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IN THE COURT OF APPEALS — DISTRICT IV
STATE OF WISCONSIN

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU,

Plaintiffs-Respondents,

v.

TONY EVERS, KAREN TIMBERLAKE and JOEL BRENNAN

Defendants-Appellants,

&

MILWAUKEE JOURNAL SENTINEL,

Intervenor-Appellant.

Case Nos. 2020AP2081 & 2020AP2103

Appeal from the Circuit Court
of Waukesha County
Honorable Lloyd V. Carter Presiding

Case No. 20-CV-1389

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 13 MEDIA ORGANIZATIONS IN SUPPORT OF INTERVENOR- APPELLANT

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, The Associated Press, The E.W. Scripps Company, International Documentary Association, The Media Institute, National Association of Black Journalists, National Association of Hispanic Journalists, National Freedom of Information Coalition, National Press Club Journalism Institute, The National Press Club, The News Leaders Association, Society of Environmental Journalists, Society of Professional Journalists, and Tully Center for Free Speech (collectively, "amici"). Amici are members of the news media and groups dedicated to defending the First Amendment and newsgathering rights of the press. Journalists and news organizations frequently rely on public records, including those obtained pursuant to Wisconsin's public records law, Wis. Stat. §§ 19.31–19.39 (the "Public Records Law" or the "Law"), to report on matters of public concern, and timely access to public records regarding crises like the COVID-19 pandemic is critical for journalists working to keep the public informed. As such, amici have a strong interest in this case.

After the Wisconsin Department of Health Services ("DHS") received public records requests seeking data about Wisconsin businesses whose

employees had contracted COVID-19, DHS decided to release records containing the names of businesses employing at least twenty-five people where at least two employees had tested positive for COVID-19 or had close contacts that were investigated by contact tracers. *See* Br. & App. of Intervenor-Appellant, Milwaukee J. Sentinel ("Intervenor-Appellant's Br.") at 5. Plaintiffs-Respondents Wisconsin Manufacturers & Commerce, Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and Visitors Bureau (the "Associations") filed suit to bar the release of those records. *Id.* at 5–6. After briefing and a hearing held on November 30, 2020, the Waukesha County Circuit Court verbally denied the State of Wisconsin's and the Milwaukee Journal Sentinel's motions to dismiss and granted the Associations' motion for a preliminary injunction. *Id.* at 9.

Amici agree with Intervenor-Appellant Milwaukee Journal Sentinel that this matter should be dismissed because Wis. Stat. § 19.356(1) prohibits the underlying action and no other provision of law—including the Declaratory Judgments Act, Wis. Stat. § 806.04—affords the Associations a means to block disclosure. *See* Intervenor-Appellant's Br. at 12–33. Amici write to emphasize the legal and policy considerations that necessitate

dismissal of this case. Members of the news media depend on timely access to records like those at issue here to report on the spread of COVID-19, which, in turn, enables Wisconsinites to make informed decisions during this public health crisis. Because a paramount goal of the Public Records Law is to ensure members of the public have access to information they need to understand issues affecting their communities and their lives, amici respectfully urge the Court to reverse the circuit court's denial of the State of Wisconsin's and the Milwaukee Journal Sentinel's motions to dismiss with instructions that this case be dismissed on remand.

ARGUMENT

I. The Associations' suit is impermissible under the Public Records Law.

Section 19.356 of the Public Records Law states in relevant part: "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," subject to enumerated exceptions not at issue in this case. Wis. Stat. § 19.356. As explained in the Milwaukee Journal Sentinel's brief, the Associations' suit is expressly barred by this statutory language, and no exception applies because the Associations are not "record subjects" within the meaning of Wis. Stat. § 19.356(2)(a), *see*

Intervenor-Appellant's Br. at 13–18; indeed, Section 19.356 was *specifically* enacted to foreclose non-record subjects from seeking judicial review to enjoin the disclosure of public records, *see id.* at 1–3; 11–13. That the Associations' lawsuit is prohibited under the Public Records Law—a conclusion drawn inexorably from the text of Section 19.356 and its legislative history—should be the end of the matter. However, because this Court's interpretation of the Wisconsin Public Records Law may be informed by the interpretations of other states' open records laws, *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 49, 327 Wis. 2d 572, 600, as further support for that conclusion, amici note that courts in other jurisdictions have held that similarly unambiguous statutory language prohibits third parties from seeking to obstruct access to information under state public records laws.

For example, in *Hunter Health Clinic v. Wichita State University*, the Court of Appeals of Kansas considered whether a person or entity seeking to prevent a state agency from disclosing records had statutory standing to bring a cause of action under the Kansas Open Records Act (KORA), Kan. Stat. Ann. §§ 45-215–45-223. 52 Kan. App. 2d 1, 2 (2015). Hunter Health Clinic ("Hunter") objected to the university's prospective disclosure of records to

the Wichita Eagle, a local newspaper. *Id*. The Kansas Court of Appeals held that Hunter did not have standing to pursue its cause of action under KORA. *Id*. It reasoned that KORA empowers Kansas courts to exercise "jurisdiction to *enforce the purposes of th[e] act* with respect to [public] records, by injunction, mandamus or other appropriate order, in an action brought by any person[.]" *Id*. at 8 (citing Kan. Stat. Ann. § 45-222(a)) (emphasis added). But "Hunter was not an entity or person whose request for records under the act . . . ha[d] been denied or impeded[.] On this basis, Hunter . . . lacked statutory standing to make a KORA claim." *Id*. at 9–10 (cleaned up). In so holding, the court noted that permitting Hunter to bring an action would be antithetical to the purposes of the public records statute: Such a "construction of KORA does not promote the public policy as determined by the legislature." *Id*. at 11. *Cf.* Wis. Stat. § 19.31 ("[I]t is declared to be the public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them.").

Notably, when presented with declaratory judgment actions brought for the purpose of preventing disclosure of public records—as the Associations have attempted to do here—courts are careful to consider the

plain text and legislative intent of the relevant open records law. For example, in *Township of Hamilton v. Scheeler*, a New Jersey township brought a declaratory judgment action against a records requester seeking relief from any obligation to respond to the requester's Open Public Records Act ("OPRA") request. No. L-0833-15, 2015 WL 3915926, at *1 (N.J. Super. Ct. Law Div. June 24, 2015). "Although the declaratory judgment action was not instituted under OPRA, [it] directly implicate[d] OPRA[,]" *id*. at *2; thus, the court turned "to the fundamental issue [of] whether the Township[] filing a declaratory judgment complaint against Scheeler . . . [was] contrary to the plain language of OPRA, and the policies that underlie" it. *Id*. Motivated by the goal of "maintain[ing] a sharp focus on the purpose of OPRA and resist[ing] attempts to limit its scope," *id.* at *3 (citation omitted), and looking at the "unequivocal" statutory text stating that "[t]he right to institute *any* proceeding under this section shall be solely that of the requestor," *id*. at *3–4 (citing N.J. Stat. Ann. 47:1A-6) (emphasis added), "[t]he court conclude[d] that the Township circumvented the substantive provisions of OPRA by filing a declaratory judgment action," *id*. at *6.

Other courts likewise have held that declaratory judgment actions may not be instituted to circumvent the plain text of a public records statute. *See,*

e.g., *City of Burlington v. Boney Publishers, Inc.*, 166 N.C. App. 186, 191–92 (2004) (examining "whether the Public Records Act . . . [was] designed to allow a government entity to file for declaratory judgment" and concluding that the Act does not "allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request," based on the plain text of the statute (citation omitted)); *Ballard v. Newberry Cty.*, No. 2017-002429, 2021 WL 116345, at *3 (S.C. Ct. App. Jan. 13, 2021) ("If we were to recognize a general right to seek a declaratory judgment that the Public Records Act has been violated, we would be creating something the General Assembly did not create and might not create if it considered the issue. We are not at liberty to add to the statutory law or subtract from it."); *see also Filarsky v. Superior Court*, 28 Cal. 4th 419, 425–26 (2002) (explaining that the California Public Records Act ("CPRA") "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies," and that the CPRA authorizes "a declaratory relief proceeding commenced only by an individual or entity seeking disclosure of public records, and not by the public agency from which disclosure is sought").

Given the clear language of Wis. Stat. § 19.356 that "no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record"—subject to exceptions not triggered by the facts of this case, Intervenor-Appellant's Br. at 16–18—this Court should reverse and remand this matter with instructions to dismiss the Associations' suit. Dismissal is not only required by law, *see* Wis. Stat. § 19.356; Intervenor-Appellant's Br. at 11–35, but comports with the public policy of Wisconsin, *see* Wis. Stat. § 19.31, and as explained below, is in the public interest.

II. Timely access to information required to be disclosed under the Public Records Law serves the public interest, especially during a public health crisis.

Members of the news media require prompt access to public records in order to report on matters of public concern; timely access is especially important in the midst of an ongoing public health crisis. *See generally* Adam A. Marshall & Gunita Singh, *Access to Public Records and the Role of the News Media in Providing Information About Covid-19*, 11 J. Nat'l Sec. L. & Pol'y 199 (2020); *id.* at 212 ("Timely and dependable access to public records and meetings is always necessary for democratic governance, but it is especially critical in times of crisis and uncertainty."). Permitting the

Associations' lawsuit to move forward is therefore not only inconsistent with Wisconsin law, as discussed *supra*, but also it deprives the public of timely, accurate information about the spread of COVID-19, just when communities need that information the most. "The peculiar value of news is in the spreading of it while it is fresh[.]" *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("[T]he element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly."). And that is especially true during a global pandemic, when members of the news media are counted on to get urgent public health information to the public. *See Grosjean v. Am. Press Co*., 297 U.S. 233, 250 (1936) ("[The press is] a vital source of public information. The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity[.]").

Here, the Associations' action, which seeks to prevent the release of records related to COVID-19 outbreaks around the state, has hindered timely access to information of pressing public concern. "These delays . . . are not only imprudent, they are harmful." Marshall & Singh, *supra*, at 207. As

Derek Kravitz, a journalist and lecturer with Columbia University's Brown Institute for Media Innovation, has explained, "[p]ublic disclosure of outbreaks are a matter of public interest, and a public health concern. . . . Greater transparency leads to greater awareness and knowledge of what's happening in local communities, and better strategies for people in either avoiding or preventing further community spread." NC Watchdog Reporting Network, *How NC chose cooperation over transparency on meatpacking plants with virus outbreaks*, News & Observer (Aug. 11, 2020), https://bit.ly/2TqLLGz. The Iowa Attorney General's Office, for example, has recognized that the disclosure of information about positive cases of COVID-19 to the media can help reduce the spread of the virus. Iowa Dep't of Justice, Office of the Att'y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-19 Pandemic* (Apr. 20, 2020), https://perma.cc/X2MV-NQSE. That office specifically advised that names of businesses that have experienced outbreaks of COVID-19 can be released to the public, as the "state epidemiologist has determined that it is necessary for protection of the health of the public to" identify such facilities. *Id.*

Access to government records concerning COVID-19 cases at businesses has made possible meaningful reporting about the pandemic. For

example, in Florida, state health administrators initially refused to disclose the names of the assisted living facilities in which residents had tested positive for COVID-19, despite numerous requests from journalists for that information. Daniel Chang, *Herald drafted a suit seeking ALF records. DeSantis aide pressured law firm not to file it*, Miami Herald (Apr. 11, 2020), https://perma.cc/Z3L9-Z2XG. By mid-April 2020, a coalition of news media entities prepared to sue the governor for violating the state's public records law. Mary Ellen Klas & Lawrence Mower, *Under pressure, DeSantis releases names of elder care homes with COVID-19 cases*, Miami Herald (Apr. 18, 2020), https://perma.cc/KYH5-9KPQ. On the eve of the lawsuit, Governor DeSantis's administration released the information, after the governor ordered the state's surgeon general to "determine that it is necessary for public health to release the names of the facilities where a resident or staff member is tested positive for COVID-19[.]" *Id.* Release of the information helped Floridians make informed decisions about family members in assisted living facilities. As a spokesperson for AARP Florida explained, "[f]amilies now have at least some idea if the disease is in the facility where their loved one is and, even better, families know where it's not. They have a greater level of peace of mind if they know their facility isn't on the list." *Id*. The

release also informed the public about the overall spread of coronavirus in assisted living facilities in Florida. For example, *The Tampa Bay Times* used the data provided by the state to compile breakdowns of cases by geographical region. *See* Allison Ross et al., *Florida releases data on number of COVID-19 cases in each nursing home, assisted living facility*, Tampa Bay Times (Apr. 27, 2020), https://perma.cc/GPG8-LYJU. Such detailed information is "essential in helping the public know the scope of the problem." *Id*.

Similarly, in Ohio, the state's Department of Health had initially refused to disclose the names of assisted living facilities in which there had been outbreaks of COVID-19. Rachel Polansky & Phil Trexler, *State of Ohio releases some details on COVID-19 cases in nursing homes after 3News investigation*, WKYC (Apr. 17, 2020), https://bit.ly/3kBPAFC. After a local news outlet filed a public records request for that data, the department began to publish the number of cases at each nursing home, broken down by county, on its website. *See id.* One individual whose parent has been in an Ohio nursing home stated that having that information helped assuage his feeling of "helpless[ness]." *See id.* In Oregon, state health officials track outbreaks of five or more employees at workplaces where there are at least thirty

workers, and such data is published weekly. *See, e.g.*, *COVID-19 Weekly Report*, Oregon Health Authority (Feb. 24, 2021), https://perma.cc/L9DR-CP38. Reporting based on these weekly updates has analyzed outbreaks at prisons, corporate distribution facilities, childcare centers, and other places, allowing Oregon communities to better understand the scope of the pandemic's toll in their state. *See, e.g.*, KGW Staff, *Here are the 102 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Feb. 4, 2021), https://perma.cc/CQC6-9VDP (discussing how, as of February 4, 2021, seven of the eight largest active coronavirus outbreaks in Oregon were at state prisons); KGW Staff, *Here are the 124 active COVID-19 workplace outbreaks in Oregon*, KGW8 (Dec. 9, 2020), https://bit.ly/3sFel6P (noting a record number of workplace outbreaks in the state, stemming in part from cases at Amazon and Walmart distribution centers); Jade McDowell, *Oregon Health Authority lists weekly workplace outbreaks*, East Oregonian (Dec. 17, 2020), https://perma.cc/7A9L-5293 (reporting outbreaks at childcare facilities). Wisconsin residents, too, are entitled to accurate information from government agencies about the spread of COVID-19 in their state.

CONCLUSION

Wisconsin residents need timely, accurate, and comprehensive information to navigate this pandemic safely; prompt access to public records about the spread of COVID-19 is vital to ensuring that Wisconsinites have access to that information. Release of the names of businesses in Wisconsin employing at least twenty-five people where at least two employees have tested positive for COVID-19 or have had close contacts that were investigated by contact tracers is required by law, and the Associations have no valid legal basis to attempt to bar DHS from disclosing that information to members of the press and public. For the foregoing reasons, amici respectfully urge the Court to reverse the circuit court's denial of the State of Wisconsin's and the Milwaukee Journal Sentinel's motions to dismiss and remand this case with instructions that it be dismissed.

Dated: March 15, 2021
Respectfully submitted,

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FORM AND LENGTH COMPLIANCE CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,856 words calculated using the Word Count function of Microsoft Word.

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§809.19(12)(f) CERTIFICATION REGARDING ELECTRONIC BRIEF

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of Wis. Stat. §809.19(12). I further certify that the text of the electronic copy of the brief is identical to the text of the paper copy of the brief filed as of this date.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused to be served an Amicus Brief via first-class United States mail, postage pre-paid before 5:00 p.m. on March 15, 2021 and served electronic mail on March 12, 2021, to counsel of record as follows:

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