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'REPLY BRIEF

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I. The common law prohibition on "globally balancing" may be enforced through a civil action for prospective relief notwithstanding Wis. Stat. §19.365(1).

A. The Wis. Stat. § 19.365(1) ban on judicial review does not bar civil actions for prospective declaratory and injunctive relief.

Teague's principal brief argued that "judicial review" is a technical term with a limited meaning. (App. Brief at 12-13, 17).

DOJ concedes "judicial review" differs from "trial *de novo,"* an "action for damages" and an [action for] an injunction. (Resp. Brief at 30-31)(citing *Wisconsin Environmental Decade v. Public Service Commission*, 79 Wis. 2d 161, 170, 255 N.W.2d 917 (1977))("[t]he legislature, recognize[es] the difference between these judicial review proceedings and civil actions"). DOJ attempts to limit that concession by asserting that this Court has "never held that when a statute uses the phrase 'judicial review,' the Legislature only means actions under Chapter 227." (Resp. Brief at 30). That observation is beside the point. Teague concedes that, in addition to 227 actions, "judicial review" also includes litigation such as *certiorari*, or actions under Wis. Stat. § 102.23, or Wis. Stat. § 108.09(7). "Judicial review" even includes actions under § 19.365(4), such as Moustakis' action for judicial review of DOJ's findings that specific documents were responsive to *The Lakeland Times'* records' request and its conclusion that those records must be disclosed. *Moustakis v. State of Wisconsin Department of Justice,* 2016 WI 42, ¶¶3, 13, 368 Wis. 2d 677, 880 N.W.2d 142. What Teague argued is that his action for prospective declaratory and injunctive relief to change DOJ policy is not an action for "judicial review."

Although DOJ repeatedly labels Teague's suit an action for "judicial review," (Resp. Brief at 22, 28, 29, 30-31), DOJ does not attempt to distinguish "judicial review" from other forms of civil litigation. This Court has described Chapter 227 "judicial

review" as litigation "to review findings of fact already established during the initial administrative agency proceedings." *Wagner v. State Medical Examiner Bd.* 181 Wis. 2d 633, 639, 511 N.W.2d 874 (1994). DOJ is a state agency; Chapter 227 applies to it, but there are no prior findings of fact here to review. Nor is there a § 227.47 decision that would be subject to § 227.52 judicial review, but for § 19.365(1). Similarly, DOJ does not explain why, after conceding civil actions for injunctive relief are different than "judicial review," it believes Teague's request for prospective injunctive relief is an action for " judicial review."

Teague has not asked this court to review **any** past action. Rather, Teague seeks declaratory and injunctive relief against a series of inter-connected DOJ policies and practices that violate the common law. They include DOJ's (a) "interpretation" that requests for criminal background checks are not requests for documents establishing innocence, (b) refusal to clarify the identity of the person about whom a requester seeks information, even when DOJ knows there has been a successful challenge, (c) sloppy matching practices, (d) refusal to "release" Teague's innocence documents when the request is an exact match on Teague's name and date of birth, and (e) its ongoing policy of applying "global balancing" instead of individual balancing of the public interest in accurate criminal reports and the public interest in preventing harm to the reputation of innocent citizens**.** Teague seeks to enjoin DOJ from pursuing these policies and practices in the future. Thus, while Teague's standing is based on past events, the relief sought is entirely forward-looking, and not a review of any past agency decision.

DOJ's other arguments are either irrelevant or mischaracterize Teague's position. DOJ's argument from page 25 through the penultimate paragraph on page 28 is not necessarily inaccurate, but the summary of *Woznicki* is irrelevant because that case addressed a situation that met the standard definition of "judicial review." Similarly, Teague never argued this litigation came within any §19.365 exception (Resp. Brief at 28-29) or that he was entitled to pre-release notification/stay (*Id.* at 29-30). Rather, he

argued § 19.365(1) does not bar civil actions for prospective declaratory and injunctive relief. DOJ also misstates (*Id.* at 29-30) Teague's argument on the "no person" and "record" language. Teague's argument is that his interpretation does not make superfluous any § 19.365(1) language. It simply provides a narrow, rather than limitlessly expansive, construction of the phrase "judicial review."

Finally, DOJ avoids rather than responds to Teague's argument that DOJ's construction of "judicial review" makes the §19.365(9) right of public officials to supplement a release of public records, a right created in the same act as §19.365(1) limitation on judicial review, an unconstitutional right without a remedy. (App. Brief at 15-17) Whatever DOJ claims about returning the law to its "pre-*Woznicki* status", the legislature would obviously not have simultaneously created a right under§ 19.356(9) and made that right unenforceable by §19.365(1). Similarly, the legislature would not, reasonably, have intended that individuals whose home addresses, emails and other personal information were being improperly disclosed have **no** form of relief beyond hoping that someone would prosecute or fire the offending record custodian. (Resp. Brief at 31-32)

B. Common law prohibits the global balancing DOJ's policy depends on.

The parties agree generally on what the common law balancing test is. They disagree on whether, based on those principals, DOJ can "globally" balance interests to create a fixed policy of releasing the records of real criminals in response to requests about innocent individuals. While DOJ (at 33-34) concedes Teague's argument (App. Brief at 8-10) that starting with the presumption of disclosure , the common law balancing test requires weighing the **public** interest in protecting private reputations against the public interest in disclosure, DOJ seeks to avoid the consequences of that

concession by recharacterizing its product. In the process, DOJ ignores the distinction made *in Breier,* between "rap sheets," which purport to identify the person and thus implicate the **public** interest in protecting private reputations , and "blotter" names which do not.

DOJ does **not** merely "provide access" to its database a million times a year. DOJ does not operate as a search engine, like Google, that returns a list of names leaving the user to winnow the wheat from the chaff. DOJ produces a single report. That single report either says there is no record found, or provides pages of arrest and conviction information, but the report purports to be about one and only one person and is associated, by the top of the report and the user input, with a named person known to the requester.

Four pages of disclaimers notwithstanding, **all** of the evidence – from the experts, from actual requesters, and from the plaintiffs (*e.g.* App. 212-228, 229-234, R.116:29-43; 117:17-30; 117:114-125; 118:15-27) – is that average users believe the reports are about the individual about whom they requested the report and are misled by the reports. Teague argued (App. Brief at 28-29) that any contrary finding is clearly erroneous and DOJ points to no evidence that **any** requester (other than the government employees trained in how to read the reports) understands the reports as DOJ claims they should be read. DOJ's "argument" (Resp. Brief at 34) that "DOJ's criminal history reports are not limited by statute or common law" must rejected as contrary to the long line of decisions by this Court requiring case by case balancing where two important public interests are in tension.

II. The report is the record that associates Parker's data with Teague's personal identifiers and that report must, by the plain language of § 19.70, be corrected or supplemented after a successful challenge.

Teague's argument and DOJ's argument (and the Court of Appeals decision) are like ships passing in the night. Teague's argument is based on the plain language of § 19.70. DOJ's argument is based on repeated mischaracterizations of Teague's position or the facts. The "record" in § 19.70 is the report, not the database. As long as the data remains in the database associated **only** with Parker's unique identifier number, it does not "pertain" to Teague. A record (report) that did not contain **Teague's** exact name and exact date of birth would not "pertain" to Teague because it would not be "personally identifiable information." *Arguendo*, Teague concedes that no name, by itself, is "personally identifiable information" because names commonly refer to multiple people. Parker's information, however, in the language of § 19.62(5) becomes "personally identifiable information" "associated with a particular individual [Teague] through one or more identifiers or other circumstances" when DOJ associates Parker's information with Teague's name and Teague's exact date of birth identifiers. However sloppy or precise the computer "match" algorithm – and it is undisputed and unchallenged that **none** of Parker's multiple dates of birth match Teague's actual date of birth – DOJ associates Parker's information with Teague's identifiers.

DOJ's argument II A fairly repeats the statutory framework, but Argument II B (at 38-39), steers off course by equating the database with the "record." The report is not accurate because Parker never used Teague's date of birth. Nor did Parker repeatedly associate Teague with his arrests or convictions. **Nothing** in the database links Parker (or his data) to Teague's real date of birth. DOJ chooses to make that sloppy association. That DOJ makes the association electronically or thinks it "mitigates" the false association with four pages of disclaimers (Resp. Brief at 39-40), miss the point. DOJ

associates Parker's information with Teague's identifiers under the plain language of the statute.

Similarly, the final three paragraphs of DOJ's argument (and the Court of Appeals language it quotes) equate the database information (which is accurate as to Parker) with the report, which makes the association with Teague's personal identifiers and becomes inaccurate. Both DOJ and the Court of Appeals ignore this important distinction. As a matter of law, the database does not make the association, the report does. Because a "record" is defined by § 19.32(2) to include "computer printouts," the report is a "record" and it is inaccurate with respect to Teague. The electronic blips of the database can be accurate because NOT associated with Teague's identifiers, but the report, which makes the association, is inaccurate when printed with Teague's name (which Parker used) and date of birth (which Parker never used).

Upon Teague's successful challenge, the plain language of the statute gives DOJ two options: (a) correct the record [the report] by breaking the association to Teague's personal identifiers, or (b) deny the challenge, inform the challenger, and allow supplementation with a "concise statement setting forth the reasons for the individual's [Teague's] disagreement with the record [the report]." Wis. Stat. § 19.70(1)(a)&(b). More pages of disclaimers in purported "mitigation" (Resp. Brief at 39) or belief that users should read more carefully are not statutory options.

III. DOJ irrationally discriminates between the two classes of innocent persons.

The parties agree on the legal standard, but disagree over its application. They also disagree over the classes of innocent people. The two classes are not innocent people whose identities have been stolen and innocent people whose identities have not been stolen. The classes created by DOJ's match policy are innocent people who get a clean report and innocent people who do not.

DOJ has never tried to explain the government's rationale for a matching process that produces a multi-page report (App. 174-88) on felon Christopher J. Peters, but allows a request for the name "Christopher Peters" and **exactly the same** date of birth to return a clean report. (A.App. 191) Nor has DOJ explained why Mary Meyer gets a criminal history record report with one date of birth (App. 167-173), while a request on the same name and a date of birth one digit (10 days) different (App. 193) produces a clean report. The unexplained Peters/Meyer outcomes are not attributable to a different, more rigorous algorithm for common names. Curtis Williams "matches" Kirthan Owens' alias "Curt Williams" (close, but not as close as "Mary Meyer" (App.167) is to "Mary Meyer" (App.193), notwithstanding a six month date of birth difference (April 25, 1963 for Curtis Williams; October 27, 1962 for Owens). (App. 129, Trial Ex. 50, 51). A process that will not "match" exactly matching names (Mary Meyer) with dates of birth 10 days apart in the same month and year, but **will** "match" similar names (Curt and Curtis) but dates of birth in different months, on different days of the month and in different years is not rational. The fact that a "computer did it" does not make rational the irrational.

Discussing the first *Aicher* factor, DOJ argues that the two classes are really different because innocent individuals like Teague have names that appear in the database, while other innocent people do not. But that "difference" exists solely because of DOJ policy, not the identity thieves. DOJ decides to treat innocent people who prove they are innocent as if they are criminals. Or, more accurately, DOJ policy and DOJ's sloppy matching procedures creates that difference. Mary Meyer the convicted misdemeanant (App.167-73) uses the same name as innocent Mary Meyer, the Wisconsin Department of Justice employee who testified at the trial in this case (R.116:122-25) No identity theft is involved. No one ever used Curtis Williams' name with his date of birth as an alias. He is not "different" because of identity theft. The criminal's use (whether coincidental or purposeful) of someone else's name is not what creates the difference

between the two classes of innocent people; it is DOJ's irrational policy and practice that produce "clean" reports for known criminal and criminal records for known innocents.

DOJ alias name practices are not germane to the legitimate government interest identified by the court of appeals; they are not a "useful first step in detecting a trick or discerning if someone has a relevant criminal record" (App. 29, ¶40). DOJ (Resp. Brief at 45-46) makes the same argument, adding that the report's pages of disclaimers and warnings protect the innocent by informing the requester of the possibility of a mismatch. All that may be true (if the disclaimers and warnings are read and potential employers take on burdens of inquiry they are not legally required to take on), but it does nothing to advance the purported, articulated, government purpose of **detecting** tricksters. Report users are not law enforcement. They do not seek to apprehend tricksters. They seek to avoid them. Sweeping innocent people into the pool of tricksters merely adds innocent people to the pool to be avoided, ensuring they will be injured. It does nothing to "detect" tricksters.

IV. DOJ concedes the finding of no stigma is clearly erroneous; the permanent false association with a criminal record by a widely used government information system creates burdens that constitute the "plus."

Teague's principal brief argued that the trial court finding of absence of stigma was clearly erroneous, lacking a scintilla of evidence to support it and contradicted by plaintiffs' evidence from experts, actual users, and the plaintiffs' experience. (App. Brief at 38-39) DOJ points to nothing in the record to refute that argument. *See Charolais Breeding Ranches, Ltd. V. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (unrefuted argument are deemed conceded).

Teague argued that this Court should analyze Wisconsin's criminal background report system as in-line with the cases holding that when a government database is widely used by the public, and required by law to be used in some classes of cases, publication of stigmatizing information satisfies the "plus" in the stigma-plus doctrine. (App. Brief at 30-34) DOJ's only response, citing no case law, is that the "plus" can be found only with proof of loss of employment. DOJ is simply wrong. In the cases Teague cites, federal courts recognized that having to manage a ubiquitous, permanent, stigmatizing characterization by a government information system constitutes a "tangible burden"--the "plus" of stigma-plus. *Id.* Like the Humphries, 554 F.3d at 1182-83, 1187-88, Teague is burdened by the constant future need to update innocence letters, figure out ways to preempt confusion about his record, and pay for fingerprints to, to prove his identity and innocence. DOJ's belief that an untested, unimplemented UPIN system may at some time ease these burdens does not undermine the applicability of the cases Teague cites.

V. Substantive Due Process prohibits the state from imposing penalties and costs associated with criminal conviction on innocent people.

In response to Teague's substantive due process argument, DOJ asserts that "DOJ's process of accurately responding to a name-based query with a criminal record containing the searched name" is constitutional. DOJ 's argument ignores that government actions may violate substantive due process "regardless of the fairness of the procedures used to implement them," *Daniels v. Williams,* 474 U.S. 327, 331 (1986) and regardless of how the state characterizes its own actions.

Teague's claim is a simple one. Just as the United States Supreme Court held that the substantive component of the Due Process Clause prohibits a State from imposing" a

penalty or costs upon a defendant whom the jury has found not guilty," this Court should find that Due Process prohibits DOJ from imposing on known innocents the penalty of having to prove they are not a criminal because of the CIB"s criminal history record reports. *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 405 (1966).

If punishing someone after acquittal by a jury "violates the most rudimentary concept of due process of law," an individual who has not been suspected of, let alone tried for, any of the crimes that appear on "his" rap sheet is constitutionally unacceptable unless the policy that produces that result is narrowly tailored to serve a compelling interest. *Id.* Under that principle, it does not matter that some users might not be misled or that Teague might be able to mitigate the penalty in some cases, A deliberate indifference to imposing penalties and costs on known innocents, like Teague, violates fundamental concepts of due process.

CONCLUSION

For the reasons argued here and in the brief-in-chief, this Court should grant Teague the relief already requested.

Dated at Milwaukee, Wisconsin this 23rd day of September, 2016

s/ Jeffery R. Myer

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Dated this 23th day of September, 2016 in Milwaukee, Wisconsin.

s/Jeffery R. Myer
Jeffery R. Myer, Bar # 1017335