IN THE SUPREME COURT OF WISCONSIN

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA 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-Appellants,

&

MILWAUKEE JOURNAL SENTINEL,

Intervenor-Appellant.

Case Nos. 2020AP2081-AC
& 2020AP2103-AC

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

BRIEF OF AMICI CURIAE
REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
AND 12 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 Center for Investigative Reporting (d/b/a Reveal), The E.W. Scripps Company, Hearst Corporation, The Media Institute, National Freedom of Information Coalition, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, The News Leaders Association, Radio Television Digital News Association, and Society of Professional Journalists (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. Timely access to public records regarding crises like the COVID-19 pandemic is critical for journalists working to keep the public informed. For these reasons, amici have a strong interest in the outcome of this case.

This appeal arises from public records requests submitted by the news media to the Wisconsin Department of Health Services ("DHS") for data about Wisconsin businesses whose employees had tested positive for COVID-19. In response to those requests, DHS planned 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* Resp. Br. of Milwaukee J. Sentinel ("Intervenor-Appellant's Br.") at 3. Plaintiffs-Respondents-Petitioners Wisconsin Manufacturers & Commerce, Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and

Visitors Bureau (the "Associations") filed suit to bar release of those records. *Id.* at 4.

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 6. The State of Wisconsin and the Milwaukee Journal Sentinel sought leave to appeal the circuit court's order. *Id.* at 7. After granting their petitions for review, the court of appeals reversed the circuit court's order, remanding with instructions to the lower court to vacate the temporary injunction and dismiss the suit with prejudice. *Id.*

Amici agree with Intervenor-Appellant 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 under the Public Records Law. *See* Intervenor-Appellant's Br. at 11–33. Further, no privacy statute bars the disclosure of the records, as the records do not identify specific individuals or implicate any of the privacy concerns the Associations purport to invoke.

Amici write to emphasize the legal and policy considerations that necessitate dismissal of this case. For more than a year, the public's right of access to critical data about the spread of COVID-19 has been unduly hindered by the instant suit. For the Public Records Law's promise of access to public information to be meaningful, Wis. Stat. § 19.31, the Law must ensure timely access to records about the spread of COVID-19 during this ongoing public health crisis—records in which there is not only a profound public interest, but also to which no statutory exemption applies. Because a principal goal of the Public Records Law is to ensure members of the public have access to the information they need to understand issues

affecting their communities and their lives, amici respectfully urge the Court to affirm the decision of the court of appeals.

ARGUMENT

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

The Associations' suit is expressly barred by Section 19.356 of the Public Records Law, which states, in relevant part, 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 enumerated exceptions not at issue here. Wis. Stat. § 19.356. As explained in the Milwaukee Journal Sentinel's brief, no exception to this rule applies because the Associations are not "record subjects" within the meaning of Wis. Stat. § 19.356(2)(a), *see* Intervenor-Appellant's Br. at 17–18. Indeed, Section 19.356 was specifically enacted to foreclose non-record subjects, like the Associations, from seeking judicial review to enjoin the disclosure of public records, *see id.* at 14–17. That the Associations' lawsuit is prohibited under the plain text of the Public Records Law—a conclusion drawn directly from the text of Section 19.356 and its legislative history—should be the end of the matter.

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, 786 N.W.2d 177, 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. 362 P.3d 10, 12 (Kan. Ct. App. 2015). Hunter Health Clinic ("Hunter") objected to the university's disclosure of certain records to the Wichita Eagle newspaper. *Id*. The Kansas Court of Appeals held that Hunter did not have standing to pursue its action under KORA, reasoning 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 15 (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 16. In so holding, the appellate 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 17; *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.").

Indeed, when presented with declaratory judgment actions brought for the purpose of preventing disclosure of public records—as the Associations have attempted here—courts have been careful to consider the plain text and legislative intent of the relevant open records law. For example, in *In re New Jersey Firemen's Ass'n Obligation to Provide Relief Applications Under Open Public Records Act*, 166 A.3d 1125 (N.J. 2017), the New Jersey Supreme Court analyzed language of the New Jersey Open Public Records Act ("OPRA") that "unambiguously confers the right to initiate a suit after a public agency's denial of access only upon the

requestor." *Id*. at 1136 (citation omitted). Recalling that "a specific statutory provision dealing with a particular subject prevails over a general provision," *id*. (citation omitted), New Jersey's highest court concluded that "OPRA's special procedure for review of an agency's denial must prevail over the general D[eclaratory] J[udgment] A[ct] statute," *id*.; *see also Twp. of Hamilton v. Scheeler*, No. L-0833-15, 2015 WL 3915926, at *2, 6 (N.J. Super. Ct. Law Div. June 24, 2015) (concluding that the Township, which brought a declaratory judgment action against a records requester, "circumvented the substantive provisions of OPRA by filing a declaratory judgment action" where such action "[was] contrary to the plain language of OPRA, and the policies that underlie" it).

Other state courts likewise have held that declaratory judgment actions may not be brought to circumvent the plain text of a public records statute. *See, e.g.*, *City of Burlington v. Boney Publishers, Inc.*, 600 S.E.2d 872, 876 (N.C. Ct. App. 2004) (examining "whether the Public Records Act . . . [was] designed to allow a government entity to file for declaratory judgment" and concluding 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 Cnty*., 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.").

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 17–18—this Court should affirm the decision of the court of appeals.

II. No privacy statute exempts the release of records that do not allow for the identification of individual patients.

The Associations contend that Wis. Stat. § 146.82, which requires confidentiality of "patient health care records" that identify individual patients, bars the disclosure of the records at issue. *See* Plaintiffs-Respondents-Petitioners' Br. ("Pls.' Br.") at 28; Wis. Stat. § 146.82(2)(a)20 (stating that patient healthcare records may be released if they "do not contain information and the circumstances of the release do not provide information that would permit the identification of the patient"). The Associations allege that the names of businesses where at least two employees have tested positive for COVID-19 is "patient-identifiable data" because "given the relatively small number of employees" at certain businesses in Wisconsin, "it would not be difficult for co-workers or community members to discern the identity of the employee or employees who have tested positive for COVID-19." *See* Pls.' Br. at 32 (citation omitted). In so alleging, the Associations ignore that DHS intended only to release the names of businesses with more than twenty-five employees.

Indeed, the Associations' argument is quintessentially speculative—and thus not an adequate basis to support nondisclosure. In an analogous case from California this year, the Alameda County Superior Court found that the respondents failed to demonstrate that the disclosure of requested data—the names of nursing homes and the number of patients and staff that had tested positive for COVID-19 at those facilities—would constitute disclosure of "individually identifiable health information" such that its disclosure may be barred under HIPAA. Order Granting Writ of Mandate at 10, *Cal. Newspaper P'ship v. Cnty. of Alameda*, No. RG20062745 (Cal. Super. Ct. Jan. 7, 2021). Nor was the respondents' insistence that

numerical data could be used to identify individuals who had contracted COVID-19 "a reasonable basis to believe that the information [could] be used to identify the individual." *Id*. Finding that no privacy statutes barred the disclosure of basic, non-identifying information about COVID-19 infection rates at facilities, the court ordered the release of the records. *Id*. at 11, 19–20. Plainly, the Associations' claim that "HIPAA presumptively forbids most entities from doing exactly what DHS is proposing here" is baseless and misleading. Pls.' Br. at 30.

As an initial matter, information that neither identifies nor could reasonably be used to identify the individual is beyond the scope of HIPAA's Privacy Rule, 45 C.F.R. § 160.103 (defining protected health information as "individually identifiable health information"), and the Associations do not aver that DHS is a "covered entity" for the purposes of the Privacy Rule, rendering HIPAA inapplicable to this case in any event. However, even assuming, *arguendo*, that HIPAA did apply, it is critical to note that HIPAA's Privacy Rule does not bar release of information whose disclosure is mandated by state law, as is the case here. 45 C.F.R. § 164.512(a)(1) (permitting disclosure without authorization "to the extent that such use or disclosure is *required by law*" (emphasis added)). When confronted with the issue, state courts have applied this reasoning and rejected HIPAA as a legal justification for withholding records from requesters. *See, e.g.*, *State ex rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181 (Ohio 2006); *Or. Health & Sci. Univ. v. Oregonian Publ'g Co., LLC*, 403 P.3d 732, 742 (Or. 2017); *State ex rel. Adams Cnty. Historical Soc'y v. Kinyoun*, 765 N.W.2d 212 (Neb. 2009); *Abbott v. Tex. Dep't of Mental Health & Mental Retardation*, 212 S.W.3d 648 (Tex. App. 2006).

Further—again assuming, *arguendo*, that a HIPAA analysis was required in this case, which it is not—it is also worth noting that HIPAA

explicitly contemplates the release of even protected health information under extreme public health circumstances like the COVID-19 pandemic. Specifically, 45 C.F.R. § 164.512(j) permits covered entities to disclose protected health information if it "is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public" and the disclosure is to "a person or persons reasonably able to prevent or lessen the threat." The records at issue here would plainly fall within this exception. As discussed in further detail below, providing information to the news media about the spread of COVID-19 across and within facilities and businesses allows the press to inform the public about potential health risks, thereby reducing the spread of the virus. *Cf.* 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, 208–11 (2020) (discussing how reporting by the news media can "reasonably prevent or lessen the threats" associated with the pandemic).

To permit Wis. Stat. § 146.82 and HIPAA—which are not applicable, here—to stifle access to information of great public interest where there is no risk of patient identification associated therewith would also run afoul of courts' clear obligation to broadly construe the Public Records Law in support of disclosure. *See, e.g.*, *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 15, 254 Wis. 2d 306, 646 N.W.2d 811 ("[T]he clearly stated, general presumption of our law is that all public records shall be open to the public."). Indeed, the Public Records Law is a "fundamental concept[] in [the] state's history of transparent government." *Journal Times v. City of Racine Bd. of Police & Fire Comm'rs*, 2015 WI 56, ¶ 45, 362 Wis. 2d 577, 866 N.W.2d 563; *see also Schill*, 2010 WI 86, ¶ 1 ("If Wisconsin were not known as the Dairy State it could be known, and rightfully so, as the Sunshine State."). The Associations' reliance on inapplicable patient-protection statutes to attempt to bar the public from accessing the records at

issue here is contrary to law and counter to Wisconsin's tradition of open government. And, as discussed below, the public interest served by disclosure of these records vastly exceeds any interest in nondisclosure.

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

The news media requires timely access to public records to carry out "its traditional function of bringing news to the public promptly." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976); *see also Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235 (1918) ("The peculiar value of news is in the spreading of it while it is fresh[.]"). This is particularly important during a public health crisis, where the public relies on the news media for urgent public health information and updates about their communities amidst rapidly changing circumstances. *See generally* Marshall & Singh, *supra*, 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.").

Disclosing records that communicate the scope of the pandemic's toll on local businesses empowers the public to make informed decisions about their health and is critical to hold unsafe employers accountable. 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 may 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.* In Massachusetts,

the Department of Labor Standards released reports of safety violations at businesses made to its pandemic hotline. Beth Healy et al., *Hundreds of Businesses in Mass. Violated COVID-19 Rules, Putting Workers at Risk*, WBUR (Dec. 14, 2020), https://perma.cc/R6C2-T5ME. The released records allowed WBUR reporters to analyze businesses and sectors that had consistently violated pandemic guidelines and provide the public with information that they could use to inform their decisions during the pandemic. *Id.*

Powerful public service journalism about the pandemic has been made possible by access to government records concerning COVID-19 cases at businesses. For example, in Florida, 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. *Id.* ("Families 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.").

Access to government records during the pandemic is also crucial for ensuring government accountability. Earlier this year, the New York Supreme Court ordered the New York Health Department to release records detailing where and when COVID-19 deaths occurred in nursing homes. Erin Durkin et al., *Judge orders state to turn over nursing home records*, Politico (Feb. 4, 2021), https://perma.cc/X37P-FRL7. Newly disclosed information allowed journalists to reveal not only the unusually swift and deadly outbreaks at nursing homes, but also facilitated public scrutiny of government efforts to obscure the extent of the outbreaks. *See generally* Jesse McKinley & Luis Ferré-Sadurní, *New Allegations of Cover-Up by Cuomo Over Nursing Home Virus Toll*, N.Y. Times (Feb. 12, 2021), https://perma.cc/5JN3-X6W5.

Just weeks ago, the Pennsylvania House of Representatives voted to amend its Disease Prevention and Control Law in order to solve the problem that information about the pandemic's reach in Pennsylvania has been too "difficult to obtain." Mark Scolforo, *Pa. House OKs Bill to Make More Pandemic Data Publicly Available*, NBC10 (Oct. 5, 2021), https://perma.cc/EN6F-48N7. The bill, argued Speaker Bryan Cutler, "would allow us as consumers, as residents, us as patients, to have access to good data so we can make good decisions." *Id*. The types of data the bill would make available include, *inter alia*, infection rates by school district. Legislators argued it would "expand the public's view of state health data, in particular aggregate data showing the size and scale of COVID-19's spread and mediation." Stephen Caruso, *Pa. House passes bill to expand open records requests for state health data*, Pennsylvania Capital-Star (Oct. 4, 2021), https://perma.cc/T67U-JZY2. "Data drives science — accurate science," House Majority Leader Kerry Benninghoff stated. "If we want to follow accurate science, we need accurate data." *Id.*

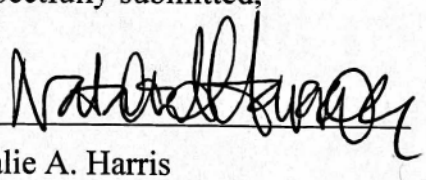
The Associations' lawsuit, which seeks to prevent the release of records related to COVID-19 outbreaks around the state, is antithetical to law, contrary to national trends supporting increased transparency of data related to the spread of COVID-19, and has hindered timely access to information of pressing public concern. Wisconsin residents deserve timely, accurate, and comprehensive information from their government about the spread of COVID-19 in their communities.

CONCLUSION

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 the Public Records 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 affirm the decision of the court of appeals.

Dated: November 30, 2021

Respectfully submitted,

By: 

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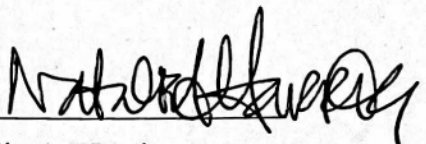
FORM AND LENGTH COMPLIANCE CERTIFICATION

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 a proportional serif font. In accordance with section 809.19(8)(c)(2), the length of this brief is 2958 words long, calculated using the Word Count function of Microsoft Word.

Dated: November 30, 2021

By: 

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused to be served a Brief of Amici Curiae Reporters Committee for Freedom of the Press and 12 Medial Organizations in Support of Intervenor-Appellant via U.S. mail and electronic mail pursuant to Wis. Stat. § 801.13(2) on November 20, 2021, to counsel of record as follows:

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