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COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS – District IV
Appeal Nos. 2020AP2081 & 2020AP2103

Wisconsin Manufacturers and Commerce, Muskego Area Chamber of Commerce and New Berlin Chamber of Commerce and Visitors Bureau,
Plaintiffs-Respondents,

v.

Tony Evers, in his official Capacity as Governor of Wisconsin, Andrea Palm, in her official capacity as Secretary-Designee of the Wisconsin Department of Health Services, and Joel Brenna, in his official capacity as Secretary of the Wisconsin Department of Administration,
Defendants-Appellants,

Milwaukee Journal Sentinel,
Intervenor-Appellant

Appeal from the Circuit Court of Waukesha County,
Honorable Lloyd V. Carter Presiding, Case No. 20-CV-1389

BRIEF AND APPENDIX OF INTERVENOR-APPELLANT, MILWAUKEE JOURNAL SENTINEL

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INTRODUCTION

In 2003, the Wisconsin Legislature eliminated the common law right of a record subject to file a lawsuit seeking to enjoin the release of public records, replacing it with a limited statutory process. *See* Wis. Stat. § 19.356(1). Despite meeting none of the requirements necessary to exercise that statutory process, Plaintiffs-Respondents (collectively, "Associations") filed this action seeking to enjoin the release of public records related to COVID-19 outbreaks around the state. The Circuit Court below failed to enforce the statutory prohibition of such suits, and it is incumbent upon this Court to correct that mistake and stop the Associations' interference with the statutory right of the Milwaukee Journal Sentinel and others to receive the records they requested.

STATEMENT OF THE ISSUES

Issue 1: Wis. Stat. § 19.356(1) states that "Except 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." Does the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, "otherwise provide" for "judicial review of the decision of an authority to provide a requester with access to a record"?

Circuit Court's Decision: Yes.

Issue 2: Do business associations have standing to challenge the release of public records on the grounds that such release would violate patient health record confidentiality laws?

Circuit Court's Decision: Yes.

STATEMENT ON ORAL ARGUMENT

The Court has ordered oral argument in this matter.

STATEMENT ON PUBLICATION

The Court should publish the decision in this matter under the considerations of Wis. Stat. § (Rule) 809.23(1)(a). The questions of who may challenge the release of public records and under what circumstances they may bring such challenges are ones of statewide importance and long history. At one point, Wisconsin courts recognized a common-law right of record subjects to receive notice that their records would be released and challenge that release in court. *See Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). However, in 2003, the Legislature acted decisively to limit that right, expressly providing that such actions could be brought only under statutory provisions. *See* 2003 Wis. Act 47; Wis. Stat. §

19.356(1); *Moustakis v. DOJ*, 2016 WI 42, ¶27, 368 Wis. 2d 677, 880 N.W.2d 142.

The Associations' theory of this case – that anybody who might be harmed by the proposed release of records can file a declaratory judgment action to halt that release – would upend that legislative decision. The prohibition in Wis. Stat. § 19.356(1) has not been analyzed in published decisions. That lack of guidance may have contributed to the Circuit Court's error in accepting the Associations' theory. Publishing the decision in this case will likely enunciate new rules or clarify existing rules of law in several respects, providing guidance to lower courts and litigants. Publication may also contribute to the legal literature by collecting case law on using the Uniform Declaratory Judgments Act to evade statutory limitations on lawsuits.

STATEMENT OF FACTS

Except as otherwise stated, all facts are taken from the First Amended Complaint and are assumed true for purposes of a motion to dismiss. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶19, 356 Wis. 2d 665, 849 N.W.2d 693.

All three Associations are trade associations that represent employers in Wisconsin. (R. 37[1]:6-9.) Plaintiff Wisconsin Manufacturers & Commerce ("WMC"), WMC's members, the members of Plaintiff Muskego Area Chamber of Commerce ("MACC"), and the members of Plaintiff New Berlin Chamber of Commerce and Visitors Bureau ("NBCC") all pay state taxes. (*Id.*) The Associations' members include sole proprietorships, employee-owned businesses, and healthcare providers. (R. 37:14.) MACC's and NBCC's members include individuals. (*Id.*)

The Milwaukee Journal Sentinel is a publishing company based in Milwaukee. (R. 19:1.) The Journal Sentinel made three record requests to the Wisconsin Department of Health Services ("DHS") on March 24, 2020, May 30, 2020, and June 6, 2020, seeking "anonymized data tracked in the Wisconsin Electronic Disease Surveillance System (WDESS) related to patients who tested for COVID-19," "all Initial Notification of Investigation forms related to COVID-19 outbreak investigations since January 15, 2019,"

[1] As two separate Petitions for leave to file interlocutory appeal were filed, two separate appellate case numbers were generated. They were consolidated by this Court's order on January 20, 2021. Inexplicably, the two Notifications of Filing of Circuit Court Record listed different-sized Records for each of the two case numbers: 2020AP2081 is listed as containing 99 documents and 2020AP2103 is listed as containing 103 documents. As the final Record Index (Cir. Ct. Dkt #111) correctly indicates that 103 documents are included in the electronic record, the Journal Sentinel cites to the Record in 2020AP2103.

and "all information listed in the COVID 19-Dashboard on the PCA portal on the 'Investigation Line List-NOT posting' tab for all counties in Wisconsin," respectively. (*Id.*) On September 25, 2020, DHS informed the Journal Sentinel that DHS would release records in response to the Journal Sentinel's requests on October 2, 2020. (*Id.*)

On September 30, 2020, Defendant Joel Brennan, Secretary of the Wisconsin Department of Administration, informed WMC that the DHS intended to "release the names of all Wisconsin business with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close contacts that were investigated by contract tracers" ("Disputed Records"). (R. 37:12.) Brennan stated that the DHS intended "to release the businesses' names and the number of known or suspected cases of COVID-19." (*Id.*) Brennan also stated that over 1,000 employers met that criteria, that the information was being released in response to record requests, and that the information was planned to be released on October 2, 2020. (*Id.*)

The Associations allege that releasing the Disputed Records would permit co-workers or community members to identify people who have tested positive for COVID-19. (R. 37:13.) The Associations also allege that

releasing the Disputed Records "will irreparably harm [their] members by effectively blacklisting them and permanently harming their reputations," because identifying them "will imply that the businesses are somehow at fault for COVID-19." (R. 37:15.) Finally, they allege that consumers will avoid businesses named in the Disputed Records. (R. 37:16.)

STATEMENT OF THE CASE

On October 1, 2020, the Associations filed this lawsuit seeking a declaration that release of the Disputed Records would constitute the unlawful release of medical records and an injunction prohibiting their release. (R. 4:13.) The Associations argued that the information in the Disputed Records was "derived from diagnostic test results and the records of contact tracers investigating COVID-19, and constitutes '[p]atient health care records' that must be kept confidential" under Wis. Stat. §§ 146.81 & 146.82. (R. 4:12.) They argued that while medical information can be released if it would not permit identification of patients, releasing the employers' names would permit identification of employee-patients. (*Id.*) Finally, they argued that the Open Records Law, Wis. Stat. §§ 19.31, *et seq.*, did not require release of the Disputed Records because § 146.82 provides an exemption and the balancing test weighs against disclosure. (*Id.*)

The Associations immediately moved for a temporary injunction and an *ex parte* temporary restraining order. (R. 5.) The Circuit Court issued a TRO the same day the Complaint was filed, halting release of the Disputed Records pending a hearing. (R. 13.) On October 2, 2020, the Journal Sentinel moved to intervene as a defendant. (R. 15.)

The Circuit Court held a hearing on October 7, 2020. (R. 102.) Hearing no objection to the Journal Sentinel's motion to intervene, the Court granted that motion. (R. 102:25.)

Evers, Palm, and Brennan (collectively, the "State") argued that the Associations had no likelihood of success on the merits because: (1) a claim to halt release of the Disputed Records did not exist; (2) the Associations lacked standing; and (3) on the merits, the State was required to release the Records under Wis. Stat. § 146.82(2)(a)20. (R. 102:11-15.) The Journal Sentinel argued that the lawsuit was improper and the Associations lacked standing. (R. 102:25-29.) As well as arguing the merits, the Associations argued that it was premature to argue standing and the availability of relief, and that not extending the TRO would moot the case because once the records were released, that bell could not be "unrung." (R. 102:8-10, 21-23,

30.) The Circuit Court agreed that the TRO needed to be extended to allow further briefing of these issues. (R. 102:32-33.)

Both the Journal Sentinel and the State moved to dismiss the action. (R. 31; R. 69.) The Journal Sentinel argued that the Associations lacked standing and that Wis. Stat. § 19.356(1) prohibited the action entirely. (*See* R. 30; R. 46.) The State argued that the Associations lacked standing and that their claim was "non-justiciable" under Wis. Stat. § 19.356(1). (*See* R. 21; R. 38.) The State also argued that the temporary injunction sought by the Associations was inappropriate on the merits because the medical record privacy laws at issue do not prohibit release of the statistical information contained in the Disputed Records. (*See id.*)

While the motions to dismiss and motion for a temporary injunction were pending, the Associations filed a First Amended Complaint. (R. 37.) The First Amended Complaint raised additional legal claims that the Associations had taxpayer standing (R. 37:6-9, 14-15) and that the planned release of the Disputed Records was a "redisclosure" not permitted by Wis. Stat. § 146.82(5)(c) (R. 37:13-14). They also made additional factual allegations of the harm they would suffer were the Disputed Records to be released. (R. 37:16.)

Several amicus briefs in support of both sides were filed as well. (*See* R. 49; R. 53; R. 57; R. 61; R. 63.)

At a hearing held on November 30, 2020, the Circuit Court verbally denied the State's and the Journal Sentinel's motions to dismiss and granted the Associations' motion for a temporary injunction. (R. 101:101, 107; I.App. 12, 18.) The Court found that the Associations had standing to bring their declaratory judgment action "primarily under the zone-of-interests concept."[2] (R. 101:94-101; I.App. 4-11.) The Court stated that the Associations had a legally protectable interest, but it failed to explain what that interest was except to state that its decision was "based upon the arguments that have been presented here today." (R. 101:100; I.App. 11.)

Although the Circuit Court recognized and summarized the arguments made by the State and the Journal Sentinel regarding Wis. Stat. § 19.356(1)'s prohibition on suits to enjoin the release of records (R. 101:92, 97, 99-100; I.App. 3, 8, 10-11), it never explained why it concluded the prohibition was not applicable (*see* R. 101:100-01; I.App. 11-12 (reviewing the elements of a declaratory judgment claim but not addressing § 19.356(1))). After the

[2] The Circuit Court believed the taxpayer standing argument was "weaker," but declined to find that the Associations lacked taxpayer standing. (R. 101:100; I.App. 11.)

Court denied the motions to dismiss, counsel for the Journal Sentinel asked the Court to clarify whether the Court was finding that the Declaratory Judgments Act was a method "otherwise provided by statute," as the Associations had argued, or that § 19.356(1)'s prohibition was not applicable for another reason. (R. 101:108; I.App. 18-19.) The Court's answer suggested the Court believed § 19.356(1)'s prohibition was not applicable because the Associations had not filed a § 19.356 challenge:

> THE COURT: My understanding, Mr. Walsh, is the plaintiffs have not argued at this point that 19.356(1) is the mechanism by which the plaintiffs are pursuing as otherwise provided by statute under the Declaratory Judgment Act. Am I correct in that understanding?
>
> MR. WALSH: You're correct, Your Honor, that we're not proceeding under that statute. We're proceeding under the Declaratory Judgment Act.
>
> THE COURT: And so the Court would not be making that finding, Mr. Kamenick, in answer to your question.

(R. 101:108; I.App. 19.) The Circuit Court's verbal rulings were reduced to written orders entered on December 4, 2020. (R. 73; R. 74; R. 75.)

Both the State and the Journal Sentinel filed petitions for leave to appeal a non-final order. This Court granted those petitions and consolidated the appeals on January 20, 2021.

STANDARD OF REVIEW

The Court of Appeals reviews a dismissal for failure to state a claim upon which relief can be granted *de novo*. *Tesch v. Laufenberg, Stombaugh & Jassak, S.C.*, 2013 WI App 103, ¶12, 349 Wis. 2d 633, 836 N.W.2d 849. Whether a complaint has properly pled a cause of action is a question of law that the Court of Appeals reviews without deference to the Circuit Court. *Hermann v. Town of Delavan*, 215 Wis. 2d 370, ¶4, 572 N.W.2d 855 (1998). The facts alleged in the complaint are accepted as true, as are reasonable inferences therefrom. *Data Key*, 2014 WI 86, ¶19. "However, a court cannot add facts in the process of construing a complaint," and "[f]urthermore, legal conclusions stated in the complaint are not accepted as true, and they are insufficient to enable a complaint to withstand a motion to dismiss." *Id.*

ARGUMENT

At its most basic level, this case should not exist. The Wisconsin Legislature eliminated the right to challenge a record custodian's decision to release records, except as to a very narrow set of record subjects who are allowed to challenge the release of only a very narrow set of records. The cause of action the Associations are trying to bring does not exist. Even if it

did, the Associations, as organizations of businesses, lack standing to bring such a cause of action.

I) WIS. STAT. § 19.356(1) PROHIBITS THIS ACTION

The Open Records Law broadly presumes that all government records shall be open to the public, subject only to explicit statutory and common law exceptions or a judicial determination that the public interest in secrecy outweighs the strong and presumed public interest in disclosure. Wis. Stat. § 19.31; *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶10-11, 254 Wis. 2d 306, 646 N.W.2d 811. Section 19.31 provides that "[t]he denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied." *Id.* Section 19.31 is "'one of the strongest declarations of policy to be found in the Wisconsin Statutes.'" *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶52, 319 Wis. 439, 768 N.W.2d 700, *quoting Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240.

Although the Open Records Law in its current form is a relatively modern creation, *see* 1981 Wis. Act 335, common-law and statutory rights of public access to government records have a long history in Wisconsin. *See generally* Linda de la Mora, *The Wisconsin Public Records Law*, 67 MARQ.

L.REV. 65, 73-74 (1983) (describing common-law and statutory rights of access going back into the 19th century). Custodians were long understood to have the unfettered discretion to disclose government records regardless of the wishes of a record subject. *See, e.g.*, *State ex rel. Bilder v. Township of Delavan*, 112 Wis. 2d 539, 558, 334 N.W.2d 252, 262 (1983) ("[I]t is the legal custodian of the record, not the [record subject], who has the right to have the record closed if the custodian makes a specific demonstration that there is a need to restrict public access at the time the request to inspect is made.").

The Wisconsin Supreme Court dramatically altered that understanding in *Woznicki*, holding for the first time that a record subject had an "implicit" right to notice and *de novo* judicial review before records concerning them were released. 202 Wis. 2d at 185, 194. Only a few short years later, the Legislature acted to curtail the excesses engendered by that decision, enacting Wis. Stat. § 19.356 in 2003. *See* 2003 Wis. Act 47. As will be explained below, the Legislature chose to strictly limit both who could bring actions challenging the release of records and what records could be challenged. The Associations satisfy neither category and are barred from challenging the DHS's decision to release the Disputed Records.

A) Wis. Stat. § 19.356(1) Prohibits Lawsuits Challenging the Release of Public Records Except as Specifically Allowed by Statute

The Associations ask the courts to review the decision of the DHS to release the Disputed Records in response to record requests, declare such release unlawful, and enjoin release. Such actions are governed by Wis. Stat. § 19.356, a statute the Associations did not mention in their Complaint, First Amended Complaint, or Brief in support of their motion for a temporary injunction. The relevant portions of § 19.356 read as follows:

> (1) Except as authorized in this section or as otherwise provided by statute, no authority is required to notify a record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and **no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record**.
>
> (2)
>
> (a) Except as provided in pars. (b) to (d) and as otherwise authorized or required by statute, if an authority decides under s. 19.35 to permit access to a record specified in this paragraph, the authority shall, before permitting access and within 3 days after making the decision to permit access, serve written notice of that decision on any record subject to whom the record pertains, either by certified mail or by personally serving the notice on the record subject. The notice shall briefly describe the requested record and include a description of the rights of the record subject under subs. (3) and (4). This paragraph applies only to the following records:
>
> 1. A record containing information relating to an employee that is created or kept by

> the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
>
> 2. A record obtained by the authority through a subpoena or search warrant.
>
> 3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.
>
> . . .
>
> (4) Within 10 days after receipt of a notice under sub. (2) (a), a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record. If a record subject commences such an action, the record subject shall name the authority as a defendant. Notwithstanding s. 803.09, the requester may intervene in the action as a matter of right. If the requester does not intervene in the action, the authority shall notify the requester of the results of the proceedings under this subsection and sub. (5).

Wis. Stat. § 19.356 (emphasis added). The legislative prohibition is strict: "no person" may do what the Associations are trying to do here unless expressly allowed by § 19.356 or another statute. As explained below, the Legislature created this provision specifically to prohibit interference with the release of public records. *See Moustakis*, 2016 WI 42, ¶27.

B) Wis. Stat. § 19.356 Does Not Permit this Suit

The Associations' suit is not permitted by § 19.356, for two independent reasons. Associations are not the kind of people allowed to bring an action under that statute, and the Disputed Records are not the kind of records covered by § 19.356.

First, the only people allowed to file a lawsuit under § 19.356 to enjoin the release of records are "record subjects." Wis. Stat. § 19.356(2)(a) states that notice of an intent to release records must be given to the "record subject" of those records, and § 19.356(4) states that once notified, the "record subject" can file a lawsuit seeking to stop release of those records. Because § 19.356(1) says that no person is entitled to notice or allowed to seek review of the decision to release records except as provided in § 19.356, no person other than a "record subject" is entitled to notice or can file suit to stop the release of records under § 19.356(4). *Moustakis v. DOJ*, 2016 WI 42, ¶¶5, 24-28, 63.

The Associations are not "record subjects." Nor are their members. "Record subject" is defined in Wis. Stat. § 19.32(2g) as "an individual about whom personally identifiable information is contained in a record." (Emphasis added.) Personally identifiable information is defined as

"information that can be associated with a particular individual through one or more identifiers or other information or circumstances." Wis. Stat. §§ 19.32(1r), 19.62(5). The Associations are not individuals, they are trade associations that represent employers. (R. 37:6-8.) Although some unknown number of MACC's and NBCC's members include individuals (R. 37:14), none of WMC's members are, and more importantly, there is no allegation that those individual-members were COVID patients whose identities could be discerned from the Disputed Records (*see* R. 37:5-8, 12-13 (alleging that the medical information of employees of employers would be released)). Therefore, neither the Associations nor their members are "record subjects" under Wis. Stat. § 19.32(2g). Because they are not "record subjects," they are not entitled to notice of release of records under Wis. Stat. § 19.356(2)(a) and have no right to file a lawsuit enjoining release of records under (4).

Second, even if any of the Associations' members could be "record subjects," the Disputed Records are not the kind of records subject to notice and suit under § 19.356. The right to sue under § 19.356(4) is dependent on delivery of notice under § 19.356(2)(a), and (2)(a) notices are given only for three specific types of records: (1) employee disciplinary records; (2) records obtained by subpoena or search warrant; and (3) records prepared by a private

employer of an employee who is also a government employee. Wis. Stat. § 19.356(2)(a)1.-3.

The Disputed Records do not fall into any of those three categories. They are records compiled by the DHS containing the identities of Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close case contacts that were investigated by contact tracers. (R. 37:12.) They were not obtained by subpoena or search warrant, so they do not fall under § 19.356(2)(a)2. They are not records of employees of the DHS, so they do not fall under § 19.356(2)(a)1. or 3. They also are not disciplinary records and were not prepared by a private employer, which provide additional reasons they do not fall under § 19.356(2)(a)1. or 3.

Because the Associations are not "record subjects" and because § 19.356 does not apply to the Disputed Records, no lawsuit under § 19.356 is permissible. Because this lawsuit is not permitted by § 19.356, it is expressly prohibited by § 19.356(1).

C) No Other Statute Permits the Associations to Challenge the Release of the Disputed Records

The Circuit Court erred by concluding that because the Associations were not filing suit under Wis. Stat. § 19.356, the prohibition in § 19.356(1)

did not apply. Subsection 19.356(1) is a general prohibition on any suit seeking to review an authority's decision to provide records in response to a record request except as specifically provided by statute. It was incumbent on the Circuit Court to determine that, if the suit were not brought under § 19.356, it was brought under some other statute that "otherwise provided" for "judicial review of the decision of an authority to provide a requester with access to a record." § 19.356(1). The Circuit Court failed to do so, and no other statute exists that would have allowed the Associations to bring suit.

The Associations did argue an alternative – that the Declaratory Judgments Act, Wis. Stat. § 806.04, "otherwise provide[s] by statute" a means of challenging an authority's decision to provide records.[3] (R. 36:14-15.) However, the Declaratory Judgments Act does not "provide" that a person may sue to block release of records; rather it creates a remedy for an existing claim that might otherwise not yet be ripe for adjudication. *See Lister v. Bd. of Regents*, 72 Wis. 2d 282, 307, 240 N.W.2d 610, 624-25 (1976).

[3] The Circuit Court does not appear to have accepted this argument. (*See* R. 101:108; I.App. 19.) However, because this Court may uphold a lower court's ruling on alternative grounds, *see Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶27, 305 Wis. 2d 582, 740 N.W.2d 177, the Journal Sentinel addresses this argument.

We know what it looks like when the Legislature "otherwise provides" a method of challenging the release of a record, and the Declaratory Judgments Act does not look anything like that. The very medical record laws that the Associations claim would be violated by the release of the Disputed Records contain such a provision: "An individual may bring an action to enjoin any violation of s. 146.82 or 146.83 or to compel compliance with s. 146.82 or 146.83 . . . ." Wis. Stat. § 146.84(1)(c). Direct actions to enjoin the release of other records appear elsewhere in the statutes as well, using similar language. *See, e.g.*, Wis. Stat. § 51.30(9)(c) (health treatment records); § 46.90(9)(c) (elder abuse reporting records); § 55.043(9m)(c) (at-risk adult records). The Declaratory Judgments Act's language looks nothing like those statutes.

For many additional reasons, the Declaratory Judgments Act does not provide a route for avoiding § 19.356(1)'s prohibition.

First, if a more specific statute provides a method of review, the Declaratory Judgments Act cannot be used to create an action not permitted by the more specific statute. *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukana*, 2013 WI App 113, ¶17, 350 Wis. 2d 435, 838 N.W.2d 103. The Declaratory Judgments Act cannot "be used to do an end run around" a more

specific provision for judicial review. *Id.* In *Darboy*, this Court rejected arguments, similar to those made by the Associations here, that a general grant of authority to file a lawsuit superseded a more specific prohibition on the type of challenge brought in that case. *Id.*, ¶¶15-17. Applying the canon of statutory construction that more specific statutes control over more general statutes, the court concluded that neither the Declaratory Judgments Act nor other statutes overcame the prohibition. *Id.*, ¶¶16-17.

Allowing a declaratory judgment action where a more specific action is prohibited puts the cart before the horse. As the *Lister* court put it, the purpose of the "Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts." 72 Wis. 2d at 307 (emphasis added). Plaintiffs cannot use a declaratory judgment action to make a claim justiciable. A claim must be justiciable first before a declaratory judgment action may be filed to enforce it.

Or put another way, "[a] justiciable controversy requires the existence of present and fixed rights." *City of Janesville v. Rock County*, 107 Wis. 2d 187, 199, 319 N.W.2d 891, 897 (Ct. App. 1982), *citing Tooley v. O'Connell*, 77 Wis. 2d 422, 434, 253 N.W.2d 335, 340 (1977). To settle a controversy

over their rights in court, the Associations would first have to have a right to not be named in a public record. No such right exists.

Second, the Wisconsin Supreme Court has previously ruled in another context that the Declaratory Judgments Act cannot fill in for "as otherwise permitted by statute." *See Rudolph v. Indian Hills Estates, Inc.*, 68 Wis. 2d 768, 773-75, 229 N.W.2d 671, 675-76 (1975). In *Rudolph*, the Supreme Court ruled that the Declaratory Judgments Act did not otherwise provide a cause of action for the dissolution of a corporation, explaining that such actions were expressly provided for elsewhere in the statutes. *Id.* at 775. Failure to follow those statutes was fatal for the plaintiff's claim, which could not be brought under the Declaratory Judgments Act. *Id.* Likewise here, the Associations' failure (and inability) to follow the provisions of Wis. Stat. § 19.356 is fatal to their claim.

Third, others have tried to assert that they could bring a lawsuit to block the release of records outside of the framework of Section 19.356 and failed. In *Moustakis v. DOJ*, a district attorney, tried to sue to enjoin the release of records related to an investigation into his behavior. 2016 WI 42, ¶¶2, 9, 13. The court concluded that because Moustakis was an "officer" and not an "employee," he fell outside of the narrow exceptions to the rule that

"no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." *Id.*, ¶¶24, 25, 29-60. Because Moustakis did not fit precisely in the narrow categories of persons allowed to sue to block the release of records, the Supreme Court unanimously concluded he was statutorily prohibited from doing so. *Id.*, ¶63.

On remand, Moustakis raised additional arguments why he should be allowed to sue to block release of records casting him in a bad light. *Moustakis v. DOJ*, No. 18-AP-373 (Wis. Ct. App., May 17, 2019) (unpublished), *review denied* 2019 WI 98, 389 Wis. 2d 32, 935 N.W.2d 675, *cert denied* 140 S. Ct. 937 (2020) (I.App. 24-45). This Court concluded that "Moustakis has not demonstrated he is entitled to any form of judicial review or relief," noting that it is "[t]he authority's obligation . . . to release the records if its consideration of the balancing test leads it to that conclusion." *Id.*, ¶29 (I.App. 37-38). This Court confirmed that no free-floating right to challenge the release of records exists. *Id.*, ¶35 (I.App. 40-41) ("[T]he 'right' Moustakis seeks to vindicate is not recognized at law.").

Finally, allowing a declaratory judgment action to challenge the release of public records would return Wisconsin to an era intentionally foreclosed by the Legislature. In 1996, the Wisconsin Supreme Court

recognized a common law right to receive notice that a record custodian intended to release records related to an individual and to seek review of that decision in court. *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), *superseded by statute*, Wis. Stat. § 19.356, *as recognized in Moustakis*, 2016 WI 42, ¶27. Although the *Woznicki* court recognized that the Open Records Law lacked statutory provisions providing for such notice and review (despite expressly providing a statutory right of review of a denial of a record request), the court concluded that record subjects' privacy and reputational interests warranted giving subjects judicial access. *Id.* at 184-85; *see also Armada Broadcasting, Inc. v. Stirn*, 183 Wis. 2d 463, 516 N.W.2d 357 (1994) (allowing record subjects to intervene in suits seeking to compel release of their records).

Woznicki addressed the release of investigatory records by a district attorney, 202 Wis. 2d at 182, but courts quickly expanded the rights to notice and judicial review to records released by other custodians. *E.g.*, *Klein v. Wis. Resource Ctr.*, 218 Wis. 2d 487, 494-95, 582 N.W.2d 44, 47 (Ct. App. 1998) (extended to personnel records). Custodians across the state faced a new and burdensome legal requirement to notify every record subject that their records would be released. They then had to wait a vague, "reasonable"

amount of time before releasing the records unless they were first sued by the subject. *See Woznicki*, 202 Wis. 2d at 193. The amount of time it took to get requesters their records naturally increased, and a flood of new litigation was filed by people who preferred not to be publicly named in government records. *E.g.*, *Linzmeyer*, 2002 WI 84; *Milwaukee Teachers Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999); *Levin v. Bd. of Regents*, 2003 WI App 181, 266 Wis. 2d 481, 668 N.W.2d 779; *Jensen v. Sch. Dist. of Rhinelander*, 2002 WI App 78, 251 Wis. 2d 676, 642 N.W.2d 638; *Atlas Transit., Inc. v. Korte*, 2001 WI App 286, 249 Wis. 2d 242, 638 N.W.2d 625; *Kraemer Bros., Inc. v. Dane County*, 229 Wis. 2d 86, 599 N.W.2d 75 (Ct. App. 1999); *Kailin v. Rainwater*, 226 Wis. 2d 134, 593 N.W.2d 865 (Ct. App. 1999); *Klein*, 218 Wis. 2d 487.

The problems caused by these cases compelled the Legislature to act. Its first attempt to reverse *Woznicki*, as a provision in the 1997 biennial budget bill, was vetoed. 1997 Wis. Act 27, § 155j. Governor Thompson noted that as a non-budgetary item, it should be addressed separately, but he expressed support for the change and stated it would "preserve the spirit of our open records law." Governor's Veto Message, A.J. at 352 (Oct. 13,

1997), *related in Milwaukee Teachers*, 227 Wis. 2d 779, ¶62 (Abrahamson, C.J., dissenting).

In 2002, the Legislature formed a Special Committee on Review of the Open Records Law. *See* Wis. Leg. Council Report to the Legislature, March 25, 2003.[4] Anticipating the situation posed by this case, the Special Committee noted that the logic of *Woznicki* and its progeny would "extend to any record subject, regardless of whether the record subject is a public employee," and identified several questions left unanswered by the courts, including who must get notice, what records required notice, the form of the notice, whether the subject has the right to inspect and copy the records, and how judicial review would proceed. *Id*. at 9.

The Special Committee proposed the legislation that would create Wis. Stat. § 19.356. *Id.* at 3; *see* 2003 A.B. 196; 2003 S.B. 78; 2003 Wis. Act 47. In particular, the Report indicates that the legislation "[l]imits *Woznicki* by stating that, except as otherwise provided, no person is entitled to notice or judicial review of an authority's decision to provide a requester with access to a record." *Id.* at 10; *see also Moustakis*, 2016 WI 42, ¶27

[4] *Available at* https://legis.wisconsin.gov/lc/media/1253/rl2003_01.pdf. All websites last accessed on February 15, 2021.

("[T]he legislature sought to limit the rights afforded by these cases 'only to a defined set of records pertaining to employees residing in Wisconsin.'"), *quoting* 2003 Wis. Act 47, Joint Leg. Council Prefatory Note; *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶42, 327 Wis. 2d 572, 786 N.W.2d 177 (Abrahamson, C.J., lead opinion) ("The legislature apparently adopted Wis. Stat. § 19.356 in 2003 to narrow and codify the notice and judicial review rights set forth in *Woznicki*.");[5] 2003 Wis. Act 47, § 4, Note ("[Section] 19.356(1) . . . limit[s] *Woznicki* by stating that, except as otherwise provided, no person is entitled to notice or judicial review of a decision of an authority to provide a requester with access to a record.").

The Legislature saw the problems created by *Woznicki* and its progeny, acting swiftly and decisively to limit the right to challenge the release of records. Instead of allowing anybody who could claim to be harmed by being identified in a record (like the Associations here) to sue, the Legislature chose to forbid such suits except in delineated circumstances.

The Associations are attempting to resurrect the *Woznicki* era on steroids. The *Woznicki* right of review was extended only to public employee

[5] The *Schill* court had the opportunity to decide the case by concluding that it was not permitted by § 19.356(1), but declined to rule on those grounds because the argument was raised for the first time by *amici* on appeal. 2010 WI 86, ¶¶35, 40-45 (Abrahamson, C.J., lead opinion)

record subjects, and that was enough to unleash a flood of litigation necessitating a legislative answer. The Associations – making the same arguments relied on by *Woznicki*, that there just has to be some way for record subjects to stop the release of records, *see* 202 Wis. 2d at 185 – seek to open the courts up to a much broader swath of litigants seeking to impede the public's right to know, dealing a devastating blow to the goals of the Open Records Law. The Associations believe that anybody who might be harmed by the release of records can file a declaratory judgment action to stop that release. That universe of potential litigants dwarfs those of the *Woznicki* era.

Opening up the courts like that would render § 19.356(1)'s prohibition meaningless. If the Declaratory Judgments Act "otherwise provide[s]" a right to challenge the release of records, then § 19.356(1) has no effect, because every person who would otherwise be prohibited from challenging the release of records could do so anyway as a declaratory judgment action. Courts must avoid interpreting statutes in a way that would render language surplusage. *Darboy*, 2013 WI App 113, ¶17 (allowing an action prohibited under a more specific statute to be brought under the Declaratory Judgments Act "would render [the more specific statute] meaningless"), *citing State v.*

Setagord, 211 Wis. 2d 397, 427, 565 N.W.2d 506, 518 (1997) ("Statutes are to be construed to avoid rendering any part of the statute meaningless or superfluous.").

Under the Associations' theory, every public employee whose non-disciplinary records are going to be released, *see* Wis. Stat. § 19.356(2)(a)1., could sue. Every public official who otherwise only has the right to augment records, *see* § 19.356(9), could sue as well. Even a record subject who missed the statutory deadline to sue under § 19.356(4) could still sue. Any litigant could sue to block a court from releasing public records from their case. Any constituent could sue to block a legislator from releasing their communications. Perhaps most tellingly, Mr. Woznicki and Mr. Moustakis could sue to stop release of their investigatory records.

An action to prevent the release of records under Wis. Stat. § 19.356 is subject to numerous restrictions and qualifications. Why would anyone file suit under that provision if a declaratory judgment action were available to them as an alternative? This is not what the Legislature intended.

The Associations' reading of the Declaratory Judgments Act would also render a portion of Wis. Stat. § 146.84(1)(c) surplusage. If a person can file a declaratory judgment action challenging the release of records – and

seek an injunction as supplemental relief, *see* § 806.04(8) – then there is no need for a separate statute allowing an individual to enjoin the release of those records. There would be no need for § 146.84(1)(c), or the statutes allowing individuals to challenge the release of health treatment records, elder abuse reporting records, or at-risk adult records. *See* § 51.30(9)(c); § 46.90(9)(c); § 55.043(9m)(c). The way these statutes are written makes clear the Legislature intended that only individuals are permitted to enjoin the release of such records.

Perhaps the greatest irony here is that the Associations are asking for greater legal rights than requesters. Requesters cannot use the Declaratory Judgments Act to challenge a custodian's decision not to release records. *See Capital Times Co. v. Doyle*, 2011 WI App 137, ¶1, 337 Wis. 2d 544, 807 N.W.2d 666 (mandamus under Wis. Stat. § 19.37 is the exclusive method for requesters to enforce the Open Records Law). Accepting the Associations' argument would place record subjects in a preferential position *vis-à-vis* record requesters, contrary to the purposes of the Open Records Law expressed forcefully in Wis. Stat. § 19.31.

The Declaratory Judgments Act does not "otherwise provide" a cause of action to challenge the release of public records. While Wis. Stat. §§

19.356 and 146.84(1)(c) do provide for such a cause of action, the Associations do not qualify for relief under either of those statutes. Therefore, the Circuit Court erred in not dismissing this case.

D) The Associations' Arguments Why the Declaratory Judgments Act Provides Them a Claim Are Incorrect

The Associations raised three arguments why they should be allowed to bring an action challenging the DHS's release of the Disputed Records despite the prohibition in Wis. Stat. § 19.356(1). None are correct.

First, the Associations' mischaracterize the Journal Sentinel and the State's argument that § 19.356 prohibits this action as arguing that § 19.356 "impliedly and partially repeal[ed]" the Declaratory Judgments Act. (R. 36:15, 16, 18, 20, 21; *see also* P. Br. in Opp. to Pet. for Leave to Appeal at 23.) That is not what the Journal Sentinel and the State are arguing. They are not arguing any kind of repeal, because the Declaratory Judgments Act never allowed an action like this in the first place. This kind of action was not recognized at common law until *Woznicki*, and *Woznicki* was not a declaratory judgment action. *See* 202 Wis. 2d at 181-82 (Woznicki's objection to release of the records presented in a criminal case); *see also Milwaukee Teachers*, 227 Wis. 2d 779, ¶¶5-6 (describing the suit as "*de novo* review provided by *Woznicki*"). The enactment of Wis. Stat. § 19.356 did

not reduce the scope of the Declaratory Judgments Act, and therefore did not partially repeal it.

Second, the Associations argue it would be absurd not to allow declaratory judgment actions to challenge the release of public records because it would "leav[e] the State with virtually unbridled discretion to violate laws." (R. 36:17; *see also* P. Br. in Opp. to Pet. for Leave to Appeal at 30-31.) The Associations claim the State could release "names, dates of birth, addresses, social security numbers, and bank account numbers of all of its employees" or "releas[e] the records of only its female employees or only its Black employees," and those employees "could do nothing to protect their rights." (*Id.*; *see also* R. 101:47-48 (suggesting the government might release confidential information in violation of constitutional provisions).)

But the Associations ignore several things. They ignore that those employees would have actions for damages against the State for such violations. There is no overarching principle that all legal wrongs must be enjoinable before they occur.[6] In fact, the default presumption is that legal

[6] For example, as a general rule, prior restraints on speech are presumed unconstitutional and even unprotected speech, such as defamation, cannot be enjoined before it is first made. *See, e.g.*, *New York Times Co. v. U.S.*, 403 U.S. 713 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931); *see also Cmty. for Creative Non–Violence v. Pierce*, 814 F.2d 663, 672 (D.C. Cir. 1987) ("The usual rule is 'that equity does not enjoin a libel or slander and that the only remedy for defamation is an action for

relief is only available after a harm has been caused, and it takes a special statute like the Declaratory Judgments Act to create anticipatory relief. *See Lister*, 72 Wis. 2d at 307 (the Declaratory Judgments Act "authoriz[es] a court to take jurisdiction at a point earlier in time than it would do under ordinary remedial rules and procedures"), *citing Borden Co. v. McDowell*, 8 Wis. 2d 246, 99 N.W.2d 146 (1959), *In re State ex rel. Attorney General*, 220 Wis. 25, 28, 264 N.W. 633 (1936), & 1 Anderson (2d ed) *Actions for Declaratory Judgments*, pp. 12, 13, sec. 3.

The Associations also ignore that any violation of the federal Constitution or a federal law could be challenged in federal court, where state procedural limitations on suit would not apply. *See, e.g.*, *Felder v. Casey*, 487 U.S. 131 (1988) (state cannot impose statutory notice of claim requirement on federal claims under 42 U.S.C. § 1983). The lack of a declaratory judgment action does not mean the lack of <u>any</u> remedy, and it is not absurd to give effect to the Legislature's choice to severely restrict actions to enjoin the release of public records.

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damages.'"), *quoting Kukatush Mining Corp. v. SEC*, 198 F.Supp. 508, 510-11 (D.D.C.1961).

Third and finally, the Associations argue that accepting their argument will not revive the *Woznicki* era. They argue that *Woznicki* and its progeny – and the Legislature's reaction to those cases in § 19.356 – deal exclusively with the balancing test, and this case is different[7] because it involves a statutory prohibition on the release of certain records. (R. 101:47-48, 60.) That is incorrect. In multiple *Woznicki*-era cases, record subjects argued that an express statutory exception prohibited the release of records. *See, e.g.*, *Linzmeyer*, 2002 WI 84, ¶¶16-22 (analyzing whether Wis. Stat. §§ 19.35(1)(am), 19.36(8)(b), 19.36(2), or 19.85(1) precluded release); *Atlas Transit*, 2001 WI App 286, ¶¶20-23 (analyzing whether 18 U.S.C. §§ 2721-2725 precluded release). Record subjects have also argued in cases brought under Wis. Stat. § 19.356 that statutory exceptions preclude release. *See, e.g.*, *Local 2489, AFSCME, AFL-CIO v. Rock County*, 2004 WI App 210, ¶¶7-20, 277 Wis. 2d 208, 689 N.W.2d 644 (analyzing whether Wis. Stat. § 19.36(10)(b) precluded release). Therefore, the Associations' hypothesized cause of action would allow the same kinds of challenges as *Woznicki*.

[7] Although the Complaint and First Amended Complaint asserted that release was improper under the common-law balancing test (R. 4:11; R. 37:14), the Associations later disclaimed reliance on that argument (R. 101:60, 89).

They also argue that they are not reviving the *Woznicki* era because potential plaintiffs will still require an underlying legal interest. (R. 36:18.) But the Associations fail to recognize that their claimed interest – that they would be harmed by the release of records – dwarfs that recognized by the *Woznicki*-era cases. If anybody who thinks they would be harmed by the release of records can file a declaratory judgment action to stop their release, that is a far greater pool of plaintiffs than government employee record subjects (or even the non-governmental record subjects that the Legislature's Committee recognized would logically have the right to sue under *Woznicki*'s reasoning, *see* Wis. Leg. Council Report to the Legislature, March 25, 2003, at 9).

Accepting the Associations' arguments would completely undo the very deliberate choice the Legislature made to strictly limit who is permitted to challenge a custodian's decision to release public records. The right of the public to access public records is paramount, and the Legislature has done what it can to ensure that records are produced speedily and with as little interference as possible. The Associations and others who would prefer not to be named in public records cannot be permitted to tie up the release of records for months or years with litigation.

II) THE ASSOCIATIONS LACK STANDING TO BRING THIS CASE

Even if the Declaratory Judgments Act "otherwise provides" a method to challenge a custodian's decision to release a public record under Wis. Stat. § 19.356(1), the Associations cannot bring such an action here because they lack standing.

A party must have standing to bring a claim in court. *McConkey v. Van Hollen*, 2010 WI 57, ¶15-16, 326 Wis. 2d 1, 783 N.W.2d 855. Standing rules in Wisconsin may not be as strict as they are in federal court, *see id.*, ¶15, but they are real and meaningful, particularly where a plaintiff brings a declaratory action rather than seeking to redress an already-suffered injury, *see Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶9, 256 Wis. 2d 859, 650 N.W.2d 81.

To bring a declaratory action, four elements are required, including that "[t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest." *Loy v. Bunderson*, 107 Wis. 2d 400, 410, 320 N.W.2d 175, 181 (1982), *quoting State ex rel. La Follette v. Dammann*, 200 Wis. 17, 22, 264 N.W.2d 627 (1936). "[T]he legal interest requirement has often been expressed in terms of standing." *Vill. of Slinger*, 2002 WI App 187, ¶9.

The Associations raise two separate arguments in favor of standing: (1) they have "zone of interest" standing via statutes that protect the medical records of individuals; and (2) they have taxpayer standing. Neither argument prevails.

A) The Associations Have No Zone of Interest Standing

"To have standing, a party must 'have suffered or be threatened with an injury to an interest that is legally protectible, meaning that the interest is arguably within the zone of interests' that a statute or constitutional provision, under which the claim is brought, seeks to protect." *Zehner v. Vill. of Marshall*, 2006 WI App 6, ¶11, 288 Wis. 2d 660, 709 N.W.2d 64, *quoting Town of Baraboo v. Vill. of West Baraboo*, 2005 WI App 96, ¶35, 283 Wis. 2d 479, 699 N.W.2d 610. "In other words, the question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n Inc.*, 2011 WI 36, ¶55, 333 Wis. 2d 402, 797 N.W.2d 789 (Abrahamson, C.J., lead op).

This requirement that an interest be <u>legally protected</u> means that harm alone cannot confer standing. *Krier v. Vilione*, 2009 WI 45, ¶20, 317 Wis. 2d 288, 766 N.W.2d 517 ("Being damaged, however, without more, does not automatically confer standing.") Plenty of government actions "harm"

people in the abstract, but unless that harm occurs to an interest that is legally protected, it cannot form the basis for a suit. *Cf. id.* ("The universe of entities or people who could be affected or damaged by a corporation that ceases to do business is without bounds."); *Pure Milk Products Coop. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691, 700 (1979) (for an injunction, "a plaintiff must show a sufficient probability that future conduct of the defendant will *violate a right of* and will injure the plaintiff.") (emphasis added).

The Associations' arguments for "zone of interest" standing fail for two reasons. First, their interests are not protected by the laws they cite. Second, even if those interests are protected, the harms they allege are far too speculative to support standing.

1) The Associations' Interests Are Not Protected by the Medical Privacy Laws

The Associations argue that they "and their members . . . fall within the 'zone of interests' that the medical-privacy laws are meant to protect." (R. 36:12.) They argue that Wis. Stat. §§ 146.82-.84 protect their interests because they are "persons" who are permitted to sue for damages if injured by a violation of those laws. (R. 36:12-13.)

The problem with the Associations' argument is that they are conflating their interests with the interests of their members' employees. The medical privacy laws do not make it illegal to release records of the businesses, they make it illegal to release records of patients. *See* Wis. Stat. §§ 146.81-.84 (focused on and repeatedly referring to "patient health care records").

But the Associations do not represent those individual patients. The Associations represent businesses whose employees may be those individual patients. (R. 37:6-9.) The Associations' members are employers, not employees. (*Id.*) A similar situation was addressed in *Milwaukee Deputy Sheriff's Ass'n v. City of Wauwatosa*, where this Court concluded that the Sheriff's Association could not assert the interests of its members in the confidentiality of medical records under a similar medical record statute, Wis. Stat. § 51.30. 2010 WI App 95, ¶¶30-33, 327 Wis. 2d 206, 787 N.W.2d 438. Section 51.30 contains identical language as § 146.84 about violators being liable to "any person." *Id.*, ¶32, *citing* Wis. Stat. § 51.30(4). Nevertheless, this Court reasoned that "[t]he focus of the statute is on the individual – the patient – whose treatment records have been released," concluding that the Sheriff's Association did not have standing to sue under

the statute because only the person who actually received treatment could do so. *Id.*, ¶¶32-33.

If the Sheriff's Association could not assert the interests of its members in the confidentiality of their medical records there, the Associations cannot assert the interests of their members' employees in the confidentiality of their medical records here. The Associations are a degree of separation further removed from the individuals who actually possess confidentiality interests than the Sheriff's Association was, and therefore have even less interest at stake.

The Associations may argue that because their member businesses are actually identified in the allegedly-confidential Disputed Records, this case is unlike *Milwaukee Deputy Sheriff's Association*. However, that argument is foreclosed by *Olson v. Red Cedar Clinic*, 2004 WI App 102, 273 Wis. 2d 728, 681 N.W.2d 306, a case cited by *Milwaukee Deputy Sheriff's Association*, *see* 2010 WI App 95, ¶33. In *Olson*, a mother argued that a medical clinic unlawfully disclosed information about her that was contained in her son's medical records in violation of medical record privacy law. 2004 WI App 102, ¶13. However, this Court concluded that because the right to confidentiality was specific to the person receiving treatment, anybody else

identified in the record had no right of confidentiality and therefore no claim against the medical provider. *Id.*, ¶14. Likewise here, even if the Disputed Records qualify as the health care records of individual patients, the businesses who may also be named in those records cannot raise a claim challenging the release of such records.

The disconnect between the interests of the Associations' members and the interests of the individual employees whose records are protected by the medical record privacy laws is made clear by looking at the harms the Associations allege their members will suffer. The Associations allege that release of the Disputed Records would "blacklist" their member businesses, inflicting "massive harm." (R. 36:3, 6.) They allege that consumers are already concerned about patronizing businesses for fear of catching COVID. (R. 36:29-30.) They allege releasing the Disputed Records will exacerbate that fear and cause reputational damages to their members. (R. 36:30.)

But these kinds of harms are not protected by the medical privacy laws. The medical privacy laws were not created to protect the income streams of businesses, but rather the dignity and privacy of individuals receiving medical treatment. *See Milwaukee Deputy Sheriff's Ass'n*, 2010 WI App 95, ¶32 (the focus of medical privacy statutes "is on the individual

— the patient — whose treatment records have been released, and the damage to be protected from is the release of confidential information").

There is a another fatal disconnect between the harms the Associations allege their members will suffer and why the release of the Disputed Records is alleged to be illegal. The Associations claim that their members' reputations will suffer, but they do not – and cannot – allege that harming those reputations is what makes the release of the records illegal. They allege the release is illegal because it would unlawfully identify employees as having had COVID.

The Associations' alleged harm is not caused by the alleged illegality of the release. A business might suffer reputational harm by being accurately identified as having a COVID outbreak regardless of whether any individual employee could be identified as having suffered the disease. It is not, therefore, the potential for identification of individual employees that would cause any harms to the Associations' members, but rather the identification of the business. This disconnect demonstrates that the harms the Associations allege they will suffer are not those protected by the medical privacy statutes they cite.

The Associations have no legally protectible interest in this case. They point to no statute or constitutional provision that protects their interests as opposed to the distinct interests of their members' employees. Therefore, they lack "zone of interest" standing.

2) The Associations' Alleged Harms Are too Speculative to Support Standing

Even if the harms alleged by the Associations could place them within the "zone of interests" protected by the medical privacy laws, the likelihood of those harms is too speculative here to support standing.

Although the Declaratory Judgments Act can be used to prevent harm that has not yet occurred, that harm still needs to exhibit a significant level of likeliness, or the case must be dismissed as unripe. Plaintiffs must show that the potential harm is likely, not just merely possible. For example, in a case cited repeatedly by the Associations, *Voters With Facts v. City of Eau Claire*, 2017 WI App 35, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds*,[8] 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131, this Court recognized that events that are "'remote, contingent, and uncertain'" cannot give rise to a judiciable claim because the "alleged injury is far too

[8] The Wisconsin Supreme Court assumed standing without deciding the question, dismissing the plaintiffs' declaratory judgment claims on their merits. 2018 WI 63, ¶26.

speculative." 2017 WI App 35, ¶¶39-40, *quoting Putnam v. Time Warner Cable*, 2002 WI 108, ¶46, 255 Wis. 2d 447, 649 N.W.2d 626. Such an injury requires "'imminence and practical certainty'" to give rise to a claim. *Id.*, *quoting Putnam*, 2002 WI 108, ¶46. "Cases are not 'ripe' where contingencies remain." *Loy*, 107 Wis. 2d at 414. "The facts on which the court is asked to make a judgment should not be contingent or uncertain." *Putnam*, 2002 WI 108, ¶44, *citing Miller Brands-Milwaukee v. Case*, 162 Wis. 2d 684, 694-95, 470 N.W.2d 290, 294 (1991).

The harms alleged by the Associations are too remote and speculative to support standing, even for a declaratory judgment action. Those alleged harms are multiple steps removed from reality. First, the Associations failed to allege that any of their member businesses would actually be identified in any of the Disputed Records.[9] If none of them are publicly identified, how would any of them be harmed? Second, even if a member business were identified, it is purely speculative that the business would suffer compensable

[9] This failure also dooms the Associations' claims of organizational standing, as they have not alleged that a single one of their members would be identified. *See Wis. Envt'l Decade, Inc. v. PSC*, 69 Wis. 2d 1, 20, 230 N.W.2d 243, 253 (1975) ("[A]n organization . . . has standing to sue in its own name if it alleges facts sufficient to show that a member of the organization would have had standing to bring the action in [its] own name.")

harm that could be shown to have been caused by the release of the truthful information in the Disputed Records.

It is well established that speculative harms are an inappropriate basis for barring the release of public records. *See MacIver Inst. v. Erpenbach*, 2014 WI App 49, ¶26, 354 Wis. 2d 61, 848 N.W.2d 862 (mere "*possibility* of threats, harassment or reprisals" insufficient to overcome strong public interest in disclosure) (emphasis original); *see also ACLU v. Dep't of Defense*, 543 F.3d 59, 84 (2d Cir. 2008) (concluding that the speculative risk that persons in photographs might be identified despite redactions "does not establish a privacy interest that surpasses a *de minimus* level").[10]

Because the harms the Associations complain of are too speculative and uncertain, and because those harms do not fall within the zone of interests protected by the health care record privacy law, the Associations have no zone of interest standing.

B) The Associations Have No Taxpayer Standing

In their First Amended Complaint, the Associations alleged that they also had standing as taxpayers to challenge the expenditure of public funds

[10] Wisconsin courts may turn to federal FOIA cases as persuasive authority. *See Racine Educ. Ass'n v. Bd. of Educ. for Racine Unified Sch. Dist.*, 129 Wis. 2d 319, 326, 385 N.W.2d 510, 512 (Ct. App. 1986).

on the allegedly-illegal activity of producing the Disputed Records to record requesters. (R. 37:6-9, 14-15.) But the Associations have not alleged that the only behavior alleged to be illegal – releasing the Disputed Records, as opposed to other activities DHS employees already perform – involves the expenditure of any money at all.

Taxpayer standing is not a free pass to challenge any government action. No court has held that the mere fact that government employees drawing government salaries are taking allegedly unlawful actions establishes the kind of pecuniary harm necessary for taxpayer standing.

"In order to maintain a taxpayers' action, it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss . . . ." *S.D. Realty Co. v. Sewerage Comm'n of Milwaukee*, 15 Wis. 2d 15, 21, 112 N.W.2d 177, 181 (1961), *citing McClutchey v. Milwaukee County*, 239 Wis. 139, 300 N. W. 224 (1941) & 137 A.L.R. 628 & cases cited therein. "[A] taxpayer [has] a financial interest in public funds" and "[a]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.* at 22. The harm occurs because the government entity has "less money to spend for

legitimate governmental objectives" or because additional taxes must be levied "to make up for the loss resulting from the expenditure." *Id.*

The Associations have not alleged that fulfilling record requests for the Disputed Records would result in the DHS having less money to spend on other governmental objectives or that additional taxes will have to be levied to make up for any loss. There is no loss or decrease in available funds here. Fulfilling record requests is a basic, routine, and fundamental function of government. Wis. Stat. § 19.31. The DHS is not spending anything responding to these requests that they would not have spent otherwise.

This case is therefore like *Lake Country Racquet & Athletic Club v. Village of Hartland*, 2002 WI App 301, 259 Wis. 2d 107, 655 N.W.2d 189. There, a taxpayer alleged that the rezoning of a single parcel and conveyance of that parcel to a private party were unlawful. *Id.*, ¶22. Employees would naturally have to be paid to accomplish those tasks. However, this Court concluded that the taxpayer had not shown that money would be spent unlawfully, and therefore there was no pecuniary harm to taxpayers. *Id.*, ¶¶22-23. The same holds true here; the expense of paying employees to perform routine job functions does not create taxpayer standing.

Even if the DHS might experience out-of-pocket costs providing the Disputed Records, they are authorized by law to recoup those costs from record requesters. Under Wis. Stat. § 19.35(3), they may charge requesters the "actual, necessary and direct cost[s]" associated with responding to a record request, compensating for any actual loss experienced. In fact, because custodians generally charge an hourly rate for time spent locating records (even if the person doing the location is salaried, *see, e.g.*, Wis. Dep't of Justice, *Wisconsin Public Records Law Compliance Guide* (Oct. 2019), p. 70, *available at* https://www.doj.state.wi.us/sites/default/files/office-open-government/Resources/PRL-GUIDE.pdf), fulfilling record requests can result in a net positive fiscal impact for the government.

Furthermore, the DHS has a legal obligation to respond to the twenty-plus record requests for the Disputed Records, *see* Wis. Stat. § 19.35(4); *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶24, 259 Wis. 2d 276, 655 N.W.2d 510, and therefore must spend time (and under the Associations' theory, money[11]) preparing that response no matter what it is. If the DHS denied the record requests, their paid employees would have to draft the

[11] The Associations complain that the DHS must pay employees "to collect, review, organize, and prepare the confidential medical information for release" (R. 36:11), but the Associations do not even allege that collecting, reviewing, organizing, or preparing this information is unlawful; it is only the release of the information they complain of.

detailed legal explanation for their denial. *ECO*, 2002 WI App 302, ¶24 ("A custodian's denial of access to a public record must be accompanied by a statement of the specific public policy reasons for the refusal.") If DHS partially denied the record requests, their paid employees would have to redact information that could not be released. Wis. Stat. § 19.36(6); *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶20-21, 341 Wis. 2d 607, 815 N.W.2d 367. Because record custodians cannot seek fees from requesters for the costs of redaction, *see Milwaukee Journal Sentinel*, 2012 WI 65, ¶58, prohibiting the release of certain information would likely result in more time (and money, under the Associations' theory) being spent responding to these requests than if the Disputed Records were released in their entirety.

Finally, the Associations' brief allusion to another theory of taxpayer standing – that the potential liability caused by an allegedly-illegal action counts as pecuniary harm (R. 36:11) – is unrecognized in Wisconsin and, if adopted, would eliminate all limits on standing. No court has ever ruled that potential liability creates taxpayer standing. The Associations' citation to *SEIU v. Vos*, 2020 WI 67, ¶69, 393 Wis. 2d 38, 946 N.W.2d 35 (R. 36:11), is perplexing. That paragraph has nothing to do with standing, much less

potential liability giving rise to taxpayer standing, but rather discussed how the legislature's interest in the public fisc justified allowing it shared authority in the settlement of claims against the State. *Id.*, ¶¶68-73. The Associations' argument is nothing but a circular tug-of-war that would allow any taxpayer to challenge any illegal activity, regardless of whether that activity required spending money, because the government would spend money litigating its legality if the suit were allowed to proceed.

If this Court accepts that any taxpayer has standing to challenge the allegedly unlawful release of a record, the Legislature's decision to limit such actions to a very narrow class of persons, *see* Wis. Stat. § 19.356(1), will be completely abrogated. Literally anybody who paid taxes would be allowed to sue to stop the release of public records, for any reason or for no reason at all. Such a decision would be even more disastrous than accepting the Associations' theory that any person possibly harmed by the release of a record can sue to stop its release.

CONCLUSION

Some people would prefer not to be named in public records. That sentiment, while understandable, does not permit an action in court to prevent (or at least delay) the release of those records. The Legislature has decided

that the paramount right of the public to access public records necessitates a system where the decision to release records may almost never be challenged before the fact. This Court should respect that decision.

The Journal Sentinel respectfully requests that this Court reverse the Circuit Court and direct that the Associations' complaint be dismissed.

Dated this February 16, 2021

WISCONSIN TRANSPARENCY PROJECT
KAMENICK LAW OFFICE, LLC
Attorney for Intervenor-Appellant
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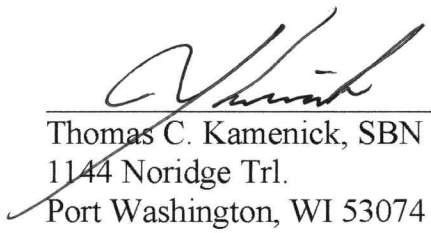

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in section 809.19(8)(b) and (c) for a brief and appendix produced with proportional serif font. This brief is 10,894 words long, calculated using the Word Count function of Microsoft Word 2016.

Dated: February 16, 2021

Thomas C. Kamenick

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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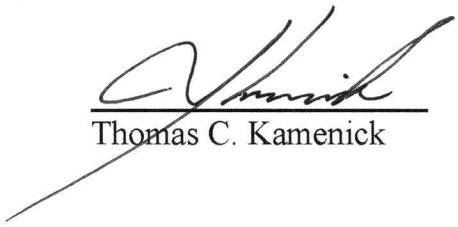

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CERTIFICATION OF COMPLIANCE WITH SECTION 809.19(2)(a)

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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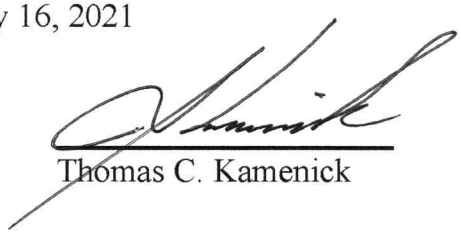

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