No. 14AP2360

In The Supreme Court of Wisconsin

DENNIS A. TEAGUE, PLAINTIFF-APPELLANT-PETITIONER, AND
LINDA COLVIN AND CURTIS WILLIAMS,
INTERVENING PLAINTIFFS-APPELLANTS-PETITIONERS,

v.

BRAD D. SCHIMEL, WALT NEVERMAN, DENNIS FORTUNATO, AND
BRIAN O'KEEFE, DEFENDANTS-RESPONDENTS.

On Appeal from the Dane County Circuit Court,
The Honorable Juan B. Colás, Presiding,
Case No. 2010CV2306

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANTS-RESPONDENTS

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

DANIEL P. LENNINGTON
Deputy Solicitor General
Counsel of Record

Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
lenningtondp@doj.state.wi.us
(608) 267-8901

Attorneys for Defendants-Respondents

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ISSUES PRESENTED

1. May Teague obtain "judicial review," Wis. Stat. § 19.356(1), to prevent the release of public criminal history records when he does not fall into one of the three categories in Wis. Stat. § 19.356(2)(a)?

The circuit court did not answer this question, but the court of appeals answered "no."

2. Does the common-law balancing test prevent release of ATP's public criminal record in response to a name-based search for Teague, whose name is listed as an alias on ATP's record?

The circuit court answered "no," but the court of appeals did not answer this question.

3. Does Wis. Stat. § 19.70, which permits Teague only to "challenge the accuracy of a record" "pertaining to" him, require DOJ to return a "no criminal history" response whenever the name "Dennis Teague" is queried?

The circuit court answered "no," but the court of appeals rejected the argument as undeveloped.

4. Does DOJ violate the Equal Protection Clause by returning a criminal history record in response to a search request for a name that has been previously used as an alias by an individual with a criminal record?

The circuit court and court of appeals answered "no."

5. Does DOJ's practice of returning a criminal history record based on a search query of a name associated with a

particular criminal record violate Teague's fundamental rights as a matter of substantive due process?

The circuit court and court of appeals answered "no."

6. Does DOJ's practice of returning a criminal history record based on a search query of a name associated with a particular criminal record unconstitutionally stigmatize Teague as a matter of procedural due process?

The circuit court and court of appeals answered "no."

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument in this case for November 9, 2016. By granting the petition in this case, this Court has indicated that this case presents issues of significant importance and therefore the opinion should be published.

INTRODUCTION

The Wisconsin Department of Justice's[1] record-check system allows members of the public to search for criminal history records through a web-based portal (or by mail). The search is name-based, meaning a requester may search the database with, at a minimum, a name and date of birth. Based on the search terms provided by the requester, DOJ's system runs those search terms against the 1.3 million

[1] The Defendants-Respondents in this case are officials at the Department of Justice, sued in their official capacities. Therefore, this brief refers to them collectively as "DOJ."

criminal records in DOJ's criminal history database. If there is a sufficient match, then DOJ returns a criminal record. This system is used more than 800,000 times per year.[2]

DOJ repeatedly warns users (both before and after a search) of the inherent limitations of a name-based search: this type of search can return criminal records for individuals without a Wisconsin criminal history if the information provided sufficiently matches a name or alias of a person with a criminal record. DOJ also warns users that, because of "identity theft," "[i]t is not uncommon for criminal offenders to use alias or fraudulent names," and that the criminal history returned by the search might not "actually belong[ ] to the person whose name and other identifying information you submitted." App. 66.[3]

DOJ also tells requesters that its name-based search is not as reliable as a fingerprint-based search, which matches fingerprints submitted by a requester to fingerprints in the database. But a name-based search is "quicker, cheaper, and

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[2] The statistics in the record are from 2014. DOJ's current statistics reflect that there are now over 1.4 million criminal records in DOJ's criminal history database, and that in 2015, DOJ responded to over 900,000 public background check requests. *See* DOJ, *Background Check & Criminal History Information*, https://www.doj.state.wi.us/dles/cib/background-check-criminal-history-information.

[3] Citations to the Petitioners' Appendix are "App. [page number]," while citations to the Respondents' Appendix are "Supp. App. [page number]." Citations to the record in this case are "R.[entry]:[page number]."

easier" for the thousands of individuals, businesses, and other organizations that rely on DOJ's system.

Several years ago, Dennis Teague's cousin, ATP,[4] stole Teague's identity.[5] As a result of that crime, the name "Dennis Antonio Teague" is now listed as an alias in the public records of ATP's criminal convictions. So when a user of DOJ's system submits a name-based search for Teague, the system also returns ATP's criminal record, which shows that ATP has used the name "Dennis Antonio Teague" as an alias. But like any other criminal history record, DOJ thoroughly explains to users that ATP's record might not be associated with Teague himself because of identity theft. Users are told to carefully compare the information they have with the criminal record (which also contains a photo). DOJ has further provided Teague with an Identity Challenge Letter, informing anyone to whom Teague provides the letter that he does not, in fact, have a criminal history. And DOJ is further implementing adjustments to the system that will result in a "no criminal history" response if Teague's name is searched along with a unique personal identification number, or UPIN, that DOJ will provide to Teague and others in his situation.

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[4] This brief will continue the court of appeals' use of initials in referring to this individual.

[5] As noted by the court of appeals, Teague is not the only plaintiff in this case, but the additional plaintiffs, Linda Colvin and Curtis Williams, do not present "any additional or different facts." App. 2. This brief will therefore refer just to Teague.

Teague cannot prevail under any of his legal theories. His claim under the public-records law is barred by the law itself, which provides—with certain exceptions not applicable here—that "no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1). And his other claims similarly fail, primarily because he is not actually challenging the accuracy of any record DOJ releases in response to a name-based search query. Moreover, Teague does not seriously contest the importance of allowing users to conduct a comprehensive name-based search of DOJ's criminal database, including names that criminals may have used as aliases.

Teague's case is based solely on the claim that he does not like that DOJ accurately informs requesters that his name has been used by ATP as an alias. This is not supported by any statute or constitutional right. His claims therefore fail and the judgment of the court of appeals should be affirmed.

STATEMENT OF THE CASE

I. Wisconsin's Public Records Law

A. Wisconsin's Public Records Law is a "fundamental" part of "our state's history of transparent government." *Journal Times v. Police & Fire Comm'rs Bd.*, 2015 WI 56, ¶ 45, 362 Wis. 2d 577, 866 N.W.2d 563. The law "declare[s]" it to be "the public policy of this state that all persons are

entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them." Wis. Stat. § 19.31.

The Public Records Law creates a "presumption of complete public access, consistent with the conduct of governmental business." Wis. Stat. § 19.31. "This presumption reflects the basic principle that the people must be informed about the workings of their government and that openness in government is essential to maintain the strength of our democratic society." *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811. Denial of public access is limited only to "exceptional case[s]," since denial "generally is contrary to the public interest." Wis. Stat. § 19.31. For example, "when the release of a police record would interfere with an on-going prosecution or investigation, the general presumption of openness will likely be overcome." *Linzmeyer*, 254 Wis. 2d 306, ¶ 30.

As the Public Records Law explains, "[e]xcept as otherwise provided by law, any requester has a right to inspect any record." Wis. Stat. § 19.35. Records, in turn, are defined broadly as "any material on which written . . . or electronically generated or stored data is recorded or preserved . . . that has been created or is being kept by an authority." Wis. Stat. § 19.32(2). Records are held by an "authority," (for the most part, any part of state or local government), Wis. Stat. § 19.32(1), and "records custodians" are individuals vested with the authority's power to make a

decision concerning a record under the Public Records Law, *see* Wis. Stat. § 19.33.

When presented with a request for a public record, a records custodian must first consider whether a statute or the common law prohibits or requires disclosure. *See, e.g.*, Wis. Stat. § 19.36(2)–(13) (exempting certain information from disclosure and prohibiting the release of certain information); Wis. Stat. § 346.70(4)(f) (requiring release of traffic reports). If neither a statute nor the common law creates a blanket rule, then "the custodian must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551. This test is generally referred to as the "common-law balancing test." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶ 5, 300 Wis. 2d 290, 731 N.W.2d 240.

B. While the Public Records Law provides relatively broad judicial remedies to require the "release of [a] record," Wis. Stat. § 19.37(1)(a), in keeping with the presumption of openness, the Public Records Law specifically limits how an individual may prevent the release of a public record. Section 19.356 provides that, "[e]xcept as authorized in this section or as otherwise provided by statute, . . . no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1). There are only "three narrow exceptions" to this "general

rule." *Moustakis v. DOJ*, 2016 WI 42, ¶ 24, 368 Wis. 2d 677, 800 N.W.2d 142. These "three narrow exceptions" are, generally speaking, (1) records involving an employee disciplinary matter, (2) records obtained through a subpoena or search warrant, and (3) records prepared by "an employer other than an authority," relating to an employee of that employer. Wis. Stat. § 19.356(2)(a)1.–3.

Although judicial remedies are limited to prevent release of records, the Public Records Law provides certain protections for personal information. For example, a requester has a greater right of access than the general public to "any personally identifiable information pertaining to the [requester] in a record containing personally identifiable information that is maintained by an authority." Wis. Stat. § 19.35(1)(am); *Hempel*, 284 Wis. 2d 162, ¶ 34. Moreover, under certain statutes or the balancing test, an authority can redact names, addresses, Social Security numbers, and other sensitive personally identifiable information in certain circumstances. *See, e.g.*, Wis. Stat. § 19.36(10)(a) (employee information). Although these statutes do not allow pre-release judicial review of these determinations, the Legislature has provided for certain penalties for individuals who mishandle personal information. *See, e.g.*, Wis. Stat. § 19.80.

C. Wisconsin's Personal Information Practices Law imposes additional duties upon authorities in their handling of public records. *See* Wis. Stat. ch. 19, subch. IV. As relevant

here, Section 19.70 grants an individual the right to "challenge the accuracy of a record containing personally identifiable information pertaining to the individual that is maintained by an authority." Wis. Stat. § 19.70(1). After receiving a "notice" "in writing," the authority must either "[c]oncur with the challenge and correct the information" or "[d]eny the challenge." Wis. Stat. § 19.70(1)(a)–(b). If a challenge is denied, then the authority must "allow the individual . . . to file a concise statement setting forth the reasons for the individual's disagreement with the disputed portion of the record." Wis. Stat. § 19.70(1)(b).

II. Wisconsin's Criminal History Record Check System

A. DOJ operates and maintains Wisconsin's criminal history database. App. 3–4; *see* Wis. Stat. §§ 165.83–.84. The database, which contains the criminal records of approximately 1.3 million individuals, App. 4, is based on records DOJ collects from law enforcement agencies, the Department of Corrections, prosecutors, and courts. App. 4, 46. Each criminal record in the database corresponds to one person, identified by his or her fingerprints, and is associated with one primary, or "master" name. App. 4, 46.

Private citizens and organizations can search Wisconsin's criminal history database through DOJ's Online Record Check System. *See* DOJ, *Wis. Online Record Check Sys.,* https://recordcheck.doj.wi.gov/. The database is

searched over 800,000 times each year, with total searches exceeding 22,000 in some weeks. Supp. App. 18–19.

B. DOJ maintains a public-facing website explaining in detail how to search the criminal history database, its limitations, and what a requester can expect to receive as search results. Supp. App. 5–10.[6] As an initial matter, DOJ explains that its record-check search system is "name-based," meaning that a requester will submit a name and date of birth to search the system and *not* a set of fingerprints. Supp. App. 5. Although name-based searches are "quicker, cheaper, and easier" than fingerprint-based searches, "they are less reliable" because search results are based on "non-unique identifying data," such as name and date of birth. Critically for this case, the website explains as follows: "It is possible for multiple persons to share a name and date of birth. In some cases, a name-based check may pull up a criminal record that does not belong to the subject of the record." Supp. App. 5.

Requesters are then directed to three specific sections of DOJ's record-check website, which DOJ warns requesters should read "[*b*]*efore* requesting a criminal history check," Supp. App. 5 (emphasis added). These three sections are described below:

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[6] The current website is in substantially the same form as appears in the record. *See* DOJ, Background Check & Criminal History Information, https://www.doj.state.wi.us/dles/cib/background-check-criminal-history-information.

How To Read A Criminal Record. In boldface type, DOJ warns requesters that if a criminal record is returned as a result of the search criteria, the requester should not "assume that a criminal history record pertains to the person whose identifying information was submitted to be searched." Supp. App. 6. Requesters should be careful to review the report's "Master Name," which may be the same or different from the name submitted in the search. Supp. App. 6–7.

If the name is different, then the record "may belong to someone other than the person whose name and other identifying data you submitted for searching." Supp. App. 6–7. This difference may be because the name submitted for searching is listed as "an alias or fraudulent name." Supp. App. 6–7.

If the name is the same, the record returned still may "belong to someone other than the person" searched (because of, for example, a shared name and birth date), and the requester should be careful to "compare the information reported on the response to the other information you have obtained about that person." Supp. App. 7.

Whatever the case, DOJ tells requesters that before making any "final decision adverse to a person based on a criminal history response," the requester should notify the person of his or her "right to challenge the accuracy and completeness of any information contained in a criminal history record" and the process for making such a challenge. Supp. App. 7.

Mistaken Identity Or False Match. DOJ's website also explains how the name of a person without a Wisconsin criminal history may show up on a criminal history report: "If someone uses a name similar to your name or gives it as an alias when arrested, that name will be entered in the Wisconsin criminal history database." Supp. App. 7. "You may have been a victim of identity theft or your name may be very similar to the name of a person who has a criminal record." Supp. App. 7. A name of a person without a Wisconsin criminal history may show up on a criminal history because "ALL names in the database, including aliases, are searched." Supp. App. 7.

Challenging A Criminal History Record. DOJ's website also lays out the process that individuals may use to challenge a criminal history (for example, because of mistaken identity). Supp. App. 9. After an individual fills out a "Wisconsin Criminal History Challenge Form," *see, e.g.*, App. 200, DOJ will then "compare your fingerprints with the fingerprints of the person who gave a name similar to your name." Supp. App. 9. If the fingerprints are different, then DOJ will issue an "Identity Challenge Letter." *See, e.g.*, App. 202. According to DOJ, "[y]ou can use this letter to prove to prospective employers or others that the criminal history . . . does not belong to you." Supp. App. 9.

DOJ's current record-check website also explains that DOJ will be implementing a Unique Personal Identification Number (UPIN) for each recipient of an Identity Challenge

Letter. DOJ, *Wis. Online Record Check Sys.,* https://recordcheck.doj.wi.gov/; *see also* DOJ, *Background Check & Criminal History Information,* https://www.doj.state.wi.us/dles/cib/background-check-criminal-history-information. When fully deployed, any individual who has received an Identity Challenge Letter will also be assigned a UPIN. When a requester provides the UPIN as part of the search process, "any arrest and/or conviction record successfully challenged would not be included in a public response." *Id.*

C. If a requester wishes to search the database, the requester may search for criminal history records at https://recordcheck.doj.wi.gov.[7] To search the database, a requester must provide, at a minimum, a name and date of birth, but other information—such as a Social Security number, race, or a maiden name—may also be provided. App. 46. When fully implemented, a requester will also be allowed to insert a UPIN for individuals who, like Teague, have been given "Identity Challenge Letters," described *supra* p. 12. *See* DOJ, *Wis. Online Record Check Sys.,* https://recordcheck.doj.wi.gov/.

Based on the information provided in the name-based search, a requester will receive one of three automatic

[7] Before July 5, 2016, DOJ's record-check system was at a different URL and operated with a different software. *See* Supp. App. 1–4. This software upgrade does not impact the relevant facts in this case.

responses relevant to this case.[8] The result may say "No Criminal History." Supp. App. 12; *see, e.g.*, App. 192–93. This result means that the system did not find "any matches or near-matches" in the DOJ database, App. 5, and therefore "no criminal history [was] found." Supp. App. 12. The result could also say "Manual Intervention." This response means "based on the information entered, an exact determination cannot be immediately made" and DOJ will need to conduct a further review. *See* App. 46–47; Supp. App. 12. Finally, the result could say "Review CIB Record," Supp. App. 11, 12. This means that a criminal history record has been located based on a "match or near match" of the search terms. App. 5.

Importantly, all three responses explain that the result was "based on a search using the identification data supplied," and that "[s]earches based solely on name and non-unique identifiers are not fully reliable." *See, e.g.*, Supp. App. 11. The result states that DOJ "cannot guarantee that the information furnished pertains to the individual you are interested in." Supp. App. 11.

D. In the case of a response stating "Review CIB Record," a requester who clicks on the link will then view the criminal history report.[9] Several complete criminal history

[8] A requester may also receive a response concerning juvenile adjudication or a result related to caregiver/daycare licensing, but these responses are not relevant to this case. Supp. App. 12.

[9] Requesters who click on "No Criminal History" will simply be taken to a summary page restating the terms searched, the result, and an

reports are contained in the appendix. *See, e.g.*, App. 65, 76, 129, 167, 174. Given the importance of the criminal history report in this case, the following section will describe this report in detail.

At the top of a criminal history report, the search criteria are clearly laid out in the following manner:

> This criminal background check was performed by searching the following data submitted to the Crime Information Bureau:
>
> | | |
> |---|---|
> | Name | DENNIS A TEAGUE |
> | Date of Birth | 10/4/1982 |
> | Sex | U[nknown] |
> | Race | U[nknown] |

App. 65.

After this identification of the search criteria, over two pages of disclaimers follow. App. 65–67. These pages, for the most part, expand upon the disclaimers listed on DOJ's website and discussed *supra* pp. 10–12. The report indicates that there is a "possible match" based on the "identifying data you provided." The criminal history, however, may include "records for multiple persons as potential matches" or "a criminal history record belonging to a person whose identifying information is similar in some way to the identifying data that was submitted to be searched, but is not

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identical disclaimer stating the limitations of the search. *See, e.g.*, App. 193.

the same person whose identifying data was submitted for searching." App. 65.

Then the criminal history report explains that DOJ "cannot guarantee that the criminal history record below pertains to the person in whom you are interested," and that a requester should "carefully read the entire" record and "not just assume that the criminal history record [ ] pertains to the person in whom you are interested." App. 65. The criminal history report likewise notes that "[i]t is not uncommon for criminal offenders to use alias or fraudulent names and false dates of birth, sometimes known as 'identity theft.'" App. 66.

Detailed instructions follow on "how to read" the report, including what to do if the "master name" on the report is "DIFFERENT from the 'Master Name' below," or "THE SAME as the 'Master Name' below." In either case, the instructions note that the report "may belong to someone other than the person whose name and other identifying data you submitted for searching." App. 66. The report tells requesters in either case to "compare the information reported [ ] to the other information you have obtained about that person." App. 66.

The report also admonishes requesters not to "make a final decision adverse to a person based on the following criminal history record" unless the requester notifies the subject of "[h]is or her right to challenge the accuracy and completeness of any information contained in a criminal history record" and the "process for submitting a challenge." App. 66.

Finally, after all the disclaimers, the report contains a heading of "Wisconsin Criminal History" followed by a bold line and then the record. For instance, in Teague's example, the name "ANTHONY TERRELL PARKER" is listed alongside a photograph of ATP. Under "alias names/ fraudulent data," the name "Dennis Antonio Teague" is listed. App. 67.

III. Litigation History

A. On April 29, 2010, Teague filed a complaint against DOJ in the Dane County Circuit Court. R.2:1–49. Teague alleged that he had been the victim of identity theft by his cousin, ATP, who had used Teague's name in the commission of several crimes. Teague's name, therefore, is listed as an alias in ATP's criminal history. "As a result, when the public requests a search of the state criminal history records using Teague's name and date of birth the response is a report of Parker's criminal history." App. 45. Teague sought "a declaratory judgment that the defendants have violated state statutes and his constitutional rights," App. 45, specifically under Wis. Stat. §§ 19.67, 19.365 (now 19.70), the common-law balancing test, the Fourteenth Amendment to the United States Constitution, and Article 1 § 1 of the Wisconsin Constitution. R.2:9–14.

On December 19, 2011, the circuit court granted summary judgment on four of Teague's claims. App. 57–58. The court decided that Teague could not prevail under Section

19.67(1)'s requirements that authorities "to the greatest extent practicable" "[v]erify the information" they collect because that requirement merely "sets standards for care in the collection of information, not for the clarity or quality of responses to requests for that information." App. 48. Although the "report could be improved to reduce the likelihood of [an] incorrect inference," "that goes beyond what the statute requires." App. 48.

The court also found that DOJ did not misapply the Public Records Law's common-law balancing test. App. 49–50. The record released was "not false; it accurately records that a man named [ATP], who has a criminal history record, once used Teague's name during a contact with police." App. 49. Teague did not "identify public interests harmed by disclosure," and therefore the balancing test weighed in favor of disclosure. App. 50.

The court then rejected Teague's claim under Wis. Stat. § 19.70 (formerly Wis. Stat. § 19.365), explaining that there is no "record" Teague can challenge, since a new report is generated each time a search request is made and DOJ does not keep any responses to a search request. There is "consequently not a record that Teague can challenge or with which his challenge can be filed." App. 51.

Finally, the court denied Teague's equal-protection claim, finding that there was a rational basis "in alerting record requesters that a person may have a criminal history record because the name they are using in their application

for employment or licensing has been used by someone with a criminal history record." App. 54. Furthermore, the "requester can then take steps to verify whether the applicant is actually the person with that criminal history record." App. 54.

After summary judgment, Teague filed an amended complaint adding two plaintiffs, Linda Colvin and Curtis Williams, and asserting the same statutory and constitutional claims. R.57:1–165. After a trial on the remaining due-process claims, the court dismissed the complaint with prejudice and entered judgment in DOJ's favor. The court found that the criminal history responses "do not convey a false and defamatory meaning" and do not "alter[ ] a legal status for any of the plaintiffs or prevent[ ] their employment or deprive[ ] them of any other right or privilege." App. 43. The court also found that DOJ's had not intentionally violated the plaintiffs' rights or been deliberately indifferent to "plaintiffs' interest in their reputation." App. 44. Finally, "though imperfect[ ]," the court recognized that DOJ's response to name-based queries "is rationally related to legitimate government interests in responding to public requests for information." App. 44.

B. On appeal, the Court of Appeals affirmed. The court unanimously decided that Section 19.356 "unambiguously precludes judicial review" of Teague's claims under the Public Records Law. App. 20. The court relied upon the plain language of that statute, which provides that "no person is

entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1).

Next, the court decided that Teague's claims under Wis. Stat. § 19.70 were "not fully developed" and should therefore "be rejected." App. 35–36. Although this decision appears in Judge Higginbotham's concurring opinion, Judge Sherman joined, making it "the majority opinion on the issue regarding Wis. Stat. § 19.70." App. 38. Judge Blanchard would have rejected Teague's claim on the merits because "Teague does not contend that it is not factually accurate to say that Teague's name has been used as an alias by ATP, nor that it is inaccurate to say that ATP has the criminal history reflected in the database." App. 25.

Finally, the court of appeals rejected Teague's constitutional claims. DOJ's process of providing ATP's criminal history in response to a name-based query for Teague bears "at least a rational relationship to a legitimate government interest in providing accurate information that may assist requesters." App. 29. The court noted that "at least sometimes" a requester may be submitting information provided by "an individual who is pretending to be someone else." App. 29. Therefore, the Equal Protection Clause is not violated.

Teague's due-process claims similarly failed because he first failed to develop a legal argument as to a substantive due-process claim, and then failed to allege any tangible harm

that is required for a procedural due-process claim. App. 30–33.

Concurring in the decision, Judge Sherman expressed frustration with DOJ's process, believing that, although it is not required to, DOJ should provide copies of Identity Challenge Letters whenever Teague's name is searched. He wrote that it would be "inexpensive" to routinely check for Identity Challenge Letters, and that such a process could be incorporated into every record check. Judge Sherman believed that if an individual has an Identity Challenge Letter and that individual is searched, that fact should somehow be incorporated into the response. App. 38–40.

C. Teague filed a petition for review, which this Court granted on June 15, 2016.

STANDARD OF REVIEW

This Court will uphold a circuit court's findings of fact unless they are clearly erroneous. *Steinbach v. Green Lake Sanitary Dist.*, 2006 WI 63, ¶ 10, 291 Wis. 2d 11, 715 N.W.2d 195. Questions of law are reviewed de novo, while "valuing the previous courts' analyses." *Linden v. Cascade Stone Co., Inc.*, 2005 WI 113, ¶ 5, 283 Wis. 2d 606, 699 N.W.2d 189.

"The constitutionality of a statute is a question of law that [this Court] review[s] *de novo*." *Aicher ex rel. LaBarge v. Wis. Patients Comp. Fund*, 2000 WI 98, ¶ 18, 237 Wis. 2d 99, 613 N.W.2d 849. When a statute is challenged, the challenger bears the burden of proving the statute unconstitutional

beyond a reasonable doubt. *Id.* ¶ 19. The same is true for administrative regulations. *Wis. Citizens Concerned for Cranes & Doves v. DNR*, 2004 WI 40, ¶ 10 n.6, 270 Wis. 2d 318, 677 N.W.2d 612.

SUMMARY OF ARGUMENT

I. Section 19.356 bars Teague's attempt to prevent DOJ's release of a public criminal history record in response to a matching name-based search. The Public Records Law specifically prevents judicial review of DOJ's decision to release the records here: "*no person* is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1) (emphasis added). Teague seeks to avoid this statutory bar by arguing that what he is seeking here—review of DOJ's name-based search process resulting in the release of a public record—is not really "judicial review" as contemplated by Section 19.356. Teague seems to claim that "judicial review" can only mean administrative-review lawsuits under Chapter 227. But Teague's attempt to limit the meaning of the phrase "judicial review" is unavailing; Teague is asking for the same review as the plaintiff in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), which is exactly what the Legislature reacted to in passing Section 19.356.

II. Even if Teague could seek judicial review of DOJ's decision to release public criminal history records in response to a name-based search query, DOJ's process complies with

the common-law balancing test. DOJ has chosen a name-based search system as its model. When a user provides certain information—at least a name and date of birth—a search algorithm seeks matching records in DOJ's criminal history database. Although this system has its downsides, the system is quicker, cheaper, and easier than a potentially more accurate fingerprint-based system. The public interest in providing access to this name-based system outweighs any public interest in not providing the system. Any concerns Teague highlights regarding the potentially misleading nature of the records are mitigated by the numerous disclosures and caveats DOJ employs both on its website and the record itself.

III. Teague has no claim for relief under Section 19.70. That statute provides that if a record contains "personally identifiable information pertaining to [an] individual," then that individual "may challenge the accuracy of [the] record." Wis. Stat. § 19.70(1). Teague's claim ultimately fails because he does not "challenge the accuracy of [the] record." The criminal history is accurate on its face: it relays to the public the information DOJ has on the name "Dennis Antonio Teague," which is, that it has been used as an alias by ATP. DOJ's disclaimers specifically warn system users of identity theft and that they should not "assume that a criminal history record pertains to the person whose identifying information was submitted to be searched." Supp. App. 6.

IV. Finally, Teague's constitutional claims are meritless. His equal-protection claim fails because DOJ has identified a rational basis for its policy: an alias may be given to a DOJ criminal-history search user, like an employer, by someone with a criminal record, and that user may unwittingly enter such a name in the search system. DOJ users are entitled to accurate results, and when they enter a name-based query, it is rational for DOJ to search all names in the database, even aliases.

Teague's due-process claims similarly fail. There is no fundamental right of Teague's implicated by DOJ's name-based search process, so the process must only pass the rational-basis test. Criminal history records—including records mentioning Teague—are public records, and the public has the right to know the results of a name-based search, so DOJ's name-based search process is rational. Therefore there is no violation of substantive due process. Moreover, Teague's claim does not implicate any notions of procedural due process because he suffers no harm from DOJ's name-based search process, which conveys truthful and accurate results of records contained in the criminal history database.

ARGUMENT

I. Teague's Public Records Law Claim Fails

A. Section 19.356 Bars Teague's Claim

1. Section 19.356 provides that, "[e]xcept 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." Wis. Stat. § 19.356(1). The statute then carves out three specific exceptions to this general rule. Before release of a record, an authority must notify any individual who is the record subject of (1) employee-discipline records, (2) records obtained through subpoena or search warrant, or (3) records "prepared by an employer other than an authority." *See* Wis. Stat. § 19.356(2)(a)1.–3. After sending a notice, the authority may not release the record for 12 days, Wis. Stat. § 19.356(5), which gives the record subject time to "commence an action seeking a court order to restrain the authority from providing access to the requested record." Wis. Stat. § 19.356(4).

Interpreting this text in *Moustakis,* this Court explained "the general rule [is] that a 'record subject' is *not entitled* to notice or pre-release judicial review of the decision of an authority to provide access to records pertaining to that record subject." 368 Wis. 2d at 681 (emphasis added). This

"general rule" is "general" because it is subject to the three exceptions in Wis. Stat. § 19.356(2)(a)1.–3., which have never been invoked by Teague in this case.[10]

This statutory text generally bars pre-release litigation, except for the three categories of record subjects who are given pre-release notice of a record and an opportunity to sue under specific timeframes.

2. Section 19.356 has its genesis in this Court's now-abrogated (in relevant part) decision in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). In that case, this Court took up the question of whether, before a public record is released, a circuit court may review whether, "in deciding that the records were to be released, [the authority] conducted the appropriate balancing test in reaching that decision." 202 Wis. 2d at 195.

After reviewing the statutes and case law applicable to Public Records Law, this Court determined that "a remedy for an individual" "seeking to deny access to his or her records" is "implicit in our law," and "that [ ] remedy [is] de novo review by the circuit court" before a record is released. *Id.* at 184–85. That decision, "for the first time . . . subject[ed] a custodian's decision to release [public] records to judicial review." 202 Wis. 2d at 200 (Abrahamson, J., concurring in part, dissenting in part). While *Woznicki* was arguably

[10] The rule is also subject to an exception in Wis. Stat. § 196.135(4), related to confidential records filed with the Public Service Commission, which is inapplicable here.

limited to district attorneys, three years later, the Court removed any doubt and applied the decision to all authorities. *See Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999).

In dissent, two Justices explained that the "determination of whether a public record should be closed rests with the legal custodian of the record rather than with the general public or any individual." *Woznicki*, 202 Wis. 2d at 203 (Abrahamson, J., concurring in part, dissenting in part). If a custodian decides to release a record, then the statutes provide no cause of action to challenge that decision. *Id.* This is in keeping with the Public Records Law's "presumption of complete public access." *Id.* (citation omitted). While the Public Records Law provides a right to compel disclosure in Section 19.37, "[t]here is no comparable statute—and no comparable case law—authorizing an action by a person seeking to prevent rather than compel disclosure." *Id.* at 210 (Abrahamson, J., concurring in part, dissenting in part).

The Legislature responded to these decisions by enacting 2003 Wis. Act 47. The Legislature directed the Special Committee on Review of the Open Records Law to recommend legislation to "implement[ ]," "amend[ ]" or "overturn[ ] the opinions" in *Woznicki* and *Milwaukee Teachers'*. *See* 2003 Wis. Act 47, Prefatory Note. The Committee and the Legislature ultimately decided to "partially codif[y] *Woznicki* and *Milwaukee Teachers'*," and

"appl[y] the rights afforded by [those cases] *only* to a defined set of records." *Id.* (emphasis added.) In contrast to *Woznicki,* the general rule (subject to certain exceptions that do not apply in this case) is now that "no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356(1).

3. Teague—just like the plaintiff in *Woznicki*—seeks review, in his complaint, of whether an authority has properly "appl[ied] the common law balancing test." R.57:15. For relief, Teague asks for a declaration that DOJ "continue[s] to violate" the Public Records Law by failing to properly "perform the common law balancing test." R.57:20. Teague seeks an injunction against DOJ to prevent the release of "public criminal record histories" under circumstances that he finds objectionable. R.57:21.

Teague's lawsuit falls directly within the statutory prohibition in Section 19.356. He seeks "judicial review of the decision of an authority to provide a requester with a public record," Wis. Stat. § 19.356(1), but he is not one of the three types of record subjects who are given pre-release notice and a 12-day period in which to file a lawsuit seeking to prevent the release of a record. *See* Wis. Stat. § 19.356(5). The records at issue here are not employee records or records obtained through subpoena or search warrant. *See* Wis. Stat. § 19.356(2)(a)1–3. Teague has never argued that they are. And this lawsuit is not "authorized in this section or

[ ][ ]otherwise provided by statute." *See* Wis. Stat. § 19.356(1).

4. Teague makes two arguments as to why Section 19.356 does not bar his attempt to prevent DOJ from releasing public records in response to a name-based search query of its record-check system. Neither argument is correct.

First, Teague claims this lawsuit does not seek "judicial review," *see* Teague Br. 11–15, and therefore does not fall within the prohibition that "no person is entitled to *judicial review* of the decision of an authority to provide a requester with access to a record," Wis. Stat. § 19.356 (emphasis added). Teague claims that "judicial review" is a "subset of the more general taxonomy of litigation" and is a mere "technical term." Teague Br. 11.

Teague points to nothing in the text of Section 19.356 suggesting that a judge reviewing whether DOJ can release a public record is *not* "judicial review." He seems to argue that the "judicial review" bar in Subsection (1) only extends to "other person[s]" (not the record subject) who may want to stop the release of documents in the three narrow categories. Teague Br. 14. But the plain language of the statute applies to *all persons* seeking to stop the release of a record, *except* for those in three narrowly defined categories: "*no person* is entitled to judicial review of the decision of an authority to provide a requester with access to *a record*." Wis. Stat. § 19.356(1) (emphasis added). Furthermore, Teague does not claim that he is entitled to notice and a 12-day automatic stay,

which appears in Section 19.356(5). This automatic stay textually links the opportunity to sue with those individuals entitled to notice. Since Teague is not entitled to notice, he is also not entitled to sue.

Instead, Teague apparently believes that the phrase "a record" can be interpreted as limited by the three categories in Section 19.356(2)(a)1.–3. Such a creative construction runs afoul of the Legislature's direction that the language of the Public Records Law should be "construed *in every instance* with a presumption of complete public access." Wis. Stat. § 19.31 (emphasis added). When the Legislature chose to bar challenges to the release of "a record," the clear interpretation that would promote "complete public access" is that "no person" can challenge the release of *any* record unless specifically provided for by statute.

The cases that Teague relies upon do not support his claim that "judicial review" is a mere "technical term." This Court has distinguished between the type of judicial review available under Chapter 227 and a *de novo* trial on the merits, *see, e.g., Wis. Envtl. Decade, Inc. v. PSC*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977), or an action for damages, *Harvot v. Solo Cup Co.*, 2009 WI 85, ¶ 41, 320 Wis. 2d 1, 768 N.W.2d 717, or an injunction, *PRN Assocs. v. DOA*, 2009 WI 53, ¶¶ 47–49, 317 Wis. 2d 656, 766 N.W.2d 559. But this Court has never held that when a statute uses the phrase "judicial review," the Legislature only means actions under Chapter 227. "Judicial review" means exactly what Teague attempts

to do in this case. This Court has explained that "judicial review entails a court's review of a lower court's or an administrative body's factual or legal findings," which is exactly what Teague hopes to have happen here. *Nankin v. Vill. of Shorewood*, 2001 WI 92, ¶ 24, 245 Wis. 2d 86, 630 N.W.2d 141 (citation omitted).

Second, Teague claims that interpreting "judicial review" to cover what he is seeking in this case would lead to "absurd results." Teague Br. 15–17.

As an initial matter, the "absurd results" cited by Teague are, in every instance, about the *release of a public record*, which is the primary purpose of the Public Records Law. *See* Wis. Stat. § 19.31. It is certainly not absurd that a public record may be released to the public.

Moreover, Section 19.356 is simply a return of the law to its pre-*Woznicki* status, except with regard to the specifically enumerated categories for which the Legislature decided notice is required and judicial review is permissible. Before this Court's decision in *Woznicki*, pre-release judicial review was not permitted under the Public Records Law. As the dissent in *Woznicki* noted, "[t]oday *for the first time* the court's ruling subjects a custodian's decision to release [public] records to judicial review." 202 Wis. 2d at 200 (Abrahamson, J., concurring in part, dissenting in part) (emphasis added). This is in part because "the general presumption of [Wisconsin] law is that public records shall be open to the public" and "the right to close a record is vested in

the custodian rather than the subject of that record." *Id.* at 203 (Abrahamson, J., concurring in part, dissenting in part) (citation omitted).

Teague also argues that Section 19.356's ban on judicial review is absurd because a public employee would be left with no remedy if an authority decided to recklessly release Social Security numbers, home addresses, telephone numbers, and email addresses in violation of Section 19.36(10)–(12). Teague Br. 16–17. This is simply not the case. State law explicitly protects personal information in its subchapter on Personal Information Practices. *See* Wis. Stat. ch. 19, subch. IV. Under this state law, *all authorities* in Wisconsin must develop rules concerning appropriate collection, use, and access to personally identifiable information, which is the very type of information Teague claims will be left unguarded. Wis. Stat. § 19.65. This subchapter further provides that employees who violate the laws on personal information may be discharged or suspended without pay, and anyone who "willfully collects, discloses or maintains personally identifiable information in violation of federal or state law" is subject to forfeiture penalties. *See* Wis. Stat. § 19.80(3). And while the Legislature chose to limit the pre-release judicial review in Wis. Stat. § 19.356(1), that chapter provides no limit on post-

release lawsuits to recover damages or other remedies as provided by law.[11]

B. DOJ Properly Released The Record Under The Public Interest Balancing Test

1. Even if Teague could seek pre-release judicial review of DOJ's decision to release certain criminal history records in response to a name-based query, DOJ's decision should be upheld. When a records custodian receives a request to inspect a record under the Public Records Law, "the records custodian, keeping in mind the strong legislative presumption favoring disclosure, must determine whether the requested records are subject to an exception that may or will prevent disclosure." *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 28, 284 Wis. 2d 162, 699 N.W.2d 551. If there is no blanket exception to disclosure from either statutory or common law, then "the custodian must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Id*.

In performing this balancing test, the custodian may take into account only the public interest; private or personal

[11] Teague's argument seems to suggest that it is "absurd" that he cannot sue the State in this case as a pre-release remedy for alleged Public Records Law violation. Yet the "legislature shall direct by law in what manner and in what courts suits may be brought against the state." Wis. Const. art. IV, § 27. The Legislature has chosen Sections 19.37 and 19.356 as the "manner" of suing the State to remedy alleged public-records violations.

interests of a particular record subject are not relevant. *See Linzmeyer*, 254 Wis. 2d 306, ¶ 31. The "public interest in protecting the reputation and privacy of citizens . . . is *not* the equivalent to an individual's personal interest in protecting his or her own character and reputation." *Id.*

2. DOJ's criminal history reports are not limited by statute or common law. Just the opposite: state law authorizes DOJ to release the "results of a criminal history search," provided that the requester pays the appropriate fee. *See* Wis. Stat. § 165.82(1m). Moreover, documents "created or . . . kept by an authority," Wis. Stat. § 19.32(2), reflecting arrests, *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 435–36, 279 N.W.2d 179 (1979), and conviction records, *Dumas v. Koebel*, 2013 WI App 152, ¶ 20, 352 Wis. 2d 13, 841 N.W.2d 319, are undoubtedly public records.[12]

Under the balancing test, the public has a strong interest in knowing when someone is arrested or convicted. In fact, "[t]he public interest is particularly significant where arrest records are concerned." *Breier*, 89 Wis. 2d at 4366. The Legislature has recognized this "particularly significant" public interest by allowing DOJ to provide access to criminal history reports. *See* Wis. Stat. § 165.82. The public, including private employers and volunteer organizations who use DOJ's

[12] This Court releases records reflecting charges and convictions on CCAP, and the site refers to such documents as "public records." *See* Wisconsin Court System, Circuit Court Access, *Access To The Public Records Of The Wisconsin Circuit Courts*, https://wcca.wicourts.gov/.

record-check system, have a strong interest in knowing who has been convicted or arrested. Moreover, some employers are *required* to run a background check. *See, e.g.,* Wis. Stat. § 50.065(2)(b)1. (healthcare workers); Wis. Admin. Code § Trans 112.155(2) (bus drivers). And requesters also benefit from a system that is quick, easy to use, and inexpensive.

On the other side of the balance, the public has an interest in the government releasing accurate criminal history information. If the government released false or misleading information, then the public interest would be harmed.

In this case, the balance weighs in favor of disclosure for the results of the name-based search. DOJ provides an expedient name-based search to members of the public who need to determine whether an individual has a criminal record. Although sometimes less reliable, the name-based method of search is "quicker, cheaper, and easier" than a fingerprint based system.

Moreover, DOJ's system returns accurate information, once the specifically enumerated caveats are properly taken into account: if a requester submits a name and date of birth, then DOJ will return all the information it has, including whether that particular name has been used as an alias for a convicted criminal. Although there could be a risk that such information is misleading, DOJ mitigates this risk by fully (and repeatedly) explaining its system to all users. DOJ explains that because its system relies on non-unique

identifying information (i.e. name and date of birth), it is "possible for multiple persons to share a name and date of birth. In some cases, a name-based check may pull up a criminal record that does not belong to the subject of the record." Supp. App. 5. Moreover, because of the risk of identity theft, the name of a person without a Wisconsin criminal history may appear as an alias on a criminal record. Supp. App. 6. DOJ warns requesters to carefully "compare the information reported on the response to the other information you have obtained about that person," and before making any "final decision adverse to a person based on a criminal history response," notify the person of his or her "right to challenge the accuracy and completeness of any information contained in a criminal history" and the process for making such a challenge. Supp. App. 7.

To further mitigate these risks of misleading information, DOJ provides Identity Challenge Letters to those individuals without a Wisconsin criminal history who have a name that appears on a criminal history report. App. 6. These letters may be provided directly to employers or other requesters to prove that the individual had no criminal history as of the date of the letter. App. 6–7. Furthermore, DOJ is implementing a UPIN process, which, once deployed, will unequivocally provide a "no criminal history" response to those individuals with a UPIN submitted as part of the search request and who otherwise have no Wisconsin criminal history. *See supra* pp. 12–13.

3. Teague does not argue that the public does not have a "particularly significant" interest in criminal records, *Breier*, 89 Wis. 2d at 436, or even that such an interest outweighs the risk of disclosing potentially misleading information. Instead, Teague argues that DOJ is prohibited from engaging in a "global" balancing test, and instead must decide in each and every case whether the public interest in disclosure is outweighed by some other public interest in non-disclosure. Teague Br. 10. Not only would this be utterly impractical (as the Department receives over 800,000 criminal history requests a year), but it is not required in this circumstance. Because all criminal history reports share the same essential characteristics, the balancing test will result in the same decision for all criminal history records. App. 50. Furthermore, requiring the DOJ to determine, on a case-by-case basis, whether to release a criminal history record for every record request received would undermine the purpose of the DOJ's criminal history database, which is to provide quick, cheap, and easy access to criminal histories.

Teague cites several cases establishing that, within the confines of the balancing test, an authority should consider the public interest in protecting reputations. *See, e.g.*, *Zellner v. Cedarburg Sch. Dist.,* 2007 WI 53, ¶ 50, 300 Wis. 2d 290, 731 N.W.2d 240. That is certainly true. But the public interest in avoiding the risk of harming an individual's reputation is outweighed greatly by the public's interest in DOJ's process of allowing name-based queries of its database,

especially in light of DOJ's repeated use of warnings and caveats. Name-based queries are "quicker, cheaper, and easier" than fingerprint-based searches. Supp. App. 5. And although name-based queries may be less reliable, DOJ properly determined that full disclosure to the public about the limitations of name-based queries mitigates any potential harm. Furthermore, DOJ provides a process allowing individuals without a Wisconsin criminal history who share a name with someone with a criminal record to receive an Identity Challenge Letter. DOJ's criminal history record-check system is currently undergoing reforms in order to allow an individual to receive a UPIN, and if that UPIN is provided in the search request, a "no criminal history" report. *See supra* pp. 12–13.

II. Section 19.70 Does Not Apply To Teague's Complaints About DOJ's Name-Based Criminal History Search Process

A. Section 19.70 provides that if a record contains "personally identifiable information pertaining to [an] individual," then that individual "may challenge the accuracy of [the] record." Wis. Stat. § 19.70(1). The individual challenges the record by "notif[ying] the authority, in writing, of the challenge." *Id*. Upon receipt of the notice, the authority may "[c]oncur with the challenge and correct the information" or "[d]eny the challenge." Wis. Stat. §§ 19.70(1)(a) & (b). If an authority denies a challenge, however, the authority must allow the individual "to file a concise statement setting forth

the reasons for the individual's disagreement with the disputed portion of the record." Wis. Stat. § 19.70(1)(b).

B. This statute does not apply to Teague's challenge to DOJ's criminal history database.

Section 19.70 does not apply here because Teague is not "challeng[ing] the accuracy of [the] record." Wis. Stat. § 19.70(1). DOJ allows a name-based search query of its criminal history database. Requesters input, at a minimum, a name and date of birth. DOJ then returns any criminal record matching that information. The information returned is accurate: a search for the name of "Dennis Antonio Teague" along with a date of birth will accurately return a criminal record associated with that name.

To mitigate any chance that requesters may misunderstand the purpose of DOJ's database (which is to determine whether the information provided matches any criminal history records), DOJ's website repeatedly explains the limitations of a name-based search query. The requester should not "assume that a criminal history record pertains to the person whose identifying information was submitted to be searched." Supp. App. 6. Because of similar names in the database or identity theft, the resulting record "may belong to someone other than the person whose name and other identifying data you submitted for searching." Supp. App. 6–7. A name of an individual without a Wisconsin criminal history may show up on a criminal history because "ALL names in the database, including aliases, are searched."

Supp. App. 7. Requesters should carefully "compare the information reported on the response to the other information you have obtained about that person." Supp. App. 7.

Requesters are getting exactly what they search for: they are asking whether any criminal records match the information they have. DOJ's system generates a report based on that search query and gives users access to that report. Teague is not "challeng[ing] the accuracy of [the] record," Wis. Stat. § 19.70(1): the record is accurate in conveying that ATP used "Dennis Antonio Teague" as an alias at some point. As Judge Blanchard noted below, "[t]he database accurately reflects that ATP is a felon who has used Teague's name as an alias, does not state that Teague is a convicted felon, and does not identify a photograph of another person as being Teague." App. 26.

Below, Teague conceded that "the database is not inaccurate in listing Teague's name as an alias for the person whose fingerprints are linked to the record listing ATP as the master name." App. 23. So Judge Blanchard correctly noted that "Teague's claim is not that the alias information is inaccurate, but that it is capable of being misunderstood unless it is also presented with the substance of the innocence letter." App. 23.

For much the same reasons, the statute does not apply because Teague is not challenging a record with "personally identifiable information pertaining to [him]." Wis. Stat. § 19.70. The record DOJ returns in response to a search for

"Dennis Teague" is a report that contains the name as an alias for ATP, but the record itself does not "pertain[ ]" to Teague.

C. Teague argues that the name-based criminal history report is not "correct" and contains "inaccurate information." *See* Teague Br. 19–21. But this is plainly not true. DOJ's system automatically generates an accurate report based on the information provided; Teague does not dispute this point. A requester submits a name-based query, and DOJ's search process determines whether that name matches. The name could be matched not only to a "master name," but also to a name listed as an alias. This is because "ALL names in the database, including aliases, are searched." Supp. App. 7. Requesters are informed, repeatedly, of the use of aliases in the commission of identity theft, *see* Supp. App. 6–7, App.66, how those names may show up on a criminal history report, *see* Supp. App. 6–7, App. 66, and that users should not "assume that a criminal history record pertains to the person whose identifying information was submitted to be searched." Supp. App. 6. DOJ's report is an accurate reflection of what information DOJ matched to the information provided by a requester. Section 19.70 therefore does not apply.

III. Teague's Constitutional Claims Fail

A. Teague's Equal Protection Clause Claim

The essence of an equal-protection claim is that the government has treated two groups differently without a sufficient reason. *See Aicher*, 237 Wis. 2d 99, ¶ 56. When this

differential treatment is not based on a suspect classification or does not implicate fundamental rights, the policy need only pass the rational-basis test. That is, "the legislative classification [must] rationally further[ ] a purpose identified by the legislature." *Tomczak v. Bailey*, 218 Wis. 2d 245, 262, 578 N.W.2d 166 (1998) (citation omitted). Under the rational-basis test, legislative classifications need not be perfect, nor must they operate without "inequities." *Aicher*, 237 Wis. 2d 99, ¶ 57. Once the bare minimum of rationality is met, "[i]t is not [the Court's] role to determine the wisdom or rationale underpinning a particular legislative pronouncement." *Id.*

This Court uses a five-criteria test to determine whether a legislative classification is rational: "(1) All classifications 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. It must not be so constituted as to preclude addition to the numbers included within a class. (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*, 237 Wis. 2d 99, ¶ 58 (citation omitted).

Teague has limited his challenge to the first and second criteria only. Teague Br. 25–27.

Criteria 1: Substantial Distinctions Exist Between the Two Classes. The two classes Teague identifies here are (1) people without a criminal record who have had their identities stolen and (2) people without a criminal record who have *not* had their identities stolen. Teague Br. 23–24. Teague claims that these two classes are treated differently because, when a requester inputs a name into DOJ's record-check system, and that name appears nowhere in the database, then a "No Criminal History Found" message is the result. But, when the name appears in the database, even if it is a name appearing only because of identity theft, then a criminal record is returned containing the name, along with appropriate disclaimers and caveats. *See supra* pp. 15–16.

There is a "substantial distinction" between the two groups Teague identifies: one group has a name that has been the subject of identity theft and is therefore listed as an alias on a criminal history. DOJ's record check takes a name submitted and searches its database. As DOJ tells all users, "ALL names in the database, including aliases, are searched." Supp. App. 7. If there is a match, it returns the criminal record associated with that name. For those individuals who, like Teague, have been the victim of identity theft, DOJ's record-check system generates a report indicating that the name has been used as an alias.

It is important and rational for DOJ's database to search aliases. Employers and other organizations that search the database want to know if the individual that they

are going to hire, or otherwise associate with, has a criminal record. A perpetrator of identity theft who has used an alias in the past may use that alias in the future. DOJ has chosen to return criminal history report based on the *name* submitted, precisely because that is the *name* that the requester wants to search. DOJ sufficiently explains exactly what a requester is getting, and the potential for a criminal history to be returned for an individual without a Wisconsin criminal history. *See supra* pp. 10–12, 15–16.

Teague's only response on this score is that DOJ *arbitrarily* matched him with ATP through its criminal-history search algorithms; therefore, any distinction between Teague and other individuals without a criminal history is the result of DOJ's caprice. But DOJ's practice is to conduct a name-based search: That is the product DOJ's users purchase, and that is what DOJ returns, with detailed caveats and disclaimers.[13] Teague's name is, in fact, listed as an alias in ATP's criminal history and that is the information DOJ conveys in its report. DOJ takes steps to mitigate misunderstandings through disclaimers, Identity Challenge Letters, and a UPIN that will return a "no criminal history" if the individual has no Wisconsin criminal history, *supra* pp. 10–13, 15–16, but it is not arbitrary to return an accurate

[13] Teague also argues that DOJ's use of algorithms to include very close matches in its results—for example, a birthdate that is six days off—is irrational. Including very close matches is perfectly reasonable, however. It mitigates typographical errors and prevents individuals from eliciting false negatives by altering their information in minor ways.

result to a name-based query for records containing that particular name under the current system.

Criteria 2: The Distinction The DOJ Practice Makes Is Highly Germane To The Purpose Of The Criminal Database System. The purpose of DOJ's name-based criminal history search is to transmit accurate criminal histories to those who submit requests. That is exactly what DOJ does: users submit a name-based query, and DOJ returns, with appropriate disclaimers, a criminal record that contains that name. Because a criminal may use an alias, searching "ALL names in the database, including aliases," Supp. App. 7, is essential in determining whether a criminal record is associated with the name-based search. Without searching aliases, requesters could easily be "trick[ed]," App. 30, by job applicants or others submitting a false name to the requester.

Teague responds by claiming that DOJ's system "does nothing to help requestors distinguish between the innocent and guilty." Teague Br. 26. But as described *supra* pp. 10–12, 15–16, DOJ repeatedly informs requesters that "a name-based check may pull up a criminal record that does not belong to the subject of the record." Supp. App. 5. DOJ only has the information submitted by the requester: at a minimum, a name and date of birth. The requester is the one in possession of other potentially relevant information, and DOJ warns requesters to carefully "compare the information reported on the response to the other information you have obtained about that person," and before making any "final

decision adverse to a person based on a criminal history response," notify the person of his or her "right to challenge the accuracy and completeness of any information contained in a criminal history" and the process for making such a challenge. Supp. App. 7.

B. Teague's Substantive Due Process Claim

Teague argues that the alias name policy violates the substantive component of the Due Process Clause; that is, it deprives him of a protected liberty interest without due process of law. In addition to mandating due procedure before a deprivation of life, liberty, or property, the Due Process Clause has been interpreted to protect substantive rights as well. *See Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997).

Glucksberg established a two-part method for determining whether a substantive right is protected by the Due Process Clause. *Id.* at 720–21. "First," the right must be "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [it was] sacrificed." *Id.* (citations omitted). "Second," there must be "a careful description of the asserted fundamental liberty interest." *Id.* at 721 (citation omitted).). The test is a demanding one; indeed this Court has noted the Supreme Court's "reluctance to expand the concept of substantive due

process." *Thorp v. Town of Lebanon*, 235 Wis. 2d 610, 641, 612 N.W.2d 59 (2000).

Teague does not expressly define the right he wants to vindicate, but he appears to claim a right not to have his name listed as an alias in a criminal record of someone else who has, in fact, used that name in the past in the commission of a crime. Whatever the right he claims, it appears that he thinks DOJ's process of accurately responding to a name-based query with a criminal record containing the searched name violates it.

Such a right is not "deeply rooted in this Nation's history." *Glucksburg,* 521 U.S. at 721. If anything, this Country has a deeply rooted tradition of *not* keeping criminal conviction records a secret. *See Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 597 & n.8 (1978) (recognizing the public's "general [common law] right to inspect and copy public records and documents, including judicial records and documents," and noting that the right "has been recognized in the courts of the District of Columbia since at least 1894"). Moreover, this right cannot be "careful[ly] descri[bed]" as *Glucksberg* requires. Teague claims the right, as a matter of constitutional law, to prohibit the State from distributing accurate information to the public. Under Teague's description of the right, it is hard to determine when the government would be allowed to distribute accurate information, and when it would be prohibited from distributing it.

Teague has no serious counter argument. He attempts to characterize his claim as a corollary to the right to be free from being adjudged a criminal without due process, but DOJ's practice is wholly disconnected from declaring Teague himself to be a criminal. Indeed DOJ's search results affirmatively state that ATP, not Teague, is the one with a criminal history, and that "Dennis Antonio Teague" is an alias ATP has used. This record is distributed with all the repeated caveats and disclaimers, as explained *supra* pp. 10–12, 15–16.[14]

C. Teague's Procedural Due Process Claim

Two components make up a claim invoking the procedural component of the right to due process. *Aicher*, 237 Wis. 2d 99, ¶ 80. First, the plaintiff must have a protected liberty or property interest, and second, that interest must have been deprived without due process of law. *Id.* The Court of Appeals resolved this claim on the first component, whether a protected interest has been deprived. App. 31–33. In his brief, Teague only asks this Court to reverse that holding and remand for an inquiry on the second component, namely whether he received the process he would be owed. Teague Br. 34.

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[14] Teague uses *McDonald v. City of Chicago*, 561 U.S. 742 (2010) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) for the main support of his substantive due-process claim. *McDonald* dealt with the incorporation of the Second Amendment, 561 U.S. at 749–50, and *Obergefell* dealt with the right to same-sex marriage, 135 S. Ct. at 2593. Neither of these cases are helpful here.

Teague claims that DOJ's practice stigmatized his reputation by associating him falsely with criminal activity. He claims that this stigma alters his rights in a tangible way because he will be required to prove that the criminal record that is generated from a search of his name is not in fact his own record.

"[R]eputation alone, apart from some more tangible interests such as employment, is [n]either 'liberty' [n]or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701 (1976). Therefore "injury to reputation alone is not protected by the Constitution." *Weber v. City of Cedarburg*, 129 Wis. 2d 57, 73, 384 N.W.2d 333 (1986). In order to establish a protected liberty or property interest based on an injury to repudiation, Teague must show "stigma plus." *Id.* (citing *Paul*, 424 U.S. at 699, 701, 706, 708–09). That is, Teague must show an injury to reputation *plus* the infringement of a legal right or status. *See id.* He can show neither.

DOJ's name-based search system does not harm Teague's reputation in any constitutionally cognizable sense. DOJ allows users to conduct a name-based search of its database. In response to a name-based search, DOJ accurately will return the information it has on the name. Here, "Dennis Antonio Teague" appears as an alias for ATP, and so DOJ returns ATP's history, with appropriate disclaimers. This implicates neither a legal right nor status.

Indeed, the circuit court specifically found that Teague had not suffered from *any* loss of employment as a result of DOJ's policy. App. 55–56.

Teague cites numerous cases from different jurisdictions explaining the level of employment impairment necessary to establish the infringement of a protected liberty interest. Teague Br. 30–34. But none of these cases are helpful to him because he has not demonstrated *any* meaningful impairment. He also argues that the mere inclusion in the database should satisfy the "plus" requirement, but inclusion alone is not an alteration of any legal right.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Dated this 8th day of September, 2016.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General

DANIEL P. LENNINGTON
Deputy Solicitor General
State Bar #1088694
Counsel of Record

Wisconsin Department of Justice
17 W. Main Street
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-8901
(608) 261-7206 (Fax)
lenningtondp@doj.state.wi.us

Attorneys for Defendants-Respondents

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The word count of the portions of this brief identified in Wis. Stat. § 809.19(8)(c)1 is 10,336 words.

Dated this 8th day of September, 2016.

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DANIEL P. LENNINGTON
Deputy Solicitor General

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DANIEL P. LENNINGTON
Deputy Solicitor General