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SUPREME COURT

STATE OF WISCONSIN
In the Supreme Court of Wisconsin
Appeal Nos. 2020AP2081-AC & 2020AP2103-AC

No. 2020AP2081-AC

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

Tony Evers, in his official capacity as Governor of Wisconsin, Karen Timberlake, in her official capacity as Interim Secretary of the Wisconsin Department of Health Services, and Joel Brennan, in his official capacity as Secretary of the Wisconsin Department of Administration,
Defendants,
&

Milwaukee Journal Sentinel,
Intervenor-Appellant

No. 2020AP2103-AC

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

Milwaukee Journal Sentinel,
Intervenor
&

Tony Evers, in his official capacity as Governor of Wisconsin, Karen Timberlake, in her official capacity as Interim Secretary of the Wisconsin Department of Health Services, and Joel Brennan, in his official capacity as Secretary of the Wisconsin Department of Administration,
Defendants-Appellants.

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

RESPONSE BRIEF OF MILWAUKEE JOURNAL SENTINEL

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INTRODUCTION

In 1996, this Court created a new common-law right – the right of a record subject to file a lawsuit seeking to enjoin the release of public records. In 2003, the Wisconsin Legislature eliminated that common-law right, replacing it with a limited statutory process and prohibiting any other person from filing such a lawsuit. Bucking that prohibition, the Plaintiffs-Respondents-Petitioners (collectively, "Associations") seek to revive the common-law right and expand it to allow any person or entity who claims they might be harmed by the release of a record to sue and hold up that release for years in litigation.

The Court of Appeals correctly ruled that the Associations failed to state a claim upon which relief could be granted, concluding both that Wis. Stat. § 19.356(1) barred this lawsuit and that the Associations lacked standing to bring this case as a declaratory judgment action. To preserve the public's right to access government records and avoid protracted litigation delaying that access, this Court should reach the same conclusion.

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.

Court of Appeals' Decision: No.

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.

Court of Appeals' Decision: No.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

By granting the Associations' Petition for Review, this Court has indicated that oral argument and publication are appropriate.

STATEMENT OF THE CASE

All three Associations are trade associations that represent employers in Wisconsin. (R. 37[1]:6-9; App. 66-69.) Plaintiff Wisconsin Manufacturers & Commerce ("WMC"), WMC's members, the members of Muskego Area

[1] All record citations are to the record in Case No. 2020AP2103-AC.

Chamber of Commerce ("MACC"), and the members of 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; App. 74.) 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. (*Id.*) Those requests sought, among other documents, records that are the subject of this matter. (*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-Appellant Joel Brennan, Secretary of the Wisconsin Department of Administration, informed WMC that 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; App. 72.) Brennan also stated that over 1,000 employers met those 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; App. 73.) 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; App. 75.) Finally, they allege that consumers will avoid businesses named in the Disputed Records. (R. 37:16; App. 76.)

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 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, permitting the Journal Sentinel to intervene with no objection. (R. 102:25.) The Circuit Court agreed to extend the TRO to allow further briefing. (R. 102:32-33.)

While the motions to dismiss and motion for a temporary injunction were pending, the Associations filed a First Amended Complaint. (R. 37; App. 61-79.) The First Amended Complaint raised additional legal claims that the Associations had taxpayer standing (R. 37:6-9, 14-15; App. 66-69, 74-75) 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; App.

73-74). They also made additional factual allegations of the harm they would suffer were the Disputed Records to be released. (R. 37:16; App. 76.)

At a November 30, 2020 hearing, the Circuit Court 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; App. 43, 49.) 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; App. 35-43.) The court stated that the Associations had a legally protectable interest but 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; App. 42.)

Although the Circuit Court acknowledged 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; App. 34, 39, 41-42), it never explained why the prohibition was not applicable (*see* R. 101:100-01; App. 42-43 (reviewing the elements of a declaratory judgment claim but not addressing § 19.356(1))). Instead, the court appeared to believe

[2] The Circuit Court believed the taxpayer standing argument was "weaker," but declined to find that the Associations lacked taxpayer standing. (R. 101:100; App. 42.)

that because the Associations were not proceeding under § 19.356, the prohibition in § 19.356(1) was inapplicable. (R. 101:108; App. 49-50.) The court's verbal rulings were reduced to written orders entered on December 4, 2020. (R. 73; R. 74; App. 55, App. 57.)

The Court of Appeals granted the State's and Journal Sentinel's petitions for interlocutory appeal and consolidated the appeals on January 20, 2021. After briefing and oral argument, the Court of Appeals reversed the Circuit Court and ordered that the case be dismissed and the temporary injunction vacated on remand. *Wis. Mfrs. & Commerce v. Evers*, 2015 WI App 35, ¶46, __ Wis. 2d __, 960 N.W.2d 442. (App. 030.)

The Court of Appeals treated the broad question in this case – whether the Associations are allowed to file this suit – as one primarily of statutory interpretation. *Id.*, ¶¶8, 11, *citing Moustakis v. DOJ*, 2016 WI 42, ¶3, n.2, 368 Wis. 2d 677, 880 N.W.2d 142 & *Voters With Facts v. City of Eau Claire*, 2018 WI 63, ¶4, 382 Wis. 2d 1, 913 N.W.2d 131. (App. 12, 13-14.)

First, the Court of Appeals concluded that the Associations lacked standing. *Id.*, ¶¶12-32. (App. 14-25.) The Court of Appeals applied the longstanding rule that a plaintiff must have a legally protectable interest to have standing to bring a declaratory judgment claim, considering and

rejecting each of the Associations' three arguments in that regard. *Id.*, ¶12. (App. 14-15.) The court rejected the Associations' argument that they had a legally protectable interest under the medical records statutes, concluding that only individual patients had such an interest and that the alleged harm to the Associations' members' reputations was not the kind of harm targeted by those statutes. *Id.*, ¶¶13-26, 31. (App. 15-22, 24.) Then, the court rejected the Associations' taxpayer standing argument, concluding that they had failed to show any expenditure of public funds would be unlawful. *Id.*, ¶30. (App. 23-24.) Finally, the court concluded the Associations had not demonstrated that judicial policy required recognition of their claims. *Id.*, ¶¶32. (App. 24-25.)

Second, the Court of Appeals concluded that Wis. Stat. § 19.356(1) prohibits this lawsuit. *Id.*, ¶¶40-45. (App. 28-30.) Subsection 19.356(1) states, as relevant here, 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." The court concluded that because the Associations could not use the Uniform Declaratory Judgments Act ("DJA") to bring suit, they had "failed to identify a statute" that otherwise provided them a method of challenging the release

of these records. *Id.*, ¶43. (App. 28-29.) Furthermore, the Court of Appeals recognized that the Legislature had expressly limited this type of claim just as it had expressly limited many other types of claims (particularly against government defendants) and the court should not craft a remedy where the Legislature has prohibited it. *Id.*, ¶44. (App. 29.)

This Court granted the Associations' Petition for Review.

STANDARD OF REVIEW

This Court reviews "[w]hether a complaint states a claim upon which relief can be granted" *de novo*. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶17, 356 Wis. 2d 665, 849 N.W.2d 693. Whether a complaint has properly pled a cause of action is a question of law reviewed 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 Associations should not have been permitted to bring this case and delay release of public records this long. To avoid such delays, the Wisconsin Legislature eliminated the common-law right to challenge a record custodian's decision to release records, replacing it with a limited statutory right not available here. 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.

Although the Court of Appeals analyzed the standing question first, analyzing § 19.356(1) first is both more logical and more useful for the public. This is a case primarily of statutory interpretation. And we have here a statute that expressly bars lawsuits like this except in carefully delineated circumstances. This entire case can be resolved by analyzing that statute and determining whether this suit falls under and of those circumstances, without having to address the more nebulous question of standing. Furthermore, a ruling under § 19.356(1) will answer more questions about who can bring lawsuits like this, leading to greater clarity in the law.

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 statutory and common law exceptions or a judicial determination that some unusual public interest in secrecy outweighs the strong presumption that the public interest favors 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."). Prior to 1996, no court decision permitted an action by a record subject to prevent the release of records.

The Wisconsin Supreme Court dramatically altered that understanding in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996), 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. 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 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 Provided 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 portion of § 19.356 reads as follows:

> 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**.

Wis. Stat. § 19.356(1) (emphases 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. The Legislature created this provision specifically to prohibit interference with the release of public records. *See Moustakis*, 2016 WI 42, ¶27.

B) The History of Wis. Stat. § 19.356 Shows Why Suits Like this Are Prohibited

In 1996, this 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*, 202 Wis. 2d 178. Although the *Woznicki* Court recognized that the Open Records Law lacked statutory provisions providing for such notice and review, it concluded that record subjects' privacy and reputational interests warranted giving them 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 duty 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 stressed that as a non-budgetary item, it should be proposed 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.[3] 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. The Committee's 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 ("[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.'"),

[3] *Available at* https://legis.wisconsin.gov/lc/media/1253/rl2003_01.pdf. (last accessed on November 16, 2021).

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 op.) ("The legislature apparently adopted Wis. Stat. § 19.356 in 2003 to narrow and codify the notice and judicial review rights set forth in *Woznicki*.").[4]

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.

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

The Associations' suit is not permitted by § 19.356, for two independent reasons. The 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(4). "Record

[4] The *Schill* Court had the opportunity to decide the case by concluding that it was prohibited 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 op.).

subject" is defined in Wis. Stat. § 19.32(2g) as "an individual about whom personally identifiable information is contained in a record." (Emphasis added.)

The Associations are not "record subjects." Nor are their members. 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 are individuals (R. 37:14), 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 § 19.32(2g) 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: (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.

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).

D) The Declaratory Judgments Act Does Not "Otherwise Provide" a Cause of Action to Prohibit the Release of Public Records

The Associations argue that the DJA "otherwise provide[s] by statute" a means of challenging an authority's decision to provide records. (P Br. 45.) However, the DJA 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).

We know what it looks like when the Legislature "otherwise provides" a method of challenging the release of a record, and the DJA does not look anything like that. Section 19.356 has express and specific language stating that release can be challenged in court. *See* § 19.356(3)-(8). The very medical record laws that the Associations claim would be violated by the

release of the Disputed Records contain such a provision as well: "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). 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 DJA's language looks nothing like any of these statutes. It does not state that "a record subject may commence an action seeking a court order to restrain the authority from providing access to the requested record." *See* § 19.356(4). It does not even say that "[a]n individual may bring an action to enjoin" the release of records. *See* § 146.84(1)(c). It does not provide that any "person is entitled to judicial review of the decision of an authority to provider a requester with records." *See* § 19.356(1).

If a more specific statute provides a method of review, the DJA 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 DJA cannot "be used to do an end run around" a more specific provision for judicial review. *Id.* In *Darboy*, the

Court of Appeals 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 the DJA did not overcome the prohibition. *Id.*, ¶¶16-17.

This Court has previously ruled in another context that the DJA 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*, this Court ruled that the DJA 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 DJA. *Id.* Likewise here, the Associations' failure (and inability) to follow the provisions of Wis. Stat. § 19.356 is fatal to their claim.

The Associations' entire argument to the contrary rests on their unsupported assertion that the DJA has always recognized a cause of action for challenging the release of public records. But the DJA was never used to bring such a cause of action until this Court created it in 1996.

1) The Declaratory Judgments Act Provides an Alternative Remedy for Existing Causes of Action

The DJA creates a remedy for an existing claim that might otherwise not yet be ripe for adjudication. *See Lister*, 72 Wis. 2d at 307. As this Court put it in *Lister*, the purpose of the "Declaratory Judgments Act is to enable controversies of a justiciable nature to be brought before the courts." *Id.* (emphasis added). Plaintiffs cannot use a declaratory action to make a claim justiciable. A claim must be justiciable first before a declaratory judgment action may be brought 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.

2) No Independent Common-Law Cause of Action to Prevent the Release of Public Records Exists

The DJA does not now and has not ever provided a right to challenge the release of records independently from some other source. As the Associations acknowledge (P Br. 44 & n.25), *Woznicki* created a new right.

Prior to *Woznicki*, there was never a case in which a record subject brought any action at all, much less a declaratory judgment action,[5] seeking to halt the release of public records.

If the Associations were correct that the DJA recognizes a right to challenge the release of public records, then there should be decades of cases prior to *Woznicki* bringing such claims. If the Associations were correct, *Woznicki* did not create a new claim at all, and *Woznicki* was completely unnecessary because record subjects could have been bringing DJA claims. But *Woznicki* did create a new claim, which the Associations acknowledge, and that fact defeats their argument.

Once *Woznicki* created that claim, then the claim had an independent life and the DJA could be used to enforce it. *See Jensen*, 2002 WI App 78, ¶8; *Atlas Transit*, 2001 WI App 286, ¶6; *Kraemer Bros.*, 229 Wis. 2d at 92. Even though *Woznicki* was not a declaratory action and most *Woznicki*-era

[5] There are a few examples of cases where the requester sought declaratory relief. *See, e.g.*, *Law Offices of Wm. A. Pangman & Assocs, S.C. v. Zellmer*, 163 Wis. 2d 1070, 1076, 473 N.W.2d 538, 540 (Ct. App. 1991). However, the distinction between a declaration that a custodian must turn over a record and a writ or order directing a custodian to do so is inconsequential, *see id.* at 1085 (referring to "declaratory mandamus"), and in at least one instance, the attempt to obtain a declaration was rejected as improper, *see Law Offices of Wm. A. Pangman & Assocs v. Stigler*, 161 Wis. 2d 828, 831, n.2, 468 N.W.2d 784, 785 (Ct. App. 1991) (noting that the action "sounded in mandamus" but that the requester filed a motion for declaratory judgment, to which the custodian objected; the parties and the court agreed to interpret it as a motion for summary judgment).

cases were not declaratory actions,[6] plaintiffs could choose to style their actions thus if they wished.

However, in 2003, the Legislature eliminated that common-law claim, replacing it with a statutory claim. *See* 2003 Wis. Act 47. Importantly, the Legislature chose to prohibit such claims in all circumstances except those it specifically permitted. Wis. Stat. § 19.356(1). Thus, the common-law claim was eliminated six years after it was created, and from then on no longer provided the basis for a DJA. Actions outside of those allowed in § 19.356 disappeared.

The only previous attempts to bring a claim to halt the release of public records outside of the § 19.356 process both failed. In both cases, courts concluded such claims could not be brought.

In *Moustakis v. DOJ*, a district attorney tried unsuccessfully to enjoin the release of records related to an investigation into his behavior. 2016 WI 42, ¶¶2. This Court concluded that because Moustakis was an "officer" and not an "employee," he fell outside of the narrow exceptions to the rule that

[6] *Linzmeyer*, 2002 WI 84; *Milwaukee Teachers*, 227 Wis. 2d 779; *Levin*, 2003 WI App 181; *Kailin*, 226 Wis. 2d 134; *Klein*, 218 Wis. 2d 487.

"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.

On remand, Moustakis raised additional, but still unsuccessful, arguments why he should be allowed to block release of records. *Moustakis v. DOJ*, No. 18-AP-373 (Wis. Ct. App. May 17, 2019) (unpublished). (I.App. 1-22.) The Court of Appeals 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. 14-15.) The court confirmed that no free-floating right to challenge the release of records exists: "[T]he 'right' Moustakis seeks to vindicate is not recognized at law." *Id.*, ¶35. (I.App. 17-18.)

Even more pertinently to this case, the Court of Appeals has also expressly concluded that a person outside of § 19.356's purview "lacks standing to bring an action for judicial review of [the release of public records]" via a declaratory judgment action. *Wetzler v. Div. of Hearings & Appeals*, No. 10-AP-824 (Wis. Ct. App. Feb 16, 2021) (unpublished). (I.App. 23-34.) The Associations argued below that because the *Wetzler* court reviewed the merits of whether the records should be released despite

that lack of standing, the case actually supports their position. (P. Ct. App. Resp. Br. 45.) However, the court only reviewed the merits because the case was a Chapter 227 review of an administrative decision. *Wetzler*, No. 10-AP-824, ¶¶1-5. (I.App. 23-26.) The court reviewed the merits of the administrative decision first, but separately concluded that the record subject could not seek declaratory relief under the DJA. *Id.*, ¶¶15-16. (I.App. 32-33.) The distinction matters because unlike administrative review under Chapter 227, review under the DJA would be *de novo*.

All of this analysis demonstrates why adopting the Journal Sentinel's interpretation would not "partially repeal" the DJA, impliedly or otherwise. (*See* P. Br. 46.) Nothing has been "repealed." The DJA still does what it has always done – provide a specific remedy for an existing claim. Once the legislature eliminated the claim for review of a decision to release records (except in circumstances all parties agree do not apply here), the DJA could no longer provide a remedy for that nonexistent claim.

3) The Exclusive Remedy Analysis Is Inapplicable

The Associations argue that because they have no remedy under § 19.356, that statute's procedures are not speedy, effective, and adequate for them, and therefore § 19.356 cannot be an exclusive remedy. (P. Br. 43-44.).

But whether § 19.356 is an "exclusive" remedy is the wrong question. This Court has no need to engage in that analysis because the statute involved tells us exactly when an action like this can and cannot be brought. *See Lister*, 72 Wis. 2d at 307-09 (concluding that the statutory procedure to be followed for a particular claim could not be considered as "merely an 'alternative' remedy" and that the DJA could not be used instead of that proper procedure). The correct question is whether the DJA "otherwise provides" a cause of action.

The problem with trying to apply the analysis from the "exclusive remedy" cases is that those cases are testing an underlying right – a legally protectable interest – that can be enforced in the first place. *See Joint Dist. No. 1 v. Joint Dist. No. 1*, 89 Wis. 2d 598, 608, 278 N.W.2d 876, 880 (1979) (determining ownership of defunct school district's assets and liabilities); *Lister*, 72 Wis. 2d 282 (seeking a refund for allegedly-overpaid tuition); *Lamar Cent. Outdoor, LLC v. Wis. Dept. of Transp.*, 2008 WI App 187, ¶32, 315 Wis. 2d 190, 762 N.W.2d 745 (determining legality of sign located on plaintiff's own property). Faced with such questions, courts then analyze whether the given procedures are sufficient to protect that acknowledged right.

But as demonstrated above, the Associations have no right to challenge the release of public records. *See Moustakis*, No. 18-AP-373, at ¶29 ("Thus, to put it bluntly, Moustakis has no right to seek to enjoin the release of the records under the circumstances here.") (I.App. 15.) The Associations are not entitled to a speedy, effective, and adequate method of challenging the release of these records because they are not entitled to any remedy at all. *Id.*, ¶35 ("Because the 'right' Moustakis seeks to vindicate is not recognized at law, Wis. Stat. § 19.356 does not impede his right to access the courts.") (I.App. 18.)

By contrast, if somebody who was otherwise covered by § 19.356 tried to bring a DJA claim instead, at that point a court might have to decide whether the § 19.356 procedures were speedy, effective, and adequate. But because the Associations have no right to sue to prevent the release of public records, the question of whether the remedy that other people have to prevent the release of public records is adequate is irrelevant.

4) The Associations' Theory Would Undo the Legislature's Choice to Strictly Limit Who Can Challenge the Release of Public Records

Allowing a declaratory judgment action to challenge the release of public records would return Wisconsin to an era intentionally foreclosed by the Legislature.

The *Woznicki* right of review was extended only to public employee 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 must 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. 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 DJA "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 DJA "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.").

The Associations' reading of the DJA would also render a portion of § 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 any other statute allowing individuals to challenge the release of personal records. *See* § 51.30(9)(c); § 46.90(9)(c); § 55.043(9m)(c).

Perhaps the greatest irony here is that the Associations are asking for greater legal rights than record requesters. Requesters cannot use the DJA 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); *see also State v. Zien*, 2008 WI App 153, ¶¶7, 12, 314 Wis. 2d 340, 761 N.W.2d 15 (trial court dismissed the plaintiff's declaratory judgment claim seeking a declaration that records had to be produced, allowing a mandamus action to proceed).[7] 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 Associations argued below 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; P. Br. in Opp. to Pet. for Leave to Appeal at 30-31.) The Associations claimed 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

[7] In contrast to the Open Records Law, the Open Meetings Law (which is frequently analyzed in tandem with the Open Records Law) expressly permits declaratory relief. *Compare* Wis. Stat. § 19.37 (Open Records Law remedies, lacking declaratory relief) *with* § 19.97(2) (Open Meetings Law remedies, including declaratory relief); *see State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, 312 Wis. 2d 84, 752 N.W.2d 295 (an Open Meetings Law case seeking declaratory relief and analyzing Open Records Law considerations).

rights." (*Id.*; *see also* R. 101:47-48 (suggesting at the temporary injunction hearing that the government might release confidential information in violation of constitutional provisions).)

The Court of Appeals rightly rejected those arguments, pointing out the obvious – that the Legislature can and has restricted and even eliminated many remedies created by courts, particularly remedies against government officials. 2015 WI App 35, ¶45. (App. 29.) There is no overarching principle that all legal wrongs must be enjoinable before they occur.[8] Rather, the default presumption is that legal relief is only available after a harm has been caused, and it takes a special statute like the DJA to create anticipatory relief. *See Lister*, 72 Wis. 2d at 307 (the DJA "authoriz[es] a court to take jurisdiction at a point earlier in time than it would do under ordinary remedial rules and procedures") (citations omitted). It is not absurd to give effect to the Legislature's choice to severely restrict actions to enjoin the release of public records.

[8] For example, prior restraints on speech are generally 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); *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 damages.'"), *quoting Kukatush Mining Corp. v. SEC*, 198 F.Supp. 508, 510-11 (D.D.C.1961).

Accepting the Associations' arguments would completely undo the very deliberate choice the Legislature made to strictly limit who is permitted to challenge the release of 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.

5) Other States' Practices Demonstrate that Wisconsin Does Not Permit the Action the Associations Are Trying to Bring

Finally, the Associations point out that two other states permit declaratory judgment actions to challenge the release of records. (P. Br. 45.)

Not only do those cases not prove the point the Associations are trying to make, they actually demonstrate how the different legal provisions in Wisconsin require a different outcome. None of the cases they cite address anything like the statutory prohibition Wisconsin has in Wis. Stat. § 19.356(1).

The "collected cases" in the cited Pennsylvania case show that, like Wisconsin, Pennsylvania had a *Woznicki* moment. In *Wilson v.*

Commonwealth, Pennsylvania's highest court decided that even though its version of an Open Records Law contained no provision allowing record subjects to challenge release, the court would create one. 50 A.3d 1263, 1276 (Pa. 2012); *compare with Woznicki*, 202 Wis. 2d at 185 (noting that the Open Records Law "does not explicitly provide a remedy" for record subjects to challenge release before creating such a remedy). The rest of the Pennsylvania cases are simply applications of that principle. *Cnty. of Berks v. Pa. Off. Of Open Records*, 204 A.3d 534 (Pa. Commw. Ct. 2019); *Grine v. Cnty. Of Centre*, 138 A.3d 88 (Pa. Commw. Ct. 2016).

But Pennslyvania's equivalent of the *Woznicki* era continued unabated, unlike Wisconsin's. If the Wisconsin Legislature had never enacted § 19.356(1), then Wisconsin courts' jurisprudence on this issue would look like Pennsylvania's. But that difference is key. Pennsylvania still allows a common-law action by a record subject to prevent the release of records. The Wisconsin Legislature eliminated that cause of action and replaced it with a limited statutory action. That difference demonstrates why the Associations have no claim here.

II) THE ASSOCIATIONS LACK STANDING TO BRING THIS CASE

Even if the DJA "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 protectable 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, 629 (1936). "[T]he legal interest requirement has often been expressed in terms of standing." *Slinger*, 2002 WI App 187, ¶9.

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 protectable, 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 legally protected 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 are within the zone of interests protected by the medical-records statutes." (P. Br. 37.) 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. (*Id.*)

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; App. 66-69.) 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 the Court of Appeals 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 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 individuals who possess the relevant confidentiality interests than the Sheriff's Association was, and therefore have even less interest at stake.

The Associations argued below that *Crawford v. Care Concepts, Inc.*, 2001 WI 45, 243 Wis. 2d 119, 625 N.W.2d 876, prohibits comparisons between § 51.30 and § 146.82. (P. Ct. App. Resp. Br. 28.)

Crawford does no such thing. The *Crawford* Court concluded that because § 51.30 offered greater protections for extra-sensitive mental health records, courts could be less protective of the more generic health care records under § 146.82. 2001 WI 45, ¶33. This Court therefore concluded that the exception for release pursuant to "lawful order of a court" had broader application in the context of § 146.82 than § 51.30. *Compare id.*, ¶32 (under § 51.30, limiting such lawful orders to situations similar to those enumerated) *with id.*, ¶33 (under § 146.84, questioning only whether the order was lawful). Nothing this Court discussed suggests that the finding of

no standing in *Sheriff's Association* under § 51.30 would not also apply to § 146.82; if anything, because the special nature of mental health records under § 51.30 requires greater protection, there is less reason to find standing to challenge an alleged violation of § 146.82.

Any potential argument that because the Associations' member businesses have standing because they may be identified in the allegedly-confidential Disputed Records 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. 37:15-16, 18; App. 75-76, 78.) They allege that consumers are already concerned about patronizing businesses for fear of catching COVID. (*Id.* at 16; App. 76.) They allege releasing the Disputed Records will exacerbate that fear and cause reputational damages to their members. (*Id.* at 15, 18; App. 75, 78.)

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"). The Associations' foreign decisions with different results cannot overcome Wisconsin courts' interpretations of Wisconsin statutes. (*See* P. Br. 37-38.)

Furthermore, the Associations' alleged harm is not dependent on the legality of the release of the records. The harms that they hypothesize would occur if the records were released, regardless of whether the release is lawful. They have a "stake" in preventing release of the records, lawful or not. Therefore, the harms that these laws protect against have nothing to do with the harms the Associations claim give them standing. The lead opinion in *Foley-Ciccantelli v. Bishop's Grove Condo. Assoc.* makes this exact point: "[T]he question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." 2011 WI 36, ¶55, 333 Wis. 2d 402, 797 N.W.2d 789 (lead op.). The provisions of § 146.82 do not protect against the alleged harms to the Associations' reputations and pocketbooks, as those harms – if they occur at all – would occur with the release of the records regardless of whether patients would be identified.

The Associations have no legally protectable interest in this case. They point to no statute or constitutional provision that protects <u>their</u> interests as opposed to the distinct interests of their members' employees. Therefore,

the Court of Appeals correctly concluded that the Associations lack "zone of interest" standing.[9]

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 DJA 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*,[10] 2018 WI 63, 382 Wis. 2d 1, 913 N.W.2d 131, the Court of Appeals recognized that events that are "'remote, contingent, and uncertain'" cannot

[9] The Associations also attack two tangential Court of Appeals conclusions: (1) that their allegations that individual patients could be identified were implausible; and (2) that the information in the Disputed Records did not constitute patient health care records. (P. Br. 10-11, 31-36.) But both of those conclusions were independent from (and addressed after) the court's conclusion that the Associations lack a legally protectible interest. Reversing either of those conclusions would have no effect on the ultimate outcome.

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

give rise to a judiciable claim because the "alleged injury is far too 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. Their 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.[11] 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

[11] 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 John K. 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").[12]

Because the harms the Associations complain of are 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.

[12] 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).

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 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.

"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, the Court of Appeals 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. 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. Taxpayer standing is not a free pass to challenge any government action.

Furthermore, 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[13]) preparing that response no matter what it is. If the DHS denied the record requests, their paid employees would have to draft the 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

[13] The Associations complain that the DHS must pay employees "to collect, review, organize, and prepare the confidential medical information for release" (R. 37:15; App. 75), but the Associations do not allege that collecting, reviewing, organizing, or preparing this information is unlawful; it is only the release of the information they complain of.

(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 or litigation costs caused by an allegedly-illegal action counts as pecuniary harm (*See* P. Br. 27, n. 11) – is unrecognized in Wisconsin and, if adopted, would eliminate all limits on standing. No court has ever ruled that potential liability or the expense of litigation creates taxpayer standing. The Associations' argument would allow any taxpayer to challenge any government 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 release of a public record, the Legislature's decision to limit such actions to a very narrow class of persons in § 19.356(1) will be completely abrogated. Anybody who paid taxes would be allowed to sue to stop the release of any public record, 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.

C) The Unique Circumstances of *McConkey* Do Not Apply Here

McConkey v. Van Hollen was a unique case where a voter challenged a constitutional amendment, arguing that the question put to voters improperly combined two different issues that should have been presented separately. 2010 WI 57, ¶2, 326 Wis. 2d 1, 783 N.W.2d 855. The Wisconsin Supreme Court expressed doubt as to whether McConkey had standing, noting that since he would have voted "no" on both questions anyway, he was not prevented from voting the way he wished for each question. *Id.*, ¶¶14, 17. Despite the doubt, the Court chose to hear the case for policy reasons, without concluding that McConkey had standing. *Id.*, ¶¶17-18.

Although the Associations list some of those policy concerns (P. Br. 42), they leave off others, and those others show how this case differs from *McConkey*. This Court agreed to decide the case in part because the citizens of Wisconsin deserved to "have this important issue of constitutional law resolved": whether the amendment had been "effectually adopted." 2010 WI 57, ¶18 (emphasis added). The Court also noted that previous challenges under the separate amendment rule had similarly been decided "without articulating a specific injury." *Id.*

Unlike *McConkey*, this case does not involve questions of constitutional law, and courts require plaintiffs to have standing when challenging the release of records. *See, e.g.*, *Milwaukee Deputy Sheriff's Ass'n*, 2010 WI App 95, ¶¶30-33; *see also Schill.*, 2010 WI 86, ¶¶37-39 (lead op.); *Zellner*, 2007 WI 53, ¶¶18-21.

McConkey is unique. This Court chose to ignore standing in order to decide whether our Constitution had or had not been amended. No court since has relied on *McConkey* to ignore standing requirements in a similar fashion. This Court should not be the first.

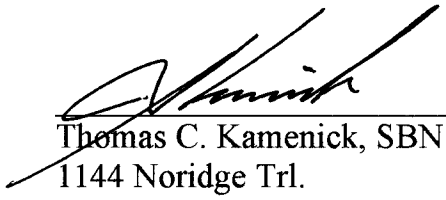
CONCLUSION

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 affirm the Court of Appeals and direct that the Associations' complaint be dismissed.

Dated this November 16, 2021

WISCONSIN TRANSPARENCY PROJECT
KAMENICK LAW OFFICE, LLC
Attorney for Intervenor/Intervenor-Appellant
Milwaukee Journal Sentinel



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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. Those portions of the brief referred to in Wis. Stat. § (Rule) 809.19(1)(d), (e), and (f) are 10,771 words long, calculated using the Word Count function of Microsoft Word 2016.

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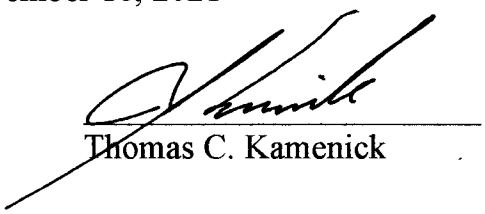

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I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, which complies with the requirements of section 809.19(12). I further certify that this electronic brief is identical in content and format to the printed 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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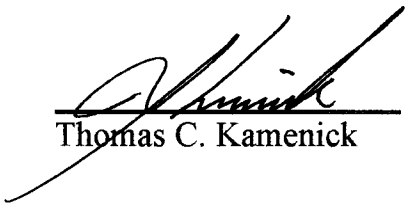

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CERTIFICATION OF COMPLIANCE WITH SECTION 809.19(8g)(b)2.

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)(am).

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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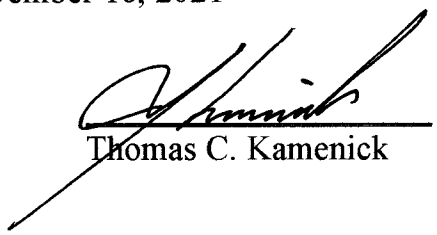

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