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December 2, 2015

Honorable Judges, Higginbotham, Sherman, and Blanchard
Wisconsin Court of Appeals
110 East Main Street, Suite 215
P.O. Box 1688
Madison, WI 53701-1688

Re: *Teague, et al. v. Van Hollen, et al.*
Appeal 2014AP002360

Dear Judges Higginbotham, Sherman and Blanchard

At oral argument on November 18, 2015, Defendants argued that this litigation is barred by Wis. Stats. § 19.356. Because the issue was not raised in the Circuit Court, or briefed in the Department's response brief on appeal, the Court ordered supplemental briefing on the issue.

Defendants argument has three fatal defects. First, under existing state and federal precedent, a state statute cannot bar litigation to vindicate federal constitutional rights. Second, this action for declaratory and injunctive relief is not, for the purposes of Wis. Stats. § 19.356(1), an action for "judicial review." Third, for the successful challengers who have demonstrated their innocence, this action is not only about "the decision of an authority to provide a requester with access to a record;" it is also about Defendants' refusal to release its records when a request for information is made about successful challengers. Wisconsin Stat. § 19.356(1) thus does not apply.

The Statute

Wis. Stats. § 19.356(1), created by 2003 Wisconsin Act 47, §4, states in full:

> *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.* (Emphasis added)

The Department argues that the "no judicial review" clause prohibits all litigation seeking to prevent disclosure unless the litigation is expressly authorized in §19.356 or some other state

statute. Teague argues that position is contrary to existing precedent, and depends upon an interpretation of the statutory language that must be rejected because it leads to absurd results.

I. A state statute restricting access to state courts has no effect on the enforcement of a right protected by the Constitution and laws of the United States enforced through 42 U.S.C. § 1983.

A state statute cannot bar a § 1983 action to enforce a federal constitutional right. *Felder v. Casey,* 487 U.S.131 (1988). Nor can a state law limit the kinds of § 1983 claims that may be brought in the state courts of general jurisdiction. *Haywood v. Drown,* 556 U.S. 729, 129 S.Ct. 2018, 173 L.Ed.2d 920 (2009). *See also, Casteel v. Vaade,* 167 Wis.2d 1, 481 N.W.2d 476 (1992)(applying *Felder* to overrule *Kramer v. Horton,* 128 Wis. 2d 404, 383 N.W.2d 54 (1986) that state judicial doctrine of exhaustion of administrative remedies could be applied to § 1983 claims); *Gillen v. City of Neenah,* 219 Wis.2d 806, 819-20, ¶¶ 21-23, 580 N.W.2d 628 (1998). Whatever Wis. Stats. § 19.356(1) means, it can have no effect on the federal constitutional claims.

II. This is not an action for "judicial review" within the meaning of Wis. Stat. § 19.356(1).

The term "judicial review" in Wis. Stats. § 19.356(1) is ambiguous. The statute does not define the phrase and it has at least two potential meanings. The phrase "judicial review" could have its common meaning in legal proceedings: one type of judicial proceedings on a limited record, usually with a short statute of limitations and a limited number of potential participants. In this narrow construction, those entitled to mandatory notice have an exclusive judicial review procedure, § 19.356(4). They are denied all other "judicial review." Defendants argue for a much broader construction, suggesting "judicial review" means "all litigation of any type" by anyone regarding the decision to disclose. The narrow construction is appropriate because (1) it reflects the common meaning of "judicial review," (2) it is supported by the context, and (3) the broad construction would lead to absurd results.

A. "Judicial review" has a common meaning.

Commonly understood, the phrase "judicial review" refers to a limited judicial proceeding such as one reviewing a final State agency decision under Wis. Stats. § 227.53 or a final local government agency decision under Wis. Stats. § 68.13, or, in the absence of some specific statutory review procedure, common law *certiorari.* See, *e.g. Tomaszewski v. Giera,* 2003, WI App 65, ¶ 17, 260 Wis. 2d 569, 659 N.W.2d 882. A state tort damages action against a government employee, following the notices required by Wis. Stats. §§ 893.81 or 893.82, is not commonly referred to as an action for "judicial review," even though it is a judicial

proceeding and it does "review" the conduct of a government employee. Similarly, an action against a state agency for injunctive relief under Chapter 813 arguing that an environmental impact statement exemption violates the State Constitution is not an action for "judicial review." *Wisconsin Brewers Baseball Club v. Wisconsin Department of Health and Social Services,* 130 Wis. 2d 79, 89, 387 N.W.2d 254 (1986). In short, not all invocations of the power of the judiciary to "review" a government decision are "judicial review." The term should be given its common meaning of one type of litigation contesting a government agency's decision-making. The ban in § 19.356(1) on other "judicial review" is, thus, not a ban on all other types of litigation.

B. The syntax and context of the "judicial review" provision supports the narrow construction of the phrase.

The relevant provision of Wis. Stat. § 19.365(1) is a single sentence of two clauses in which notice and "judicial review" are conjoined. The Joint Legislative Prefatory Note to 2003 Wisconsin Act 47 (attached) similarly links mandatory notice and judicial review.

> This bill partially codifies *Woznicki* and *Milwaukee Teachers* ... appl[ying] the rights afforded by *Woznicki* and *Milwaukee Teachers,* only to a defined set of records pertaining to employees residing in Wisconsin. As an overall construct, records relating to employees under the bill can be placed in the following 3 categories:
>
> > 1. Employee related records that may be released under the general balancing test without providing a right of notice or judicial review ... ;
> >
> > 2. Employee related records that may be released under the balancing test *only* after a notice of impending release and the right of judicial review have been provided ....
> >
> > 3. Employee-related records that are absolutely closed to public access ....

Significantly, the Note always links the terms "judicial review" and "mandatory notice," just as the syntax of § 19.365(1) links both in a single sentence.

As the Note makes clear, the legislature's "partial codification" of *Woznicki* and *Milwaukee Teachers* limits who is entitled to prior notice, and then limits the means those people have of contesting a proposed release. *See* Wis Stats. § 19.365(3) and Wis. Stats. § 19.365(4). The fact that the Judicial Council comment describes the "construct" as related to "employee-related" records, indicates the legislation was "codifying" a specific time limited procedure for

the class of persons involved in *Woznicki* and *Milwaukee Teachers* – government employees. Those persons are, by statute, entitled to prior notice; they also have an exclusive judicial remedy, triggered by the §19.356(2) notice, conditioned on the §19.356(3) notice of intent to sue, and subject to the10 days statute of limitations in § 19.356(4). In the only published appellate case construing the law, the Court of Appeals also linked the mandatory notice and the "right of action provisions" of § 19.365. *Local 2489, AFL-CIO v. Rock County,* 2004 WI App. 210, ¶¶ 3,4, 277 Wis. 2d 208, 689 N.W.2d 644.

Nothing in the language of 2003 Wisconsin Act 42 or the detailed Judicial Council Note suggests the legislature intended Wis Stats. § 19.365 to repeal the *de novo* common law balancing test or the public interest in protecting innocent citizens' reputations. That **public** interest was recognized long before *Woznicki See Newspapers, Inc. v. Breier* 89 Wis. 2d 417, 430, 433, 279 N.W.2d 179, 185, 187 (1979); *Armada Broadcasting v. Stirn,* 183 Wis. 2d 463, 516 N.W.2d 357 (1994) (record subject has right to intervene of right in requester's litigation). That public interest in protecting private reputations continued to be recognized after 2003 Wisconsin Act 47 became law. *See, e.g., Zellner v. Cedarburg School District,* 2007 WI 53, ¶¶5, 49-52, 300 Wis. 2d 290, 731 N.W.2d 240.

Based on the "contextualized text" and the Note, Wis Stats. § 19.365 (1) must be construed as applying only to record subjects entitled to pre-disclosure notice. To construe the statute more broadly would be to find that, in "partially codifying" *Woznicki,* the legislature intended to eliminate courts' authority to apply the *de novo* common law balancing test in all open records cases other than those involving public employees.

C. The Department's interpretation conflicts with other provisions of 2003 Wisconsin Act 47, yielding absurd results

Defendants' argument yields absurd results clearly not contemplated by the legislature because they are directly contrary to other provisions of 2003 Wisconsin Act 47. Act 47 also created some specific disclosure prohibitions. See, § 7 of Act 47 (attached), creating Wis. Stat. § 19.36(10)-(12). These subsections prohibit disclosure of any employee's name, address, Social Security Number, and test scores. If Defendants' interpretation of Wis. Stats. § 19.356(1) is correct, no employee of an authority can to prevent disclosure of information that legislature explicitly forbade being disclosed. They cannot bring an action for judicial review under Wis. Stats. § 19.356(4) because they are not entitled to the notice required by § 19.356(2)(a)1, or 2, or 3. Perhaps employees of employers "other than an authority" are entitled to such notice under § 19.356(2)(a)3, but employees of an authority are not within that exception. Government employees' home addresses, Social Security Numbers and test scores are not the result of a disciplinary matter under § 19.356(2)(a)1 or a subpoena under §19.356(2)(a)2. If the Defendants' interpretation of § 19.356(1) is correct, those government employees have no method to protect their Social Security Number or balance disclosure of their home address. That result is absurd.

III. This action is not simply a "judicial review of the decision of an authority to provide a requester with access" within the meaning of Wis. Stats. § 19.356(1), because it is also an action to compel disclosure of accurate information in response to a nam-based record request about plaintiffs' names and plaintiffs' dates of birth.

This case is not simply about the release of Parker's record when a request is made for Teague's record. It is also about the Defendants' refusal to grant "access" to Teague's record in response to a request for a background check using Teague's name and date of birth. The denial of access to Teague's database "record" of innocence or to the physical paper records of his successful challenge cannot possibly be shoehorned into the language precluding judicial review of the "decision to provide a requester with access" because it is not a decision to provide "access." Rather, the decision denies access to both database records and paper records that are, in fact, responsive to the request about Teague's name and Teague's date of birth.

That decision to withhold access is an element of both the federal constitutional claims and the open records statutory claim. With respect to Teague's Due Process claim, the "stigma" comes from the fact that the record produced in response to background check requests on Teague is not about Teague. The "plus" comes from Defendants' refusal to provide "access" to the records that **are** about Teague: a clean database credential of "no record" and the parper records of the successful challenge and identity theft. Similarly, on the Equal Protection and Substantive Due Process constitutional claims, it is the refusal of the Department to grant "access" to the truthful records in its possession that creates the constitutional injury.

The open records common law balancing test claim is also about Defendants' refusal to grant "access" to information about innocence. Defendants' justify "globally" denying access to the records in their possession showing plaintiffs are innocent and the victims of identity theft on the mere speculative possibility some criminal might dupe some requestor. Defendants' second justification, raised at oral argument, is that Defendants "interpret" the record request as a request for a search only of its electronic database by whatever algorithm the Defendants choose, and not for other easily identfied records. Because that "interpretation" involves a decision NOT to provide access, rather than "the decision of an authority to provide a requester with access to a record, Wis. Stat. § 19.356(1) does not forbid this litigation.

Sincerely,

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cc: Asst Attorney General Russomanno