 20, 1990 arrest of Kirk Owens, using the alias name "Kirthan Arnell Henderson," with an October 27, 1962 date of birth, lists another alias "Curt NMI Williams." (App. 207-08, Trial Exhibit 50)

[3] The trial exhibits are in three folders marked as R.106 in the record on appeal. The trial testimony is from DOJ witness Mary E. Meyer; it appears at pages 119-120 of R.118.

DOJ deems that a "match" to Curtis Williams' name and April 25, 1963 date of birth. Despite the fact that Owens used a birthdate that matched neither on Williams' month, day, or year of birth, DOJ responds to a background check on Williams, with his real date of birth, by producing a 38 page criminal history. (App 123-160, Trial Exhibit 66)

DOJ's imprecise matching also returns false clean reports in response to record requests about actual criminals. A record request for Mary Meyer, date of birth August 17, 1977, produces a seven page criminal history report. (App. 161-167, Trial Exh. 19). A report request with the same name, but a birthdate of August 7, 1977, produces a clean report. (App. 186-87, Trial Exh. 20). A request for Christopher J. Peters, date of birth September 22, 1967, returns a fifteen page report. (App. 168-182, Trial Exh. 22). A request with no middle initial with the **same** date of birth returns a clean report. (App. 185, Trial Exh 22).

The second relevant fact not clear from the court of appeals decision is the ease with which DOJ could produce the records of successful challengers who have proved their innocence. All of the paper records of all of the challenges since DOJ began the challenge process fit in one file drawer 30 feet away from the worker who process background checks. (R.120:113-116)

ARGUMENT

STATE LAW CLAIMS

I. THE DOJ'S "GLOBAL BALANCING" VIOLATES PUBLIC RECORDS LAW AND PETITIONERS ARE ENTITLED TO DECLARATORY AND INJUNCTIVE RELIEF ON THAT GROUND.

A. DOJ's alias name policy violates the common law balancing test of the open records law.

In the circuit court, DOJ argued the public records common law balancing test permits its alias name policy because it had "globally balanced" the public interests and decided it is always better to release a criminal history even when it knows that there is an innocent victim of identity theft. (R.32:18) Relying on *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 440, 279 N.W.2d 179 (1979), the circuit court agreed, concluding case by case balancing was unnecessary because "the nature of these records and the balancing considerations do not vary from case to case." (App. 50).[4]

The circuit court decision, like the DOJ policy, ignores the long recognized **public** interest in protecting private reputations when an open records request is made to law enforcement. In *Breier*, the Court applied the common law balancing test to hold that the presumption of openness associated with a daily police "blotter" comprised of dates, names, and arrest charges outweighed the public interest in reputation of the person arrested. The public interest included disclosure as a check on law

[4] The court of appeals did not address the merits of the public records argument, finding that Wis. Stat. 19.356 precludes any challenge to the release of another person's criminal record in response to a criminal background check on an innocent person. The court of appeals' disposition of the common law balancing test claim is discussed in the next section of this brief.

enforcement's behavior, either in arresting citizens on questionable charges, or in misuse of prosecutorial discretion. 89 Wis. 2d at 436-437.

While upholding disclosure of blotters, *Breier* explicitly recognized that law enforcement information can be so damaging to private reputations that the common law balance could be struck differently in other contexts. Specifically, *Breier* noted the differences between a daily "blotter," with no identifying information other than a name, and a "rap sheet."

> An entirely different issue would be presented to this court if a right of access were claimed to the "rap sheets," the alphabetical records, by the name of the arrested person, which show all arrests of and police contacts with individuals, regardless of whether an arrest or conviction resulted.

89 Wis. 2d at 432.

Breier explained that one of the "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 (emphasis added). "Hence we have concluded that there is a **public policy interest** in protecting the reputations of citizens." 89 Wis. 2d at 430 (emphasis added). Wisconsin courts have repeatedly affirmed that public interest in protecting private reputations. *Zellner v. Cedarburg School District,* 2007 WI 53, ¶50, 300 Wis. 2d 290, 731 N.W.2d 2400; *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811.

In this case, DOJ is not only disclosing information that damages the private reputations of innocent people, it is doing so without balancing interests in each case for each record released. DOJ rationalizes its policy of disclosure, even when the background check is sought for an innocent person, on the grounds that, in theory, a requester might be being "duped"

by a criminal seeking employment under the alias name. (R.32:19-20). The problem is that neither DOJ nor the circuit court weighed the public interest in the innocent person's reputation against this theoretical possibility.

This Court should declare that the DOJ's "global balancing" does not comport with the common law balancing test. Wisconsin courts have repeatedly held that the common law balancing test is a document by document balancing, not "global" balancing. *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, 780, 546 N.W.2d 143 (1996); *Law Offices of William A. Pangman & Associates v. Stigler,* 161 Wis. 2d 828, 840, 468 N.W.2d 784 (Wis. Ct. App. 1996). *See also, Hempel v. City of Baraboo,* 2005 WI 120, ¶62, 284 Wis. 2d 162, 194, 699 N.W.2d 551. This Court should, in addition, hold that the public interest in protecting the reputations of innocent citizens outweighs the public interest in DOJ's producing the criminal's record, and only the criminal's record, in response to a request for a background check on an innocent person.[5]

B. Wis. Stat.19.356(1) does not bar Petitioners from seeking Declaratory and Injunctive Relief on their Public Records Claim.

The court of appeals held the final clause of section 1 of Wis. Stat. § 19.356(1) bars all civil litigation challenging the record custodian's release policies unless that litigation is explicitly authorized by § 19.356 or some other statute. (App. 15-16, ¶¶29-32) The court of appeals is wrong.

[5] The Court could, alternatively, enjoin DOJ from associating Petitioners' names with criminal records until after the agency balances the interests. But Petitioners believe the balance is, in their cases, clear.

Wisconsin Stat. § 19.356 bars individuals from seeking "judicial review "of authorities' decisions to release certain kinds of records; it does not deprive all litigants of the right to challenge the legality of the release policies to be applied to future requests.

1. Standard of review

The goal of statutory construction is to "ascertain and give effect to the intent of the legislature." *Lake City Corp. v. City of Mequon,* 207 Wis.2d 155, 162, 558 N.W.2d 100 (1997). Courts give statutory language "its common, ordinary, and accepted meaning, unless the words are technical or specially defined, in which case we will give those words their technical or special definitions." *Brunton v. Nuvell Credit Corp.* 2010 WI 50, ¶ 16, 325 Wis. 2d 135, 785 N.W.2d 302; *see also* Wis. Stat. 990.01 Courts also consider the scope, context and structure of the statute. *State ex rel Kalal v. Circuit Court for Dane County,* 2004 WI 58, ¶46, 271 Wis. 2d 633, 681 N.W.2d 110.

2. "Judicial review" is a technical term that refers to one type of litigation, not all litigation.

"Judicial review" has been repeatedly defined as a technical term by Wisconsin courts. It does not mean the equivalent of "all litigation" or "all review by a court." Rather, "judicial review" is a subset of the more general taxonomy of litigation, "actions" and "special proceedings." *See* Wis. Stat. § 801.01. As early as 1977, this Court recognized the legislature's intent to differentiate between judicial review proceedings and regular civil actions. *Wisconsin Environmental Decade v. Public Service Commission*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977); *see also, Wisconsin Brewers Baseball Club v. Wisconsin Department of Health and*

Social Services, 130 Wis. 2d 79, 89, 387 N.W.2d 254 (1986)(distinguishing between judicial review and an action against a state agency for relief under Wis. Stat. Ch. 813),

This Court has continued to make similar distinctions, describing, "judicial review" as a "special proceeding," not a civil action. *See, e.g., State ex rel Town of Delevan v. Circuit Court of Walworth,* 167 Wis. 2d 719, 725, 482 N.W.2d 899 (1999)("We have previously stated that a Ch. 277 judicial review is a special proceeding."). In *Nankin v. Village of Shorewood*, the Court reiterated the distinction between "judicial review" and other litigation and gave that distinction constitutional significance:

> The problem with this characterization is that an action under Wis. Stat.74.37(3)(d) is not simply another means of judicial review. Judicial review entails "[a] court's review of a lower court's or an administrative body's factual or legal findings." *Black's Law Dictionary* 852 (7th ed.1999). That is not the case in an action under § 74.37(3)(d). Instead, this statute affords the claimant the right to pursue an action according to state civil practice and procedure, including the right to a trial.

2001 WI 92, ¶ 24, 245 Wis. 2d 86, 630 N.W.2d 141. S*ee also, Metropolitan Associates v. City of Milwaukee*, 211 WI 20, ¶ 45, 332 Wis. 2d 85, 796 N.W.2d 717. More recently. this Court has also distinguished between "judicial review" and actions for damages, *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶39, 320 Wis. 2d 1, 768 N.W.2d 176, and between a Chapter 227 judicial review and an action for an injunction. *PRN Associates v. Department of Administration*, 2009 WI 53, ¶¶ 47-49, 317 Wis. 2d 656, 766 N.W.2d 559.

This long history of distinguishing between judicial review and other forms of civil action identifies "judicial review" as a technical term. It must therefore be construed as a technical term in Wis. Stat. § 19.356

unless there is clear evidence the legislature intended to use the term differently.

Nothing in the statute evidences that intent. Wisconsin Stat. § 19.356(1) states in full

> (1) Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and **no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.**

Wisconsin Stat. § 19.356(1) does not redefine "judicial review" to include all other civil actions. Nor does the final clause of that sentence make 'judicial review" part of a list of litigation types, signaling the legislature's intent to abandon the technical meaning of the term "judicial review."

3. The context of Wis. Stat. § 19.356 supports interpreting "judicial review" in the narrow technical sense.

Construing the phrase "judicial review" narrowly is also consistent with its context. The phrase that bars "judicial review" occurs in Wis. Stat. § 19.356(1). Subsection (1) is negative. It limits the duty to notify established in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), to the duty to notify in §19.356 or "as otherwise provided by statute." Similarly, it bars "judicial review" except as authorized by § 19.356 or "as otherwise provided by statute."

Subsection (2) creates a duty to notify the record subject, but only as to three types of records: (a) disciplinary or investigatory records, (b) records obtained by subpoena or search warrant, and (c) records prepared by employers other than an authority. *Schill v. Wisconsin Rapids School District*, 2010 WI 86, ¶40, 327 Wis. 2d 572, 786 N.W.2d 177. Thus the

Woznicki duty to notify abolished in subsection (1) is narrowly recreated in subsection (2).

Not everyone referred to in a covered record is a "record subject." *See* Wis. Stat. §19.32(2g). For example, the supervisor who initiates a disciplinary matter or investigation referred to in Wis. Stat. § 19.356(2)(a)1 need not be a "record subject." Witnesses and report writers are not necessarily "record subjects." The private employer who prepares the employee records described in Wis. Stat. § 19.365(2)(a)3 is not necessarily a "record subject." Not all persons mentioned in a subpoena or search warrant are necessarily "record subjects."

Wisconsin Stat. § 19.356(3), gives the notified record subject five days to notify the public record authority of his or her intent to sue. Under Wis. Stat. 19.356 (4), the record subject has 10 days from receiving the Wis. Stat. 19.356(2) notice to commence the action.. Under Wis. Stat. 19.356(5), the record release is stayed throughout the litigation, including all appeals. Subsection (6) provides that in the subsection (4) action, common law principles apply. Under subsection (7), the circuit court must decide the case within 10 days of filing proof of service, unless there is cause for an extension.

In that context, both the "except as authorized in this section or as otherwise provided by statute" language and the "no person is entitled to judicial review" language of Wis. Stat. 19.356(1) can be construed in a way that does not yield an absurd result. Three classes of record subjects are entitled to notice and to an automatic stay of record release, but they must act quickly if they want to file an action for judicial review. Their remedy is exclusive No other person, not the private employer who created the §19.356(2)(a)3 record, or other people who are not "record

subjects" connected with the disciplinary or investigatory § 19.356(2)(a)1 matter, or persons tangentially connected (but who are not "record subjects") to the subpoena or search warrant may seek the § 19.356(4) judicial review with its automatic stay or any other "judicial review."

The clear intent of Wis. Stat. § 19.356 is to limit the duty of prior notice, but balance the automatic stay with expeditious resolution for limited class of record subjects. There is no intent to prohibit citizens who might need declaratory and prospective injunctive relief from obtaining that relief without notice or an automatic stay. For example, a business about to disclose trade secrets to the government might need to seek a determination that the government will not grant a competitor's open records request for the trade secret. Under the court of appeals' construction, such litigation is barred unless provided for in some other statute. The trade secret misappropriation statute, Wis. Stat.§ 134.90, is of no use because the State's conduct in receiving a trade secret does not fit easily into the Wis. Stat. 134.90(2) description of misappropriation. Similarly, if the Department of Revenue decided to sell tax return data to raise revenue, individual taxpayers would be hard pressed to find a statute that specifically authorizes suit to protect their statutory rights to confidentiality under, for example, Wis. Stats. §§ 71.78, 72.06, 78.80(3).

Petitioners' interpretation of "judicial review" is thus supported by the context of the surrounding statutes.

4. The court of appeals decision leads to absurd results.

The Act that created Wis. Stat. § 19.356(1) also created Wis. Stat.19.36(9), entitling public office holders to augment public record releases, and §§ 19.36 (10)-(12), making employees' social security

numbers, home addresses, telephone numbers, and email addresses confidential. *See* 2003 Wisconsin Act 47, §§ 4,7. The court of appeals decision produces absurd results with respect to these simultaneously enacted provisions.

Public office holders who are record subjects have a statutory right to notice of planned release of records and a right to "augment" the record before release. Wis. Stat. § 19.356(9)(a), (b). But public office holders are not "excepted" by Wis. Stat. § 19.356(2)(a). *See Moustakis v. State of Wisconsin Department of Justice*, 2016 WI 42, 368 WIs. 2d 677, 880 N.W.2d 142. Moustakis explicitly invoked Wis. Stat. § 19.356(4), arguing that he was an "employee" referred to in §19.356(2)(a)1, defined by 19.32(1bg). Although this Court unanimously rejected that argument, Justice Roggensack's concurrence and dissent recognizes the right of a public office holder to sue to enforce the § 19.356(9) rights, even though Moustakis is not authorized to commence a Wis. Stat. § 19.356(4) judicial review. *Moustakis,* ¶ 66. There is no statute identified that might satisfy the "otherwise provided by statute" phrase of Wis. Stat. §19.356(1) to support Moustakis's enforcement of his Wis. Stat. § 19.356(9) rights to notice and augmentation.

Similarly, Wis. Stat. §19.36(10)-(12), generally protects employees' social security numbers, home addresses, telephone numbers and email addresses. If a public record authority possesses that information about employees of an employer **other than** an authority, those **private** employees are entitled to notice and a right of action under Wis. Stat. §19.356(2)(a)3. **Public** employees, however, have no such protection because their social security numbers, home addresses, telephone numbers and email addresses are not within § 19.356(2)(a)3 [employers other than

an authority] or § 19.356(2)(a)2 [search warrant subpoena], or even within Wis. Stat. § 19.356(2)(a)1 because the authority did not obtain them as the result of a disciplinary investigation. They have no right of action, according to the court of appeals, because the authority has their statutorily confidential information because of routine payroll and personnel practices. The absurd result is that the legislature took away by Wis. Stat. § 19.356(1) the very confidentiality it sought to guarantee by enacting Wis. Stat. § 19.36(10)-(12) in the same Act.

Teague's construction of "judicial review" is consistent with *Moustakis.* Limiting "judicial review" to its technical meaning allows an action for injunctive relief by a public office holder to vindicate the § 19.356(9) rights, or a public employee enforcing the § 19.36(10)-(12) confidentiality rights. If the court of appeals decision stands, public office holders and employees could only argue (if they were allowed to sue) that providing them a statutory right but no judicial remedy contravenes Article 1,9 of the Wisconsin Constitution. See, *e.g. Aicher v. Wisconsin Compensation Fund*, 2000 WI 98, ¶43, 237 Wis. 2d 99, 613 N.W.2d 839.

Teague is not arguing that Wis. Stat § 19.356(1) is unconstitutional. However, the court of appeals decision leads directly to constitutionally questionable outcomes — a result that must be avoided if possible. *See, e.g., State v. Migliorino*, 150 Wis. 2d 513, 525, 442 N.W.2d 36 (1989); *Jankowski v. Milwaukee County*, 104 Wis. 2d 431, 439-440, 312 N.W.2d 45 (1981); *State ex rel Lynch v. Conta*, 71 Wis.2d 662, 689, 239 N.W.2d 313 (1976). Construing "judicial review" in its technical sense comports with the plain language of Wis. Stat. § 19.356, avoids absurd results, and preserves the constitutionality of the statute.

II. ONCE A REPORT IS CHALLENGED, WIS. STAT. § 19.70 REQUIRES DOJ EITHER TO CONCUR AND START PRODUCING ACCURATE CRIMINAL BACKGROUND REPORTS OR TO DENY AND ALLOW THE CHALLENGER TO EXPLAIN WHY HE OR SHE DISAGREES WITH THE DISPUTED PORTION OF THE RECORD.

This issue involves statutory interpretation. Appellate review is independent. *Apple Valley Garden Ass'n, Inc. MacHutta*, 2009 WI 28 ¶12, 316 Wis. 2d 85, 763 N.W.2d 126.

A. The inability to identify whether relief is sought under §19.70(1)(a) or 19.70(1)(b) is irrelevant.

The court of appeals criticized Teague for not making clear whether he sought relief under Wis. Stat. §19.70(1)(a) (correction) or (1)(b) (supplementation), but then concluded that neither "is a vehicle for directing authorities how they must keep records." (App. 25, ¶ 51). That criticism is misdirected.

Under the plain language of the statute, the choice of relief does not depend on the desires of the challenger, but on the response of the agency or entity that maintains the record. Wisconsin Stat. § 19.70(1) reads:

> **(1)** Except as provided under sub. (2) [which exceptions do not apply], 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** … **and allow 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 . . . of the reasons for the denial.

Wis. Stat. § 19.70(1)(emphasis added). The verbs are "concur . . .and correct," or "deny, . . .notify . . .and allow." Whether a record is corrected, or supplemented after notice, depends on whether DOJ "concurs" or "denies" the challenge. In this case, the problem is that DOJ concocted some third alternative not authorized by law.

There is no dispute that Petitioners challenged DOJ's association of their personally identifying information with someone else's criminal record. Under § 19.70(1)(a), DOJ must correct the report if it "concurs" in the challenge. DOJ could correct the report in either of two ways: stop sending out Parker's report in response to a background check on Teague, or start sending out the successful challenge information with the inaccurate association of Parker's information with Mr. Teague. If DOJ denies the challenge, then under the plain language of Wis. Stat. § 19.70(1)(b) DOJ must notify Teague and allow him to supplement the record.

Ironically, Judge Blanchard envisions exactly the kind of relief that could **either be a** Wis. Stat. 19.70(1)(a) correction. or Wis. Stat. 19.70(1)(b) supplementation : a simple statement that "Teague is a different person from Parker and as of 2009 had no criminal history." It would be better if DOJ told the whole truth—that Dennis Teague has no criminal history and was the victim of identity theft by Parke— but Judge Blanchard's statement could be either a correction or a supplementation. Under the plain language of the statute, it is DOJ's choice into which pigeon hole the relief is placed.

B. The challenge is to the report, not the database or how information is maintained.

The court of appeals had two other problems with Teague's request for relief under Wis. Stat. § 19.70.

First, the court of appeals concluded Wis. Stat. § 19.70 is a vehicle for correcting records, not for challenging "the database" or "how [DOJ] must keep records." (App.25, ¶ 51) That conclusion reflects a fundamental misunderstanding of the relationship between the database as an information system and the reports produced from that system. Individual reports, not the database, associate Parker's criminal history with Teague's identifiers. The report does not "list Teague's name as an alias for the person whose fingerprints are linked to the record" (App. 23, ¶47). The report **starts** with a centered subject block containing Dennis Teague's name and date of birth. Appended to that block are paragraphs of text about DOJ reports, other information, and a full list of Parker's arrests and convictions. (App. 59, 61-69). Teague is not challenging the database or how DOJ keeps records; he challenges the correctness of the report made in response to a request for a criminal history report about him.

Second, the decision concludes (App 25, ¶51) relief is not available under Wis. Stat. § 19.70 because what Teague seeks is "not a correction, but an explanation that contains additional information." That conclusion is also wrong.. According to MERRIAM WEBSTER'S DICTIONARY, correct is a transitive verb meaning "to make or set right." *See* http://www.merriam-webster.com/dictionary/correct. The CAMBRIDGE FREE DICTIONARY similarly defines correct as to "to show or fix what is wrong: make right." *See http://dictionary. cambridge.org/us /dictionary / english/correct*

Nothing in Wis. Stat.§ 19.70 prohibits DOJ from correcting inaccurate information in either of these fashions, by adding or taking away information. If DOJ "concurs" in the challenge under §19.70, DOJ must do something to "make or set right" the report. If DOJ does not "concur," DOJ must add a "concise statement setting forth the reasons for the

individual's disagreement with the disputed portion of the record" under §19.70(1)(b).

The court of appeals simply got the statutory interpretation question wrong. Nothing in the plain language of the statute limits its applicability to cases in which the requested correction is simple or which can only be accomplished by subtracting information rather than adding it.

C. Parker's criminal history pertains to Dennis Teague when Parker's information is associated with Teague's name and date of birth identifiers.

Although the court of appeals did not address the circuit court's reasons for dismissing the §19.70 claim, that issue was briefed on Appeal. (Appellants' Brief at 16-20).

According to the circuit court, Parker's information did not "pertain" to Teague because it was about Parker. (App. 51-52) The circuit court misinterpreted the plain meaning of: "personally identifiable information." "Personally identifiable information" is defined by Wis. Stat. § 19.62(5) as "information that can be associated with a particular individual through one or more identifiers or other information or circumstances." Because DOJ associates Parker's criminal record with Teague's name and date of birth, DOJ makes Parker's criminal history information "pertain" to Teague. Parker's criminal record can "pertain" to more than one person because DOJ associates that information with more than one "particular individual" through "one or more identifiers [Teague's name and date of birth and Parker's names and aliases and different dates of birth] or other information or circumstances [the report]." But a report on Teague, requested for his name and date of birth (which Parker never used) still associates Parker's information with Teague's personal identifiers.

The circuit court also reasoned that Wis. Stat.§ 19.70 does not apply because DOJ does not keep copies of the paper report and therefore does not "maintain" the record. (App. 51) This reasoning is not supported by the plain language of the statute or common sense. The record is the report. Information used to construct the report is "maintained" in the database. The express language of Wis. Stat. § 19.70 recognizes that distinction. The accuracy of a "record" is challenged; the information is maintained. A criminal history report is a "record" as much as property tax assessment printout is a "record", even though the assessor gives the record to the requestor and the information remains maintained in the database.

CONSTITUTIONAL CLAIMS

STANDARD OF REVIEW

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*, 168 Wis.2d 227, 236. 483 N.W.2d 278 (Wis. Ct. App. 1992). Whether that presumption applies to sub-regulatory practices such as the CIB alias name policy is less certain. The court of appeals deemed this argument forfeited. Petitioners believe it should be now addressed because neither party, nor the Court, would be disadvanted by clarifying the proper standard of review at this stage in the proceedings. S*ee State v. Agnello*, 226 Wis.2d 164, 173, 593 N.W.2d 427 (1999) (the forfeiture "rule exists in large part so that both parties and courts have notice of the disputed issues as well as a fair opportunity to address them"). The case does **not** deal with presumptively

constitutional **legislation.** DOJ's alias name policy and "matching" are unwritten, sub-regulatory decisions, not legislative policy choices.

Unpromulgated administrative 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 only promulgation provides the "rational, public process" 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 (Wis. Ct. App. 1999).

III. DOJ's ALIAS NAME POLICY VIOLATES EQUAL PROTECTION.

The DOJ's alias name policy creates two classes of innocent people. The first class consists of those with no arrest or conviction history who get a clean report – a no criminal history found– each time DOJ responds to a private citizen's background check request using their names and dates of birth. Teague belongs to a second class of innocent people. When someone requests a background check about this "second class" of innocents, they receive the criminal history of another person. This second class cannot receive a "No Criminal History Found" report even after they prove they are innocent. Teague argues that this substantially different treatment

violates equal protection under rational basis review. *See, e.g., Aicher*, 237 Wis.2d 99 at 130.

The court of appeals rejected Teague's argument because the "DOJ's practices "bear at least a rational relationship to a legitimate government interest in providing accurate information that may assist requestors." (App. 29, ¶59). The court of appeals based that conclusion on a cursory examination, in two paragraphs, of Teague's claim that DOJ's alias policy did not satisfy three of the five factors used to determine whether unequal treatment of classes is irrational enough to violate Equal Protection. *See Aicher,* 237 Wis.2d at 130; *see also, Nankin v. Village of Shorewood,* 2001 WI 92, ¶39

The first criterion is whether there is a substantial distinction between the two classes of innocent people. *State v. Trepanier*, 204 Wis. 2d 505, 511–12, 555 N.W.2d 394, 397–98, 1996 WL 536904 (Wis. Ct. App. 1996)(" Burglars are not so substantially different from all other groups encompassed under the statute as to justify the rule that all burglars pay the [DNA] surcharge regardless of their participation in submitting a biological sample to the DNA bank.") There is no question that within the criminal history database all innocent people are the same. None of them have unique SID number; none of them have fingerprints in the system; none of them have arrests or convictions. The only difference between these classes is one based on external circumstance. The DOJ "matched" them to an alias name once used by someone with a criminal record.

The court of appeals reasoned the classes were substantially distinct because the second class consists of those linked to criminals who have "pretended to be that person in the past." (App. 29, ¶60). That is incorrect. The second class is "connected" to criminals by obscure algorithms, which

determine that a non-matching name and non-matching date of birth, or a sort of matching name and a non-matching date of birth are "close enough." Some in that class are also probably matched for the reason stated by the court of appeals. As the record shows, however, it is the government's arbitrary "matching" methods that determine when an innocent person falls into one class or another; there is no distinction between the classes of innocent people. There is not even a distinction based on the actual behavior of criminals.

In *Nankin v. Village of Shorewood*, this Court struck down the legislature's different treatment of property owners depending on the size of the community on a similar principal ("populous counties do not present any special problems or concerns such that it is rational to restrict such circuit court actions in populous counties."). 2001 WI 92, ¶ 41. *Nankin* indicated that "substantial differences in procedure" were enough to offend equal protection if those differences were irrational. *Id.*,¶ 45. Like the regulation invalidated by *Nankin*, DOJ's alias name policy focuses on a class of innocent people whose behavior does not present any problems of concerns that make it rational to restrict their liberties. To be sure, residents of populous communities differ from residents of less populous communities, just as there is a difference between those associated by DOJ (though algorithms, partial identifiers, and other methods) with criminal records not their own. But that difference is not substantial. DOJ's rationalization of its practices—it is a match because we say it is a match—is not a rational basis for treating two classes of innocent citizens differently.

The policy also fails to satisfy the second criterion: it is not germane to a permissible government end or goal. The relationship between a

permissible goal and the challenged classification must be "close" and appropriate. *Nankin*, 2001 WI 92, ¶ 41 The court of appeals reasoned that disclosing the criminal's record as the background report of an innocent person is "a useful first step" for detecting the "trick" if a criminal seeks to dupe the requester by re-using a false identity. (App. 29, ¶60). However, DOJ's policy is not "close" and appropriate to the legitimate goal of providing people accurate information that will aid them in making choices. DOJ policy will scare people into not hiring innocent people. But it does **nothing** to help requestors distinguish between the innocent and the guilty; it does not even tell the requestor that DOJ knows there are two real people, one of whom is guilty and one of whom is innocent. The policy is also not close and appropriate to the goal of deterring tricksters. It rather encourages tricksters either to make slight changes in their names and date of birth to get clean records) (Mary Meyer and Christopher Peters) or to use new aliases and new dates of birth. Finally, DOJ's reports do nothing to help the requester determine if Teague is the criminal who has stolen Parker's identity or Parker who has stolen Teague's identity.

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 the whole class differently forever. The distinguishing characteristic could be one-time use decades ago or a pattern of very recent use. Given the very obvious differences of risk associated with that characteristic, a blanket policy is not a reasonable basis for imposing a cost that applies equally and forever to all victims both of identity theft and DOJ information systems

design choices. In *Trepanier*, burglars' allegedly high recidivism rate did not sufficiently distinguish them from the class of others covered by the statute to make it rational that they alone should pay a DNA surcharge while not contributing DNA. *See* 204 Wis. 2d 505, 513. If a one-time cost imposed after a finding of guilt could not justify a distinction based on known recidivism risks, a permanent cost imposed without any risk assessment on innocents must violate equal protection.

IV. BECAUSE TEAGUE HAS DEMONSTRATED THAT DOJ'S REPORTS STIGMATIZE AND CREATE A TANGIBLE BURDEN, THIS COURT SHOULD REMAND TO THE CIRCUIT COURT TO DETERMINE WHAT PROCESS IS DUE

"Stigma-plus" is the doctrine developed to identify interests protected by the Due Process Clause notwithstanding the fact that mere defamation is not sufficient. "To prevail on a stigma-plus 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 rejected Teague's procedural due process argument based on a finding of fact—the reports were not stigmatizing—and a conclusion of law—Teague had established no "plus." The court of appeals did not address the stigma issue instead affirming the circuit court decision that no plus had been established.

This Court should find that a) the circuit court finding that DOJ's record reports are not stigmatizing is clearly erroneous and b) that the

"plus" is satisfied, when the stigma-creating engine is a government run database supplying criminal histories to all members of the general public because inclusion in the database creates a tangible burden on liberty/property or an alters a legal status.

A. The Circuit Court's "stigma" finding was clearly erroneous.

"Stigma" is proved if **some** of members of the general public reasonably interpret the reports with rap sheets as referring to the innocent people identified at the top of page 1 of the report. *See 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.); *see also Laughland v. Beckett,* 2015 WI App 70, ¶ 21, 365 Wis. 2d 148, 164, 870 N.W.2d 466, 473 (communication is defamatory if the language is 'reasonably capable of conveying a defamatory meaning to the ordinary mind and …the meaning ascribed … is a natural and proper one.) 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.")

As Teague argued on appeal, the circuit court's finding of no stigma was clearly erroneous[6] because DOJ presented not a scintilla of evidence about how members of the general public interpreted the reports. (Appellants' Brief at 33-34). DOJ's brief did not dispute the argument that

[6] The first sentence of ¶ 67 of the court of appeals decision is simply wrong. Six pages of Teague's appellate brief (30-35) and pages 8-9 of the reply brief specifically address how the circuit court's finding on the "stigma" prong was clearly erroneous.

this finding of absence of stigma was clearly erroneous. *See, e.g., Charolais Breeding Ranches v. FPC Securities,* 90 Wi.s2 d 97, 109, 279 N.W.2d 493 (Wis. Ct. App. 1979). By contrast, Teague presented both lay and expert evidence that the general public could and does believe the plaintiffs have extensive criminal records.

The uncontroverted expert opinion evidence was that the structure, formatting, labeling, other writing conventions, along with reading practices of average readers reading reports (as opposed to pleasure reading) of skimming, scanning, and skipping, are understood by average requesters as "authoritatively about a person in the world about whom the information was requested." (App. 200; 199-207, Trial Exh. 2; App 208-213, Trial Exh. 29) The expert opinion was that a member of the general public, without specialized training, would believe that a background check on Dennis Teague, using Dennis Teague's date of birth would return a result about Dennis Teague. (App. 209-210, Trial Exh. 2)

The expert opinion was confirmed by the testimony of actual users of background check reports. Human resources personnel who used DOJ reports testified they believed Teague had a criminal record after reviewing the DOJ reports. (R.117:114-127; R.118:15-25). Linda Colvin testified about having to prove to prospective and current employers that the reports were not accurate-despite showing them her letters. She must verify her innocence with a fingerprint based report. (App. 229-234)

For these reasons, this Court should find that DOJ's criminal history record reports are "stigmatizing" with respect to Teague, Colvin, and Williams.

B. Inclusion in a general purpose database, available to the public, can satisfy the plus if that inclusion creates a tangible burden or alters legal status.

According to the court of appeals, relying on *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir. 2005), and *Doyle v. Camelot Care Ctrs., Inc.* 305 F.3d 603, 617 (7th Cir. 2002). (App. 33, ¶68), Teague has not proven "plus" because he failed to establish the DOJ reports constituted an "almost insuperable impediment on obtaining a position in" an entire occupational field, or a complete bar to employment. (App. 33, ¶68)

The court of appeals got two things wrong. First, it pulled descriptive language out of both cases while ignoring the underlying logic of the cases. The insuperable impediment to employment in a single field of work is a sufficient burden, not a necessary prerequisite to establish the "plus." Second, the court of appeals ignored the line of cases which have applied the logic and lessons of *Dupuy* and *Doyle* to other kinds of state run databases. As Teague argued on appeal, and again argues here, that line of cases demonstrates that where a government database is heavily used, and widely relied upon, and where reliance on the database is either required or legally permissible, wrongful inclusion constitutes a tangible burden that satisfies the plus of stigma plus.

In *Dupuy*, the database consisted of the names of individuals who had been "indicated" as perpetrators of child abuse or neglect. Under Illinois law, prospective employers were required to check the registry and to notify DCFS in writing if they wanted to hire someone who they discovered had been indicated. *Id.* at 498. While Illinois law did not prohibit employers from hiring individuals listed on the registry, these legal steps or requirements ensured that inclusion in the registry "places a

significant, indeed almost insuperable, impediment on obtaining a position in childcare." 97 F.3d 493, 511.

Doyle reflects a similar logic, finding the plaintiffs alleged a sufficient deprivation of liberty based on the high number of childcare providers who consulted the database and the imposition of legal responsibilities on employers who might try to hire an indicated applicant. 305 F. 3d at 617. Like *Dupuy*, *Doyle* demonstrates the importance of the state's role in encouraging (by statute) use of the database, and advocating or allowing (by law) employment decisions to be made based on the reports received in response to database queries.

Less onerous and less obvious burdens can trigger a protected interest. In *Wisconsin v. Constantineau,* 400 U.S.433, 435, 91 (1971), the "plus" was a one year suspension of the right to purchase alcohol within the city limits of Hartford, Wisconsin; *see also Kroupa v. Nielsen*, 731 F.3d 813, 819 (8th Cir. 2013)(denial of participation in 4-H activities); *Sciolino v. City of Newport News*, 480 F.3d 642, 650 (4th Cir. 2007)("plus" if former employer has policy to provide stigmatizing personnel file to any prospective employer who inquires, without proof that plaintiff applied to inquiring employer)

But the logic of *Dupuy* and *Doyle* has been most fully articulated and expanded in other government database cases. *Dupuy* and *Doyle* dealt with a single purpose database, primarily used by state-regulated childcare providers. Other state and federal courts have looked at publically available databases used for a much broader array of purposes such as sex offender registries. The obvious stigma of being labeled a sex offender on a public website satisfies the "plus" even when inclusion in the database does not foreclose a specific field of employment. *See e g. 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 …. these statutes unquestionably affect a constitutionally protected interest in liberty."); *see also 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").[7]

A 2008 registry case from California expanded still further these principles. *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). In *Humphries*, the state abuse registry policy mandated that once a substantiated report had been entered into the database, it had to remain there even after the accusation had been disproved. *Humphries* identifies two factors that satisfy the "plus." First was perpetuity. The information remained in the database even after disproven. 554 F.3d at 1182-83. Second was ubiquity. 554 F,3d at 1187-88. Many employers and licensing agencies were required to consult the registry (just as many Wisconsin agencies and employers are required to run background checks) and to investigate any report. Other agencies and parties **could** consult before allowing adoption or volunteer opportunities and similar privileges. *Id.* The court recognized that the plaintiffs would often be able to obtain a

[7] Sex offender databases have passed constitutional muster because information about sex offenders is true and only applied after a criminal adjudication. That is not true for DOJ's operation of its criminal background check sales to private citizens. DOJ refuses to send out the clean credential even when the background check request is for the innocent citizen who has proved the fact of innocence.

benefit sought, but held that the constant struggle to obtain those benefits was a tangible burden, altering though not extinguishing "a right or status recognized by state law." *Id.*, 1188.

In *Humphries*, the plus did not require "preclusion from employment in an entire occupational field. The imposition of a constant pattern of struggles to obtain rights or benefits is a sufficient tangible burden.

Other courts have recognized that "plus" can be established through this kind of incremental burden, when the database is widely used, and state law allows or requires discrimination based on inclusion. *See, e.g., 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") In *Kelley v. Mayhew*, 973 F.Supp.2d 31 (D. Me. 2013), the court found that 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 status to satisfy the "plus." 973 F. Supp.3d at 43-44.

Although no federal or state court has yet applied the tangible burden test to the kind of state-run data base at issue in this case, the record clearly establishes that Wisconsin's criminal background checks are as ubiquitous as the childcare data bases and just as permanent. DOJ produces approximately 800,000 criminal background report on private citizens for private citizens annually. (R.109, Trial Exhibit 95) That is equivalent to a 10^{th} of Wisconsin's population. Further, DOJ's policy is permanent, Like the Humphries, Teague, Colvin, and Williams have proved their innocence. Yet they must for the rest of their lives manage the consequences of their false criminal labels: anticipating who might conduct a background check

and when, buying new innocence letters, and never knowing who has been mislead by the misleading reports. At trial, Linda Colvin testified that all her nursing employers still required, after reading her innocence letter, further verification of innocence in the form of a fingerprint-based background check. In Colvin's field, nursing, most employers in every state require background checks to ensure compliance with a web of state and federal laws. Such checks cost time and money, constituting a "tangible burden."

As the cases cited above demonstrate, this amount of burden, when it is perpetual and involves struggles to obtain the rights and benefits that should belong to an innocent individual, satisfies the plus of stigma plus. Because the circuit court did not address the question of what process is due, this Court should hold that a protected interest exists through the stigma-plus doctrine and remand for a determination of what process is due.

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

The court of appeals rejected Petitioners' substantive due process claim on the ground Petitioners did not provide "useful authority" for a claim the court described as novel. (App. 031) The court of appeals was correct that the precise issue raised by this case has not been addressed by any federal or state court: whether the state can disseminate through a database identified as the authoritative repository of state criminal records reports falsely associating innocent people with a criminal record without violating due process. The court of appeals was wrong to dismiss Teague's substantive due claim on that process on that ground that it is novel.

The United States Supreme Court recognizes that fundamental rights may manifest themselves in different ways in the wake of historical and

technological changes. In, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 787 (2010), the Court affirmed that the Second Amendment protects an individual's right to possess handguns in the home because self-defense is a right separable from militias and because the handgun is the modern choice for individual self-defense. The right to self-defense through the ownership of handguns was not, according to the Supreme Court, a new fundamental right, but a necessary corollary, in today's world, of the core right protected by the Second Amendment; *see also Obergefell v. Hodges*, 135 S. Ct. 2584 (recognizing that courts have not always associated the fundamental right to marry with same-sex couples: "[This]Court, like many institutions, has made assumptions defined by the world and time of which it is a part."). Like *McDonald, Obergefell* demonstrates that a fundamental right cannot be identified by merely naming it; fundamental rights are identifiable, despite historical changes, by an analysis of why the right is fundamental to the Constitution or our system of laws.

The right Teague seeks to vindicate is, like the rights construed in *McDonald* and *Obergefell*, a necessary corollary to a right deeply rooted in America's history and tradition—the right not to be deprived of liberty, on the grounds one is allegedly a criminal, in an arbitrary fashion. The rights to a jury trial, to the presumption of innocence, and to the prohibition against coerced confession are not rights of substantive value in and of themselves. They are, rather, procedural brakes on the government's power to turn citizens into criminals. That right has always been understood to extend beyond the mere protection from loss of physical liberty. *See, e.g., Jordan v. State*, 512 N.E.2d 407, 409 (Ind. 1987) ("when an adult is convicted of a crime, the conviction is a stigma that follows him through life, creating many roadblocks to rehabilitation."); *United States v. Dancy*,

510 F.2d 779, 782, (D.C. Cir. 1975) ("The stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth.")

Even if a sentence is merely a fine or the warning of probation, the stigma of criminalization means the Constitution prohibits the affixing of that label through arbitrary or irrational abuses of government power

> [B]ecause of the certainty that [one found guilty of criminal behavior] would be stigmatized by the conviction . . . a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."
>
> "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."

In re Winship, 397 U.S. 358, 363-64 (1970).

The right not to be arbitrarily "adjudged" a criminal is logically inseparable from the right not to be labeled as a criminal when one is not. That right is also deeply rooted in American legal traditions. In *Beauharnais v. Illinois*, 343 U.S. 250, 255-56 (1952), Justice Frankfurter noted that "[l]ibel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives were no defense." The same opinion noted the unquestioned link between defamation[8] and false accusations of criminality: "No one will gainsay that it is libelous falsely to charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana." *Id.*

[8] The First Restatement of Torts reflects the historic rule that publication of written material tending "so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" – subjected the publisher to liability although no special harm to reputation was actually proved. Restatement of Torts 559 (1938)

This fundamental right also means that the government cannot punish or burden someone, because of an association with criminality, when they are innocent. In 1996, the United States Supreme Court struck down a Pennsylvania law allowing juries to impose costs on individuals acquitted of crimes. *Giaccio v. State of Pa.*, 382 U.S. 399, 405, 8 (1966). The majority opinion found the law void for vagueness, the concurring opinions by Justices Stewart and Potter were much simpler and much shorter, finding that punishing the innocent violated substantive due process. *Id.* (*Stewart, J. concurring*)("In the present case it is enough for me that Pennsylvania allows a jury to punish a defendant after finding him not guilty. That, I think, violates the most rudimentary concept of due process of law."); *Id.*,(*Fortas, J. concurring*) ("In my opinion, the Due Process Clause of the Fourteenth Amendment does not permit a State to impose a penalty or costs upon a defendant whom the jury has found not guilty of any offense with which he has been charged.").

Under DOJ's policy, innocent people like Teague, Colvin, and Williams are forced to constantly prove that they are not criminals because the state's own criminal history record reports say they are. They, as Colvin testified, may be asked to obtain fingerprint background checks to verify their innocence. They may be temporarily or permanently denied jobs, housing, volunteer opportunities because the state identifies them with a criminal history they deny they have. Those burdens are like a fine they must pay, over and over again, despite the fact that they have proved they are innocent and have no criminal record. DOJ's alias name policy is nothing more or less than a penalty or cost imposed through modern technology on subjects the state knows are innocent. That behavior may be, as Justice Sherman observed in his concurrence, the behavior of a bully,

but it is more than that. It violates the most rudimentary concept of due process of law.

Even if the government had a compelling interest in controlling the use of alias names in the employment context, DOJ's alias policy cannot survive unless it is narrowly tailored to serve that end. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302 (1993). There is no tailoring in this policy. DOJ inflicts the same burden on individuals "matched" by computer algorithms as it inflicts on victims of professional identity theft. DOJ engages in no risk assessment prior to associating a criminal record with a person known to be innocent. DOJ never reviews alias associations for staleness. A policy risk assessment where, for example, aliases used by convicted sex offenders or aliases used in the past three years might pass muster as not arbitrary, but not a policy applied mechanically, without any discretion or limitation.

The novelty of the technology in this case should not justify the government's deprivation of a fundamental right of all people not to be penalized or forced to bear a cost associated with criminality when one is innocent of any crime.

CONCLUSION

For the reasons, the Court should (1) reverse the court of appeals on its Wis. Stat. § 19.356 holding and the circuit court grant of summary judgment, and either hold that DOJ's alias name policy violates the common law balancing test or remand for further decision on that issue, (2) reverse the court of appeals and the circuit court grant of summary judgment to defendants under Wis. Stats. § 19.70 and remand for further proceedings, (3) find a protected interest under the stigma-plus doctrine and remand to the circuit court for further proceedings on what process is due, (4) reverse the grant of summary judgment to defendants on the Equal Protection claim and remand with directions to grant plaintiffs' motion for summary judgment, and (5) vacate the judgment on the substantive due process claim and remand with directions to enter declaratory judgment in Petitioners' favor.

Dated at Milwaukee, Wisconsin this 1st day of August, 2016.

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