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SUPREME COURT OF WISCONSIN
Appeal No. 2021AP2190

MARK GIERL,

Petitioner-Respondent,

v.

MEQUON-THIENSVILLE SCHOOL DISTRICT,

Respondent-Appellant-Petitioner

Appeal from the Circuit Court of Ozaukee County, Judge Steven Michael Cain Presiding, Case No. 2020CV240

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

Applying the well-settled balancing test, the Circuit Court and Court of Appeals ruled that the Mequon-Thiensville School District failed to meet its burden of proving that any public interests in nondisclosure outweighed the strong presumption that the public interest favors disclosure of government records. Specifically, the lower courts ruled that the District, which had used an email distribution list to engage in ideological advocacy, could not withhold that distribution list from a public record request.

That decision is consistent with six decades of formal Attorney General guidance requiring government distribution lists to be made public. It is also consistent with multiple published Court of Appeals cases from the last decade requiring the release of personal email addresses. Nothing about this case represents an "unprecedented" or "illogical" "expansion of Wisconsin's Public Records Law" (*see* Pet. for Review, 9) in the law or suggests review by this Court is necessary.

Applying "past precedent" and "judicial precedent" (the District's own words and quotation marks, *see id.*, 8-9), the lower courts searched the record and concluded that the District failed to introduce any evidence that its speculated fears – that parents would stop providing email addresses to the District, interfering with efficient communication – were at all likely to occur should these addresses be released. In fact, when the District released its parent email list in 2015, it received no complaints, and no parents asked to be removed from emails. Because no harm to the public interest was likely to occur, the lower courts ruled, the balancing test favored disclosure. That decision is based on the particular facts of this case and does not warrant Supreme Court review.

SUPPLEMENTAL STATEMENT OF THE CASE

Supplemental Statement of Facts

The District obtains parents' email addresses through its student information system. (R. 25:5.) The District does not inform parents in writing what their email addresses will and will not be used for. In discovery, Gierl asked the District to provide copies of "[a]ll communications from You to Parents describing or explaining what the email addresses they provide will be used for during the last five school years." (*Id.*, 12.) The District responded that it "is not aware of any documents responsive to this Request," except that the Student/Parent Handbook states, "In order to provide appropriate educational services and programming, the

board of education must collect, retain and use information about individual students." (*Id.*, 13.)

The District submitted no admissible evidence that it "assure[s] parents their email addresses would not be disclosed unnecessarily." (*See* Pet. for Review, 18.) The day after the District filed its reply brief in support of summary judgment in the Circuit Court (*compare* R. 32 *with* R. 33), its lawyers received an unsworn letter from Gierl's neighbor, stating, as relevant, "I actively volunteered in the [District] . . . . When we asked parents for their emails for school communications, we promised to not share the addresses with anyone else." (R. 34:1.) The District thereafter filed an amended reply brief, adding argument based on that letter. (*See* R. 35:10-11.)

Affidavits submitted in support of summary judgment must "set forth such evidentiary facts as would be admissible in evidence." Wis. Stat. § Rule 802.08(3). An unsworn letter containing inadmissible double hearsay[1] would not be admissible in evidence. Wis. Stat. §§ (Rule) 908.01, 908.02. As the lower courts noted, the timing of the letter's submission raised questions about the letter's provenance and the information could not have been relied on by the District's custodian when denying Gierl's request. (R. 44:13-14 (P-App. 37-38); 2021AP2190, Slip Op., ¶11, n.5 (P-App. 9).) The admissible evidence here shows the District did not inform parents their email addresses would not be shared.

After the District provided a list of parent email addresses to a third party for use by other organizations in 2015 (*see* R. 25:6-7), no parents contacted the District in writing to express concern over sharing their email addresses with the District, request that the District not share their email addresses, or request that the District take their email addresses off the District's lists (*id.*, 13). Nor did any parent contact the District in that time period to inform the District that all or any part of the directory data for their children may not be released under Wis. Stat. § 118.125(2)(j). (*Id.*, 7.)

The District sent an invitation to the parent email addresses to attend a webinar titled "The Talk: A Necessary Conversation on Privilege and Race with Our Children." (R. 27:5-6.) That email expressly invited "members of our school

[1] The neighbor, Sarah Dwyer, was relating something she had said in the past, one layer of hearsay; the affiant, Attorney Jennifer Williams, was relating what Dwyer said she had said, a second layer of hearsay. (R. 33, 34.)

community to participate" in order to "[l]earn interventions to help become a powerful ally." (*Id.*)

"The Talk" was full of ideological and controversial messages designed to promote a certain world view – Marxist philosophies of collectivism over individuality, class struggle as reflected by race, and treating people based on the color of their skin. (R. 28:1, ¶¶5, 7.) "The Talk" promoted, both explicitly and implicitly, Critical Race Theory, books like *White Fragility* by Robin DiAngelo, and using "equity" as a justification to treat some people better than others because of the color of their skin. (*Id.*, 1-2, ¶¶8-10.)

"The Talk" went beyond merely spreading a message, actively encouraging participants to become radical activists. (*Id.*, 2, ¶12.) The presenters argued that the participants should strive to be "anti-racists," including being willing to engage in violence for the cause. (*Id.*, ¶¶13-14.) The presenters encouraged people to take action and speak up, teaching strategies to interrupt people who disagree and educate them about why they are wrong. (*Id.*, ¶¶15-17.) "The Talk" rarely discussed education in the classroom, continually calling on people to take action in the broader community. (*Id.*, ¶19.) In his concluding remarks, the District's Superintendent, Dr. Matthew Joynt, encouraged participants to "advocat[e] at the community-wide level for the change you see needed. It can't just happen in the hallways of the school." (*Id.*, ¶20.)

Supplemental Statement of the Case

The Court of Appeals' decision was heavily reliant on the oral ruling issued by the Circuit Court, quoting it at length. (Slip op., ¶¶8, 10, 13 (P-App. 4-8, 10.) The Court of Appeals began by summarizing the facts and then relating the standard of review for summary judgment under the Open Records Law. (*Id.*, ¶¶1-7 (P-App. 1-4).) In its legal analysis, the court first rejected the District's argument (also made here), that the parent email addresses do not relate to the "affairs of government and the official acts of those officers and employees who represent them." (*Id.*, ¶¶8-9 (P-App. 4-7).) The court quoted two pages of the oral ruling transcript where the Circuit Court explained at length how the District used its email distribution list to promote a variety of its interests and official business. (*Id.*, ¶8 (P-App. 4-7).)

The remainder of the opinion was dedicated to the balancing test. (*Id.*, ¶¶10-15 (P-App. 7-12).) The court related the District's argument that releasing the addresses would "chill[] . . . parents' willingness to provide their e-mail addresses

to the District and thus stifle District-parent communications." (*Id.*, ¶10 (P-App. 7-8).) The court concluded, again relying on and quoting the Circuit Court, that the District had not placed any evidence into the record to support that such a chilling effect would occur. (*Id.*) On the contrary, the court noted, when the District released those addresses in 2015, "no chilling effect was observed following that release." (*Id.*) The court contrasted this case to *Hempel v. City of Baraboo*, 2005 WI 120, ¶79, 284 Wis. 2d 162, 699 N.W.2d 551, where there was factual support for the custodian's concerns, and compared this case instead to *John K. MacIver Inst. v. Erpenbach*, 2014 WI App 49, 354 Wis. 2d 61, 848 N.W.2d 862, where it was mere "speculation" that any harmful effects would occur. (*Id.*, ¶11 (P-App. 8-9).)

The Court of Appeals then dismissed the District's concerns that releasing the list would result in "unwanted spam," agreeing with the Circuit Court that at most, that would be a minor inconvenience. (*Id.*, ¶13 (P-App. 10).) The court took issue with the District's complaint that Gierl wanted to spread his political ideology, noting that the District was already doing the same thing and could not use "taxpayer resources for an ideological or political monopoly." (*Id.*, ¶14 (P-App. 10-11).) The court concluded that the District had not met its burden of proving that the public interest in keeping the email addresses secret outweighed the strong public policy in favor of releasing them. (*Id.*, ¶15 (P-App. 11).)

I) THE OPEN RECORDS LAW

Wis. Stat. § 19.35(1)(a) and (b) provide that "any requester has a right to inspect any record" and "to make or receive a copy of a record." The first sentences of the Open Records Law declare why the State created such a broad right:

> In recognition of the fact that a representative government is dependent upon an informed electorate, it 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. Further, providing persons with such information is declared to be an essential function of a representative government and an integral part of the routine duties of officers and employees whose responsibility it is to provide such information.

Wis. Stat. § 19.31. "This statement of public policy in § 19.31 is one of the strongest declarations of policy to be found in the Wisconsin statutes." *Zellner v. Cedarburg Sch. Dist.*, 2007 WI 53, ¶49, 300 Wis. 2d 290, 731 N.W.2d 240.

The presumption in favor of access requires that the Open Records Law "shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business," and "only in an exceptional case may access be denied." Wis. Stat. § 19.31 (emphasis added). The Open Records Law must "be liberally construed to favor disclosure." *ECO, Inc. v. City of Elkhorn*, 2002 WI App 302, ¶23, 259 Wis. 2d 276, 655 N.W.2d 510. "[T]he legislature's well-established public policy presumes accessibility to public records . . . ." *Id.* "[T]he legislative presumption [is] that, where a public record is involved, the denial of inspection is contrary to the public policy and the public interest." *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 426-27, 279 N.W.2d 179, 184 (1979). Access is therefore presumed, and exceptions to access, including in balancing test cases, must be narrowly construed. *Jensen v. Sch. Dist. of Rhinelander*, 2002 WI App 78, ¶21, 251 Wis. 2d 676, 642 N.W.2d 638; *In re Zimmer*, 151 Wis. 2d 122, 131, 442 N.W.2d 578, 582 (Ct. App. 1989).

While the presumption of access is strong, it is not absolute. *Hempel*, 284 Wis. 2d 162, ¶28. "Two general types of exceptions may apply: statutory exceptions and common law exceptions." *Id.* If neither type of general exception applies, the court applies the balancing test to determine "whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Id.*

It is the authority's burden to justify any denial of a record request. *Dem. Party of Wis. v. DOJ*, 2016 WI 100, ¶9, 372 Wis. 2d 460, 888 N.W.2d 584. "The party seeking nondisclosure has the burden to 'show that public interests favoring secrecy outweigh those favoring disclosure.'" *Id.* (*quoting MacIver*, 354 Wis. 2d 61, ¶14) (internal quotation omitted). Public records are "subject to a strong presumption favoring their disclosure" and the burden lies with the party resisting disclosure "to rebut the strong presumption to the contrary." *C.L. v. Edson*, 140 Wis. 2d 168, 182, 409 N.W.2d 417, 422 (Ct. App. 1987); *see also Fox v. Bock*, 149 Wis. 2d 403, 417, 438 N.W.2d 589, 595 (1989) (placing the "burden of proof of facts" and "producing evidence" on the authority).

II) REASONS TO DENY THE PETITION

Under the considerations of Wis. Stat. § (Rule) 809.62(1r), this Court should not grant this Petition. The Petition presents no constitutional or court policy issue, the Court of Appeals' decision is not in conflict with other binding decisions, and

the decisions that it relies on are not ripe for re-examination. *See* § 809.62(1r)(a), (b), (d), (e).

A decision in this case would not help develop, clarify, or harmonize the law. *See* § 809.62(1r)(c). The balancing test has a long history, first expressed almost 60 years ago. *See State ex rel. Youmans v. Owens*, 28 Wis. 2d 672, 681-82, 137 N.W.2d 470, 474-75 (1965). It has not changed significantly in six decades, and the District is not asking the Court to change it.

The question of law in this case is not novel. *See* § 809.62(1r)(c)2. It asks whether the lower courts properly concluded that the District failed to meet its burden of proving that the public interests in nondisclosure outweighed the strong presumption that the public interest favors disclosure. The facts are novel, true, but the balancing test is a fact-specific inquiry, *see Hempel*, 284 Wis. 2d 162, ¶¶62-63, and the facts of nearly every case are novel. The novel facts were a good reason for the Court of Appeals to publish its decision for future guidance, *see* § 809.23(1)(a)2., but not a good reason for this Court to take the case. Furthermore, because of its fact-specific nature, this case does not involve a statewide issue. *See* § 809.62(1r)(c)1. Yes, other requesters will likely ask for other distribution lists from other government authorities – even school districts – but the balancing test in each case will come down to the facts specific to that situation.

This case involves "the application of well-settled principles to the factual situation," *see* § 809.62(1r)(c)1., and is "factual in nature," *see* § 809.62(1r)(c)3. Review is therefore not appropriate.

A) The Balancing Test Does Not Need Development, Clarification, or Harmonization

The balancing test is a bedrock of Open Records Law jurisprudence, first expressed in 1965 but based on principles dating back much further than that. In *Youmans* (which predates the modern statutory Open Records Law), this Court noted that a previous decision had recognized "that in certain situations a paper may in the public interest be withheld from public inspection," which were too numerous to list. 28 Wis. 2d at 680-81 (*quoting International Union v. Gooding*, 251 Wis. 362, 372-73, 29 N.W.2d 730, 736 (1947)). This Court then noted that there were public interests in favor of disclosing records as well, and that the two needed to be balanced against each other, such that the question becomes whether "permitting inspection would result in harm to the public interest which outweighs any benefit

that would result from granting inspection." *Id.* at 682. This Court cautioned that under that balancing test, "public policy favors the right of inspection of public records and documents, and, it is only in the exceptional case that inspection should be denied." *Id.* at 683.

This Court clarified the balancing test two years later in *Beckon v. Emery*, 36 Wis. 2d 510, 153 N.W.2d 501 (1967). Repeating its admonitions that public policy favors disclosure and secrecy should be the exception, it ruled that a custodian must explain the public policy reasons behind its denial – why release would harm the public interest. *Id.* at 516-18. "[T]here is an absolute right to inspect a public document in the absence of specifically stated sufficient reasons to the contrary." *Id.* at 518. This Court refused to permit the custodian to raise arguments not made in its denial, even though "a number of plausible and perhaps valid reasons for withholding the documents could have been specified." *Id.*

In 1979, this Court expressed the public policy favoring disclosure specifically as a "presumption" that the public interest favored release. *Newspapers*, 89 Wis. 2d at 427. That presumption can only be overcome if the custodian can "satisfy the court that the public-policy presumption in favor of disclosure is outweighed by even more important public-policy considerations." *Id.* That presumption was codified in the policy statement of the modern Open Records Law in 1982. 1981 Wis. Act 335, § 14; § 19.31 ("[The Open Records Law shall be construed in every instance with a presumption of complete public access . . . .") Because the modern Open Records Law expressly incorporated existing common law principles of record access, *see* § 19.35(1)(a), the balancing test became a fixture of modern record cases.

The balancing test has been in existence nearly 60 years. It has not meaningfully changed in that time. The minor clarifications made the test even more disclosure-friendly by expressing the policy in favor of disclosure as a presumption that must be overcome. *Youmans*, *Beckon*, and *Newspapers* are still frequently cited in balancing test cases. *See, e.g.*, *Madison Teachers, Inc. v. Scott*, 2018 WI 11, ¶17, 379 Wis. 2d 439, 906 N.W.2d 436; *Dem. Party of Wis. v. DOJ*, 372 Wis. 2d 460, ¶9; *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶56, 319 Wis. 2d 439, 768 N.W.2d 700; *Zellner*, 300 Wis. 2d 290, ¶43; *Hempel*, 284 Wis. 2d 162, ¶4; *Linzmeyer v. Forcey*, 2002 WI 84, ¶¶28, 31, 254 Wis. 2d 306, 646 N.W.2d 811; *New Richmond News v. City of Richmond*, 2016 WI App 43, ¶11, 370 Wis. 2d

75, 881 N.W.2d 339; *Portage Daily Register v. Columbia Co. Sheriff's Dep't*, 2008 WI App 30, ¶20, 308 Wis. 2d 357, 746 N.W.2d 525;

The District does not suggest that the balancing test needs to be developed, clarified, or harmonized. The law it seeks to apply is so well established that the District cited only one case in its entire Petition – a case setting forth the basic rule of the balancing test. (Pet. for Review, 17 (*quoting Dem. Party of Wis.*, 372 Wis. 2d 460, ¶9).) The District does not cite to any other cases about the balancing test. It does not try to show any conflict between balancing test cases, any confusion about the application of the balancing test, or any gaps left unresolved by the balancing test. It ignores a published decision applying the balancing test and requiring the release of email addresses. *See MacIver*, 354 Wis. 2d 61. It ignores a case requiring a school district to release the names and addresses of parents, *see Hathaway v. Joint Sch. Dist. No. 1, City of Green Bay*, 116 Wis. 2d 388, 342 N.W.2d 682 (1984), and a case requiring a school district to release the email addresses of school board applicants, *see Mastel v. Sch. Dist. of Elmbrook*, 2021 WI App 78, 399 Wis. 2d 797, 967 N.W.2d 176.[2]

What is there to develop, clarify, or harmonize if the balancing test is so well settled? The District is not asking this Court to exercise its law-developing powers. The District just wants a different result – or at least to keep these records secret as long as possible.

B) Resolution Depends on the Specific Facts of this Case

The question before the lower courts was whether the District met its burden with evidence to prove that the public interest in nondisclosure it identified – a chilling effect on parents providing their email addresses to the District, thus interfering with school-parent communication – outweighed the strong presumption that the public interest favors disclosure. The District claims it has no burden (*see, e.g.*, Pet. for Review, 9-10 ("the government authority in a Public Records Law case bears no burden of proof in these matters") (emphasis original), 19-20 ("the authority in a Public Records Law case bears no burden of proof in these matters") (emphasis original)), but the District is wrong.

[2] Although neither *Hathaway* nor *Mastel* applied the balancing test, they demonstrate a history of releasing the kind of information the District thinks it would be dangerous to release.

The authority has the burden to justify denying any record request. *Dem. Party of Wis. v. DOJ*, 372 Wis. 2d 460, ¶9. "The party seeking nondisclosure has the burden to 'show that public interests favoring secrecy outweigh those favoring disclosure.'" *Id.* (*quoting MacIver*, 354 Wis. 2d 61, ¶14) (internal quotation omitted). Public records are "subject to a strong presumption favoring their disclosure" and the burden lies with the party resisting disclosure "to rebut the strong presumption to the contrary." *C.L.*, 140 Wis. 2d at 182; *see also Fox*, 149 Wis. 2d at 417 (placing the "burden of proof of facts" and "producing evidence" on the authority).

But to "show" that public interests in nondisclosure outweigh those favoring disclosure takes evidence, not mere allegations. *See MacIver*, 354 Wis. 2d 61, ¶¶23, 26, 29, 31 (rejecting allegations of public interests in nondisclosure unsupported by evidence). In performing the balancing test, a court must "'make a factual determination supported by the record of whether the documents implicate the public interests in secrecy asserted by the custodians.'" *Mayfair Chrysler-Plymouth, Inc. v. Baldarotta*, 162 Wis. 2d 142, 157, 469 N.W.2d 638, 643 (1991) (*quoting Milwaukee Journal Sentinel v. Call*, 153 Wis. 2d 313, 317, 450 N.W.2d 515, 516 (Ct. App. 1989). When a government authority asserts that release of records would create negative consequences, it must prove that those consequences are reasonably probable with record evidence, and may not rely on speculation and opinion, even by an expert. *MacIver*, 354 Wis. 2d 61, ¶¶14, 23, 26, 29; *see also C.L.*, 140 Wis. 2d at 184 (rejecting an expert's opinion that release would create a "potential" for harm, because "there is no factual foundation shown to support the expert's conclusion"). "[T]he custodian has the burden of producing evidence and persuading the finder of fact that the proffered facts are true." *Fox*, 149 Wis. 2d at 417.

The balancing test is fact-specific, performed on a case-by-case basis. *Hempel*, 284 Wis. 2d 162, ¶¶62-63 (on a "case-by-case basis," the balancing test looks at whether "the facts are such that the public policy interests favoring nondisclosure outweigh the public policy interests favoring disclosure") (emphasis added). "[T]he balancing test must be applied with respect to each individual record." *MJS v. DOA*, 319 Wis. 2d 439, ¶56 (*citing Wis. Newspress, Inc. v. Sch. Dist. of Sheboygan Falls*, 199 Wis. 2d 768, 780, 546 N.W.2d 143, 147 (1996)). The uniqueness of each case makes review by this Court unhelpful. The next case to come along will involve distinct facts and the parties will analogize to the existing balancing test cases just like they always have. This case will not result in a blanket

rule that decides whether schools must always or should never release parent email addresses. *See Hempel*, 284 Wis. 2d 162, ¶62 ("An open records analysis under paragraph (a) is rarely subject to blanket exceptions or bright line rules."). Whether the District met its burden here to prove that the harm to the public interest it identified would be "reasonably probable," *see MacIver*, 354 Wis. 2d 61, ¶¶23, 25-26, will not determine whether future custodians meet their burden.

The District did not meet its burden here. All four judges to review that question agree. Again, the harm alleged by the District was to the public interest in protecting the efficiency of communication between schools and parents. (R. 2:12 (P-App. 24).) The District alleged that, if the addresses were released, parents would stop providing their addresses, making communication more difficult. (*Id.*; *see also* R. 15:3-4, 9, 21; R. 35:3.) Both lower courts found that claim to be mere speculation. (R. 44:12-13 (P-App. 36-37; Slip op., ¶¶10-11 (P-App. 7-9).)

The District presented no evidence that a single parent would stop providing an email address, much less that parents would do so in significant enough numbers to cause real concern. The District presented no evidence that it lacked other means of communicating with any parent who refused to provide an email address. The District presented no expert testimony or evidence from the experience of other schools.

The best the District can do is share a recent letter from one parent who used to volunteer for the District, who said she would tell parents their email addresses would not be shared. Aside from being inadmissible, the letter is irrelevant. It was not something the custodian could have considered when denying Gierl's request, and furthermore it did not say anything about parents refusing to provide email addresses. (*See* R. 44:13-14 (P-App. 37-38); Slip Op., ¶11, n.5 (P-App. 9).)

The District cannot exempt itself from the Open Records Law by telling people it will not share their information. To be enforceable, an assurance of confidentiality must meet a demanding test the District never tried to meet. *See Mayfair*, 162 Wis. 2d at 168.[3]

The District tries to shift attention away from its failure to meet its burden by attacking the other side of the equation – the public interest in disclosure. The

[3] The test requires: (1) a clear pledge of confidentiality; (2) made in order to obtain information; (3) without which pledge the information would not have been provided; and (4) satisfaction of the balancing test.

District repeatedly claims that the records Gierl seeks do nothing to "further the objective of showing the affairs of government and/or the official acts of those officers and employees who represent the public." (*See, e.g.*, Pet. for Review, 5, 7, 9-10, 15-16, 18-19.)

But the District ignores that this Court has already rejected that argument, concluding that the legislative declaration of policy establishes a "strong, legislatively-created presumption in favor of disclosure" of all public records. *MJS v. DOA*, 319 Wis. 2d 439, ¶59. The "public interests are independent of [record subjects'] status as private persons." *C.L.*, 140 Wis. 2d at 182. "[A court's] determination does not hinge on whether there is some interest sufficient to justify disclosure. The legislature has already answered that question." *MJS v. DOA*, 319 Wis. 2d 439, ¶59.

In the end, this case is about applying the well-established balancing test to somewhat new facts. What the District calls "judicial creep" is just how common law works – courts analyze new situations by analogizing them to the most similar prior cases. This case is not about the underlying legal issues – even the District admits that the Court of Appeals relied on "judicial precedent" and "past precedent." (*See* Pet. for Review, 8-9.) The District's arguments are not about law, they are based entirely on the specific circumstances of this case. This is a textbook example of the routine application of existing precedent, not requiring review by this Court.

C) The Court of Appeals' Decision Is Consistent with Precedent and Formal Attorney General Opinions

The District argues that the Court of Appeals' opinion is a "broad, unprecedented expansion of Wisconsin's Public Records Law far beyond the Legislature's intent." (*Id.*, 12.) However, the lower court's decisions are consistent with established cases and formal Attorney General opinions, none of which the District acknowledges in its Petition.

This case is consistent with *MacIver*, which required releasing email addresses to a requester. There, State Senator Jon Erpenbach redacted the names and email addresses of people who had sent him emails regarding Act 10. 354 Wis. 2d 61, ¶¶1-4. Erpenbach argued that under the balancing test, the risk to the senders' safety and privacy, as well as a chilling effect on communications, justified redacting that information. *Id.*, ¶5. The Court of Appeals rejected both arguments. *Id.*, ¶¶1, 32. With regard to safety and privacy, Erpenbach argued that the "nuclear

environment" surrounding Act 10 made it likely people would face threats, harassment, and reprisals if they were identified. *Id.*, ¶¶22-23. While the court acknowledged the legitimacy of that concern, it held that without a specific showing that such risks were not just possible but reasonably probable, they could not form the basis for denying a request. *Id.*, ¶¶23-26 (*citing Doe v. Reed*, 561 U.S. 186 (2010) (requiring release of names and home addresses of signers of a petition to repeal a controversial same-sex marriage law)). With regard to the chilling effect, Erpenbach argued that people would be less likely to communicate with government officials if they knew their identities and email addresses would be released. *Id.*, ¶27. The court rejected that argument as well, concluding that there was "limited reason" to conclude that any chilling would occur. *Id.*, ¶¶28-31.

This case runs parallel to *MacIver*. Both requesters sought email addresses. Both authorities claimed a chilling effect justified withholding those addresses. Both authorities offered affidavits – lacking factual foundation – with opinions supporting their arguments. Both authorities offered insufficient facts to support their claimed public interests in nondisclosure. The lower courts correctly analogized this case to *MacIver* and concluded that case's application of the balancing test required release of the email addresses.

The outcome in this case is consistent with other cases that have required school districts to release parent contact information and private email addresses, albeit not under the balancing test. In *Hathaway*, this Court required a school district to release parent names and addresses. 342 Wis. 2d at 390. In *Mastel*, the Court of Appeals required a school district to release the names, addresses, phone numbers, and email addresses of applicants for a school board position. 399 Wis. 2d 797, ¶¶13-19. Although neither case applied the balancing test, they demonstrate a history of releasing the kind of information the District wants to hide.

The Court of Appeals' ruling is also consistent with formal Attorney General opinions. The Attorney General is statutorily charged with interpreting the Open Records Law, and his opinions, while not binding on courts, are given persuasive value. *Milwaukee Journal Sentinel v. City of Milwaukee*, 2012 WI 65, ¶41, nn. 17-19, 341 Wis. 2d 607, 815 N.W.2d 367. In 61 OAG 297 (R. 7:31-32), the Attorney General concluded that "a list of students who are on a waiting list for a particular program" should be disclosed. In 68 OAG 68 (R. 7:33-36), the Attorney General concluded that "mailing lists," including lists of "conservation and environmental

organizations, citizen committees for resource management and environmental purposes and subscriber lists to [DNR publications]" should be disclosed.

The Attorney General has more recently addressed email distribution lists, concluding that they, too, should be released "absent a specific statutory exception or a showing of particularized harm to the public interest from release of such records." 02 OAG 03, 5 (R. 7:41) (emphasis added). That formal opinion first reviewed the two earlier opinions and "considerable precedent" requiring the disclosure of names and street addresses. *Id.*, 3-4 (R. 7:39-40). Finding emails analogous to street addresses, the Attorney General concluded distribution lists of email addresses should be treated like street addresses. *Id.*, 4-5 (R. 7:40-41).

The District has consistently relied on one informal letter from an Assistant Attorney General. (*See* Pet. for Review, 6, 8-10, 14, 18-19.) That letter's application of the balancing test was cursory, assumed underlying facts not present in this case, and predated *MacIver*, which rejected one of the letter's key premises. The letter's assertion that "most people expect that when they divulge their personal email account addresses to someone, that person will not re-disclose it to a third party without prior notice or consent" is contradicted by *MacIver*'s recognition that people generally understand that information provided to the government – including contact information – is subject to transparency laws. 354 Wis. 2d 61, ¶29. More importantly, the letter fails to acknowledge the formal Attorney General opinions supporting the release of lists of email addresses in government possession as well as other distribution lists.

III) THE DISTRICT DISTORTS THE COURT OF APPEALS DECISION

If some of the District's criticisms of the Court of Appeals decision seem convincing at first glance, a look at what the court actually wrote is necessary. The District presents a distorted version of that ruling and then claims it needs correcting. But that version falls apart at first glance.

Contrary to the District's claims, the Court of Appeals did not "largely ignore[]" the informal Assistant Attorney General letter. (*See* Pet. for Review, 6, 10, 20.) The court explained the District's reliance on the letter (Slip op., ¶2 (P-App. 2), pointed out that if the legislature had wanted to exempt private email addresses, it could have done so in the pupil records or public records law (*id.*, n.1),

and agreed with Gierl that the chilling effect predicted by the letter was unlikely to occur (*id.*, ¶13 (P-App. 10)).

Contrary to the District's claim, Gierl did not ask the Court of Appeals to "ignore the balancing test in its entirety." (*See* Pet. for Review 9.) All three of Gierl's briefs in this case argued at length why the balancing test favored disclosure. (*See* R 29; R. 36; Ct. App. Resp. Br., Mar. 18, 2022.) Nor did the Court of Appeals ignore the balancing test. After setting forth the facts and the standards of review, the court spent the rest of its opinion applying the balancing test. (Slip op., ¶¶8-15 (P-App. 4-11).)

Contrary to the District's claim, Gierl did not "ask[] the Court of Appeals to wholly ignore the purpose and intent of the Public Records Law." (*See* Pet. for Review 9.) Gierl has consistently argued that this Court's decision in *Milwaukee Journal Sentinel v. Department of Administration* establishes that all public records further the purpose and intent of the Open Records Law, and why these particular records show the affairs of government and the official acts of those officers and employees who represent the public. (*See* R. 29:18-22; R. 36:4-5; Ct. App. Resp Br., Mar. 18, 2022 at 7, 29-31.) The Court of Appeals included the legislative policy statement from Wis. Stat. § 19.31 and spent over two pages explaining how release furthered the purpose and intent of the Open Records Law. (Slip op., ¶¶7-9 (P-App. 4-7).)

Contrary to the District's claims, the Court of Appeals never required the District to show that the District was harmed. (*See* Pet. for Review, 5, 17-20.) The District has argued at length (both here and in the Court of Appeals, *see* Ct. App. App. Br., Feb. 22, 2022, at viii-ix, xviii-xix, 12-13, 18, 20, 38, 40[4]) that the courts in this case have faulted the District for not proving that the District was harmed.[5] That claim is false. The Court of Appeals explained the argument the District was making – that release would harm the public interest by interfering with school-parent communications – and then looked for proof of that specific harm. (Slip op.,

[4] PDF page numbers 8-9, 19-20, 33-34, 39, 41, 59, 61.

[5] Even if the lower courts had required the District to show harm to itself, that would not have been a problem, so long as it had been properly analyzed as a facet of harm to the public interest more broadly. A harm to the government authority can be considered as a subset of harm to the public interest, just like harm to a record subject can be considered as a subset of harm to the public interest. *Cf.*, *Linzmeyer*, 254 Wis. 2d 306, ¶31 ("[T]he public interest in protecting the reputation and privacy of citizens . . is *not* equivalent to an individual's personal interest in protecting his or her own character and reputation.") (emphasis original).

¶¶10-11 (P-App. 7-9).) The court never asked the District to prove that it would be harmed. The court found the District had presented no evidence of harm to the public interest – no evidence that parents would stop providing their email addresses or that communicating with parents would be inhibited. (*Id.*) With no evidence of the supposed chilling effect, the public interest in avoiding a nonexistent harm was far too low to outweigh the strong public interest in disclosure. (*Id.*, ¶¶10-11, 15 (P-App. 7-9, 11.)

CONCLUSION

This is a garden variety balancing test case. The Court of Appeals applied longstanding, unquestioned precedent to a factual situation whose precise contours had not been previously addressed. The District is not asking this Court to exercise its law-developing powers. The District just wants a different result – or at least to delay the inevitable.

The lower courts correctly ruled that the District failed to meet its burden of proving that the public interest in nondisclosure of these email addresses outweighed the strong presumption that public interest favors disclosure. Gierl respectfully requests that this Court deny this Petition so that these records can finally be released.

Dated this January 19, 2023

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in ss. 809.19(8)(b) and (bm) for a brief produced with proportional serif font. The length of this brief is 6,035 words, calculated using the Word Count function of Microsoft Word 2016.

Dated: January 19, 2023

Electronically signed by Thomas C. Kamenick
Thomas C. Kamenick

CERTIFICATE OF COMPLIANCE WITH SECTION 809.19(12) (2019)

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) (2019). 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.

Dated: January 19, 2023

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