Nos. 2020AP2081-AC & 2020AP2103-AC

In the Supreme Court of Wisconsin

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,
AND
MILWAUKEE JOURNAL SENTINEL,
Intervenor-Appellant

No. 2020AP2103-AC

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Plaintiffs-Respondents-Petitioners
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Defendants-Appellants,
AND
MILWAUKEE JOURNAL SENTINEL,
Intervenor

On Review of a Decision of the Court of Appeals Reversing the Waukesha County Circuit Court, The Honorable Lloyd V. Carter, Presiding

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

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Counsel for Plaintiffs-Respondents-Petitioners

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I. The Associations have standing to bring this suit under the Uniform Declaratory Judgments Act.

The law of standing "is construed liberally" in Wisconsin. *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. "When a challenge is made to standing as alleged in a complaint, [this Court] take[s] the allegations in the complaint as true and liberally construe[s] them in the plaintiff's favor." *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 18, 275 Wis. 2d 533, 685 N.W.2d 573.

Because this case is at the pleading stage, this Court should liberally construe the Associations' allegations and conclude they have standing. "[S]tanding is satisfied when a party has a personal stake in the outcome." *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517. Because the Associations and their members have a personal stake in this case, they have taxpayer standing, zone-of-interests standing, and judicial-policy standing.

A. The Associations have taxpayer standing.

"[T]his court has been disposed toward finding that the taxpayer has sustained a direct and personal pecuniary loss" to confer standing. *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 878, 419 N.W.2d 249 (1988). Although taxpayer standing requires "a damage to [the plaintiff] different in character from the damage sustained by the general public," *id.* at 877, the damage need not be different than the harm suffered *by other taxpayers*. Instead, a taxpayer sues "on behalf of himself and other taxpayers." *Id.*

The Associations sufficiently allege a pecuniary loss by alleging that the State is illegally spending resources responding to the records requests at issue. (Associations' Br. 27–31.) "[A]ny illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *City of Appleton*, 142 Wis. 2d at 879 (citation omitted).

The State contends that the Associations lack taxpayer standing because the State "does not expend additional funds or

raise taxes to decide that records should, or should not be, released." (State's Br. 39.) The Journal Sentinel makes a similar argument. (Journal Sentinel's Br. 56.)[1] But taxpayers may "contest the validity of a variety of governmental activities accompanied by expenditure of public moneys," regardless of "whether the illegal expenditures resulted in a net saving" or would "result in increased taxation." *Thompson v. Kenosha Cty.*, 64 Wis. 2d 673, 680 & n.9, 221 N.W.2d 845 (1974) (citation omitted). A taxpayer has standing to challenge a government decision that could diminish the "value" of its "services," even if the decision would *reduce* government expenditures. *See Hart v. Ament*, 176 Wis. 2d 694, 699–700, 500 N.W.2d 312 (1993).

By devoting resources to compile and release the records at issue here, the State causes a pecuniary loss to taxpayers. Every illegal government expenditure causes a pecuniary loss for taxpayers "because it results either in the governmental unit having less money to spend for legitimate governmental objectives,

[1] This reply brief cites the page numbers at the top of the pages in the Journal Sentinel's brief.

or in the levy of additional taxes to make up for the loss resulting from the expenditure." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961). True, a government salary alone does not create taxpayer standing if "[p]recisely the same salary would have been paid for the same service" even if the plaintiff prevailed. *McClutchey v. Milwaukee Cty.*, 239 Wis. 139, 141, 300 N.W. 224 (1941). Here, however, the State's employee salaries would *not* fund *the same service* if the Associations prevail in this case because the Associations contend that the State should not release the records at issue. The State would spend more resources on "legitimate governmental objectives" if it stopped devoting resources to its planned illegal release of records. *S.D. Realty*, 15 Wis. 2d at 22.

Citing a three-justice lead opinion, the State suggests that "binding precedent" requires a plaintiff to be within the "zone of interests" of a statute or constitutional provision to have standing. (State's Br. 40 (citing *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 54, 333 Wis. 2d 402, 797 N.W.2d 789).)

But the State has not cited any legal authority (including *Foley-Ciccantelli*) holding that a plaintiff must satisfy the zone-of-interests test to have *taxpayer* standing. To the contrary, courts do not perform a zone-of-interests analysis if a plaintiff has taxpayer standing. *See Coyne v. Walker*, 2015 WI App 21, ¶¶ 7, 9, 12–13, 361 Wis. 2d 225, 862 N.W.2d 606, *aff'd*, 2016 WI 38, 368 Wis. 2d 444, 879 N.W.2d 520. Indeed, the State recognizes that "[t]axpayer standing, if present, would be a form of a legally protectable interest." (State's Br. 36.)

The Journal Sentinel argues that "[t]axpayer standing is not a free pass to challenge any government action." (Journal Sentinel's Br. 57.) True, a taxpayer cannot sue, for example, "merely because [the taxpayer] disagrees with the legislative body." *Kaiser v. City of Mauston*, 99 Wis. 2d 345, 360, 299 N.W.2d 259 (Ct. App. 1980), *overruled on other grounds by DNR v. City of Waukesha*, 184 Wis. 2d 178, 515 N.W.2d 888 (1994). "An allegation that the [government] has spent, or proposes to spend, public funds illegally is, however, sufficient to confer standing on a taxpayer."

Id. A taxpayer must only "allege illegality in order to have standing." *Id.* at 361. The Associations pass this low bar.

B. The Associations also satisfy the zone-of-interests test for standing.

Citing *Milwaukee Deputy Sheriff's Association v. City of Wauwatosa*, 2010 WI App 95, 327 Wis. 2d 206, 787 N.W.2d 438, and *Olson v. Red Cedar Clinic*, 2004 WI App 102, 273 Wis. 2d 728, 681 N.W.2d 306, the State and the Journal Sentinel argue that the Associations are not within Wis. Stat. §§ 146.82 and 146.84's zone of interests.

Those cases are inapposite. In both cases, the court held that a third party lacked standing to challenge the release of a patient's record under Wis. Stat. § 51.30. This statute provides that "all treatment records shall remain confidential and are *privileged to the subject individual*." Wis. Stat. § 51.30(4) (emphasis added). The court relied on this italicized language when holding that section 51.30 protects only a patient's information. *Milwaukee Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 32; *Olson*, 273 Wis. 2d 728, ¶ 14. Here, the relevant statute does not contain that italicized

qualifying language. It provides that "[a]ll patient health care records shall remain confidential," period. Wis. Stat. § 146.82(1).

The mode of analysis under section 51.30 differs from that under section 146.82. *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶ 33, 243 Wis. 2d 119, 625 N.W.2d 876. The Journal Sentinel argues that *Crawford* hurts the Associations' position because *Crawford* suggests that a circuit court has narrower authority to order the release of a record under section 51.30 than under section 146.82. (Journal Sentinel's Br. 48–49.) That aspect of *Crawford* is irrelevant because the present case does not involve such an order. *Crawford* is relevant because it recognized that sections 51.30 and 146.82 differ. Because *Olson* and *Milwaukee Deputy Sheriff's Association* addressed section 51.30, they are inapplicable.

The State argues that the Associations cannot sue under Wis. Stat. § 146.84(1)(c), which allows an "individual" to seek injunctive relief and damages. (State's Br. 29–32.) The Associations concededly may not sue under that provision, but

they are within the zone of interests of section 146.84(1)(b) and (1)(bm). Under those two subsections, any person, "including the state," who violates section 146.82 or 146.83 under certain circumstances "shall be liable to any person injured as a result of the violation for actual damages to that person." Wis. Stat. § 146.84(1)(b) & (1)(bm). These subsections provide an "enforcement mechanism" for violations of section 146.82(1). *See Townsend v. ChartSwap, LLC*, 2021 WI 86, ¶ 18. If the State releases the confidential records at issue, in violation of section 146.82(1), the Associations' members could sue the State for damages under section 146.84(1)(b) or (1)(bm). The Associations' members are within these statutes' zone of interests.

The State incorrectly assumes that a plaintiff is within a statute's zone of interests only if that statute gives the plaintiff a cause of action. If the State were right, the Declaratory Judgments Act (DJA) would be meaningless because it would apply only if a separate statute provided a cause of action. The DJA empowers courts "to declare rights, status, and other legal relations *whether*

or not further relief is or could be claimed." Wis. Stat. § 806.04(1) (emphasis added). The Associations may bring this suit under the DJA to *raise claims* under Wis. Stat. §§ 146.82 and 146.84, although the Associations cannot currently *file a suit seeking damages* under those two statutes.

The State argues that the records at issue are not health-care records under Wis. Stat. ch. 146. (State's Br. 32–34.) But the merits are irrelevant at this stage, *see Thompson*, 64 Wis. 2d at 679, as the State concedes. (State's Br. 33.)

Regardless, the State is wrong to suggest that it may release confidential information just because it is in a different format than a health-care provider's record. Under the State's logic, the State could obtain a confidential health-care record, copy its contents into a new document, and release the new document pursuant to an open-records request. Section 146.82 prohibits the release or *re-release* of *information* contained in patient health-care records by any entity holding the information or records. *See Wall v. Pahl*, 2016 WI App 71, ¶¶ 15–26, 371 Wis. 2d 716, 886

N.W.2d 373; *see also* Wis. Stat. § 146.82(5)(c) (prohibiting re-release). Chapter 146 applies here.

C. Permitting the Associations to continue this litigation would promote the policy purposes of standing.

The Journal Sentinel argues that the Associations do not have standing under *McConkey* because that case involved a constitutional issue. (Journal Sentinel's Br. 60.) That distinction is immaterial because the statutory issues here are a matter of significant statewide concern.

The State argues that "*McConkey* cannot serve as a substitute for the plaintiffs failing to invoke a statute that applies to them." (State's Br. 41.) But *McConkey* found standing "as a matter of judicial policy." *McConkey*, 326 Wis. 2d 1, ¶ 17. Standing requires a plaintiff to have a personal stake to ensure robust argument. *Id.* ¶ 16. The Associations meet that requirement because this case could greatly impact their members. Even if *McConkey* required plaintiffs to invoke an applicable statute, the

Associations' members fall within Wis. Stat. §§ 146.82 and 146.84's zone of interests.

The State argues that under the Associations' rationale, "any person could sue to enjoin the release of patient health care records." (State's Br. 41; *see also* Journal Sentinel's Br. 38.) Not true. "[T]o have standing to bring an action for declaratory judgment, a party must have a personal stake in the outcome and must be directly affected by the issues in controversy." *Lake Country Racquet & Athletic Club, Inc. v. Vill. of Hartland*, 2002 WI App 301, ¶ 15, 259 Wis. 2d 107, 655 N.W.2d 189. The Associations' members meet that requirement because this case could affect their reputations and financial well-being.

II. Section 19.356 does not preclude the Associations' declaratory-judgment action.

The State and the Journal Sentinel suggest that judicial review of a planned release of a public record is barred unless the record falls within Wis. Stat. § 19.356(2)(a)1.–3. (State's Br. 43–44; Journal Sentinel's Br. 33.) Those three subdivisions are the only instances where *this statute* provides a right to both pre-release

notice and judicial review. *Moustakis v. DOJ*, 2016 WI 42, ¶¶ 26–28, 368 Wis. 2d 677, 880 N.W.2d 142. But they are not the only instances where judicial review of a planned record release is permitted.

Judicial review of a decision to release a public record is permitted whenever "authorized in this section or *as otherwise provided by statute*." Wis. Stat. § 19.356(1) (emphasis added). So, review is authorized as provided in section 19.356(2)(a) or *by other statute*. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 40, 327 Wis. 2d 572, 786 N.W.2d 177 (lead opinion); *Teague v. Van Hollen*, 2016 WI App 20, ¶¶ 30–31, 367 Wis. 2d 547, 877 N.W.2d 379, *rev'd on other grounds sub nom. Teague v. Schimel*, 2017 WI 56, 375 Wis. 2d 458, 896 N.W.2d 286. As the Journal Sentinel recognizes, several statutes permit lawsuits seeking to block the release of records. (Journal Sentinel's Br. 28–29.)

The DJA is one such statute. Courts "liberally" administer the DJA. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 316, 529 N.W.2d 245 (Ct. App. 1995). When the Open Records Law

maintains nondisclosure protections "otherwise provided by law," courts view that language as protecting "established principles," including common-law principles. *See Seifert v. Sch. Dist. of Sheboygan Falls*, 2007 WI App 207, ¶ 28, 305 Wis. 2d 582, 740 N.W.2d 177. Before section 19.356 was enacted, Wisconsinites had a common-law right to use the DJA to challenge the release of a public record. (*See* Journal Sentinel's Br. 32–33.) This "firmly established" right applied with heightened force to government records concerning private-sector employees. *See Kraemer Bros., Inc. v. Dane Cty.*, 229 Wis. 2d 86, 101–02, 599 N.W.2d 75 (Ct. App. 1999).

Because section 19.356(1) does not unambiguously foreclose declaratory-judgment actions to block the release of a record, this Court should construe this statute to allow such actions. "A statute in derogation of the common law must be strictly construed so as to have minimal effect on the common law rule." *NBZ, Inc. v. Pilarski*, 185 Wis. 2d 827, 836, 520 N.W.2d 93 (Ct. App. 1994).

The Legislature simply enacted section 19.356 "to limit" two of this Court's decisions which had "held that *public employees* were entitled to notice and to seek pre-release judicial review of the response to records requests pertaining to them." *Moustakis*, 368 Wis. 2d 677, ¶ 27 (emphasis added). This statute entitles public employees to pre-release notice only regarding records concerning "disciplinary matter[s]" or "possible employment-related violation[s]." Wis. Stat. § 19.356(2)(a)1. Private-sector employees, by contrast, have a broad right to pre-release notice about any records with information "relating to" them. Wis. Stat. § 19.356(2)(a)3. By limiting *public* employees' right to *pre-release notice*, the Legislature did not limit *private-sector* workers' common-law right to *judicial review*.

The Associations' logic does not render any statutory language superfluous or meaningless. The purpose of section 19.356(1) is to make clear that *this statute* does not create a broad right to pre-release notice or judicial review. Subsection (2) limits the right to pre-release notice to just three categories of records

and narrows public employees' common-law right to pre-release notice.

Contrary to the Journal Sentinel's argument, the Associations' view does not render Wis. Stat. § 146.84(1)(c) superfluous with the DJA. Section 146.84(1)(c) allows a plaintiff to recover damages, even against the State. The DJA cannot be used to recover damages. *Putnam v. Time Warner Cable of Se. Wisconsin, Ltd. P'ship*, 2002 WI 108, ¶ 50 & n.16, 255 Wis. 2d 447, 649 N.W.2d 626.

The Associations are not using the DJA as an "end run" around section 19.356's specific, exclusive method of judicial review. (*See* State's Br. 48–49.) If a specific method of review "would not provide a party with adequate relief, a challenge may be properly made by commencing an action for declaratory relief." *Jackson Cty. Iron Co. v. Musolf*, 134 Wis. 2d 95, 101, 396 N.W.2d 323 (1986). Judicial review under section 19.356 is not exclusive because the Associations may not sue under this statute. Indeed, this statute eschews exclusivity by allowing judicial review "as

otherwise provided by statute." Wis. Stat. § 19.356(1). The Journal Sentinel seems to correctly recognize that the exclusivity rule does not apply here. (Journal Sentinel's Br. 35–37.)

Allowing this suit to proceed does not conflict with the rule that a specific statute controls over a more-general one. This rule of statutory construction "applies only when there is truly a conflict." *Pritchard v. Madison Metro. Sch. Dist.*, 2001 WI App 62, ¶ 15, 242 Wis. 2d 301, 625 N.W.2d 613. "Conflicts between statutes are not favored, and courts are to harmonize statutes to avoid conflicts when a reasonable construction of the statutes permits that." *Id.* The DJA can be harmonized with Wis. Stat. § 19.356(1), which allows a lawsuit challenging the planned release of a public record if the lawsuit is "otherwise provided by statute," such as the DJA.

There is no merit to the Journal Sentinel's undeveloped argument that the Associations' view would give more protection to a record subject than to a record requester. (Journal Sentinel's Br. 39–40.) A requester is entitled to an explanation of an

authority's decision to withhold a record and may sue to compel the release of a record. Wis. Stat. §§ 19.35(4)(b), 19.37(1)(a). A record subject, by contrast, has a right to pre-release notice in three limited situations. Wis. Stat. § 19.356(2)(a)1.–3. Without pre-release notice, a record subject cannot realistically sue to prevent the release of a record.

The State and the Journal Sentinel rely on an unpublished court of appeals decision, but that case supports the Associations' view. (State's Br. 46; Journal Sentinel's Br. 34–35.) In that unpublished decision, the court held that the plaintiff could not bring a declaratory-judgment action under Wis. Stat. § 19.356(1)'s "otherwise provided by statute" language because the statutes being invoked (Wis. Stat. §§ 905.04 and 146.81) did not cover the plaintiff's situation. (State's Br. 46.) Here, however, the Associations fall within the zone of interests of Wis. Stat. §§ 146.82 and 146.84 and thus may rely on the "otherwise provided by statute" language in section 19.356(1).

CONCLUSION

This Court should reverse the court of appeals' decision and remand this case to the circuit court for further proceedings.

Dated this 15th day of December 2021.

Respectfully Submitted,

Electronically signed by:

Scott E. Rosenow

Scott E. Rosenow
Wis. Bar No. 1083736
WMC Litigation Center
501 East Washington Avenue
Madison, Wisconsin 53703
(608) 661-6918
srosenow@wmc.org

Counsel for Plaintiffs-Respondents-Petitioners

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,977 words.

Dated this 15th day of December 2021.

Electronically signed by:

Scott E. Rosenow

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 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 copies of this brief filed with the court and served on all opposing parties.

Dated this 15th day of December 2021.

Electronically signed by:

Scott E. Rosenow