STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2019AP96

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FRIENDS OF FRAME PARK, U.A.,

PLAINTIFF-APPELLANT,

v.

CITY OF WAUKESHA,

DEFENDANT-RESPONDENT-PETITIONER,

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REVIEW OF A DECISION OF THE COURT OF APPEALS, DISTRICT II, REVERSING A JUDGMENT OF THE CIRCUIT COURT FOR WAUKESHA COUNTY, CASE NO. 17-CV-2197, THE HON. MICHAEL O. BOHREN, PRESIDING

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# NEWS MEDIA *AMICI'S* BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

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GODFREY & KAHN, S.C.
James A. Friedman, State Bar No. 1020756
Daniel C.W. Narvey, State Bar No. 1104663
1 East Main St., Suite 500
Madison, WI 53703
(608) 257-3911
jfriedman@gklaw.com
dnarvey@gklaw.com

*Attorneys for Non-Parties*
*the Wisconsin Broadcasters Association, the*
*Wisconsin Freedom of Information Council, the*
*Wisconsin Newspaper Association, the Wisconsin*
*Transparency Project, and the Reporters Committee*
*for Freedom of the Press*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page**

### CASES

**STATUTES**

## OTHER AUTHORITIES

## INTRODUCTION

Before the Court's decision in this appeal, Wisconsin appellate courts used a catalyst test to determine whether a public records requestor had "prevailed in whole or in substantial part," under Wis. Stat. §19.37(2) and, therefore, was entitled to recover reasonable attorney fees and costs. In its decision, however, the Court adopted a new test: whether there was a "judicially sanctioned change in the parties' legal relationship." Of course, it is this Court's prerogative—in fact, its job—to interpret the language the Legislature chooses to use in statutes. Here, however, neither lower court considered this new test, and the parties did not have the opportunity to brief it. The Plaintiff now moves the Court to reconsider its decision and provide the parties that opportunity. The News Media *Amici* support that motion.

## ARGUMENT

### I. The Court Should Permit Full Briefing on the Appropriate Test for Prevailing in Whole or Substantial Part, Rather Than Adopting a Sweeping Change to Wisconsin Law Without Full Party Participation.

The issue before this Court, as presented by the Petition for Review, the briefing of the parties, and the Court of Appeals decision, was whether Friends of Frame Park, U.A. ("Friends") "prevailed" under Wis. Stat. § 19.37(2)(a) and, hence, is entitled to recover its attorney fees and costs. In its July 6, 2022 decision, the Court changed decades of Wisconsin law on fee-shifting in open records cases, adopting a test for deciding whether a party "prevailed" that was never advanced or briefed by either of the parties, nor addressed by either of the lower courts, at any point in the litigation. The Court can and should correct this procedural misstep by allowing the parties to fully brief the question that the Court treated as dispositive: whether a party has "prevail[ed] in whole or in substantial part," under Wis. Stat. § 19.37(2)(a), when the litigation has a causal nexus with the government's release of records (the "catalyst" test), as Wisconsin courts long have held, or whether there must be a judicially sanctioned change in the parties' legal relationship, as the Court held here.

This Court consistently has recognized that while it has discretion to address issues *sua sponte*, this power should be used sparingly and only in limited circumstances. In *Bartus v. Wisconsin Dep't of Health & Soc. Servs.*, 176 Wis. 2d 1063, 1071–73, 501 N.W.2d 419 (1993), the Court observed:

> We agree that briefs provide valuable guidance to courts grappling with the task of resolving difficult questions.
>
> Declining to adopt a per se rule requiring courts to permit the submission of additional briefs whenever an issue is raised *sua sponte*, we nevertheless emphasize this court's preference for requesting briefs whenever they might aid the court.... We therefore urge the courts to exercise caution when determining an issue *sua sponte* without the assistance of supplemental briefs and to ask for briefs unless the matter is quite clear.

*Id.* at 1072-73.

As the Court explained, certain issues, like questions of a jurisdictional or procedural nature, or those relating to "quite obvious legal defects," would not necessarily benefit from supplemental briefing. On the other hand:

> [s]tatutory interpretation is a complex task, requiring courts to weigh many variables before arriving at a balanced and reasonable construction of legislative intent. Unlike legal defects that can frequently be resolved without assistance from litigants, statutory interpretation is an area in which the courts usually should be willing to delay their determination until they have the assistance of briefs.

*Id.* At 1073; *see Oddsen v. Henry*, 2016 WI App 30, ¶ 42, 368 Wis. 2d 318, 878 N.W.2d 720 ("While we have the power to raise an argument *sua sponte*, it is a power we exercise sparingly, and for good reason. The rule of law is generally best developed when issues are raised by the parties and then tested through adversarial briefs. Even when a court sees a dispositive issue that the parties neglected, intentionally or otherwise, the better course is to permit the parties additional briefing.") (citations omitted); *see also United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring) ("The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases,

distinguishes our adversary system of justice from the inquisitorial one.").

This case, like *Bartus*, involves a challenging question of statutory interpretation. The statutory interpretation question presented by this case is neither clear nor obvious, nor does it relate to jurisdiction or procedure. To the contrary, the Court's ruling overturned long-established Wisconsin law and impacted the substantive rights, not only of the parties to this case, but of all Wisconsin citizens who may seek the disclosure of records from the government in the future.

Furthermore, this decision likely overturns the use of the catalyst test under other fee-shifting provisions in Wisconsin statutes, thus impacting other parties and interest groups who had no notice or opportunity to participate in this case because the dispositive issue was never argued by the parties or raised below. *See, e.g.*, *Hartman v. Winnebago Cnty.*, 216 Wis. 2d 419, 437, 574 N.W.2d 222 (1998) (catalyst theory applicable in civil rights case under 42 U.S.C.

§ 1983); *Cmty. Credit Plan, Inc. v. Johnson,* 228 Wis. 2d 30, 35, 596 N.W.2d 799 (1999) (adopting catalyst test for fee-shifting under Wisconsin Consumer Act); *Kilian v. Mercedes-Benz USA, LLC*, 2011 WI 65, ¶ 41, 335 Wis. 2d 566, 799 N.W.2d 815 (applying catalyst test for fee-shifting under Wis. Stat. § 218.0171(7)). The dramatic reach of this decision is another compelling reason to order full briefing regarding the appropriate test for recovering attorney fees under § 19.37(2) and other fee-shifting statutes.

## II. Without the Benefit of Party Briefing, the Court Overlooked Key Precedent and Historical Context.

The Court was right to decide this case based on a textual analysis of Wis. Stat. § 19.37(2)(a). But without hearing from both sides on the precise issue, the Court may have misapplied this textual analysis. As the parties and *amici* will have the opportunity to demonstrate, if the Court orders full briefing, a proper textual analysis – based on the plain meaning and original understanding of the relevant language at the time of the statute's enactment – supports the

"causal nexus" or "catalyst" test to determine whether a party is entitled to recover attorney fees as a prevailing party.

As the Court explained in the decision in this case, "[w]hen the legislature uses a legal term of art with a broadly accepted meaning—as it has here with 'prevails' in § 19.37(2)(a)—we generally assume the legislature meant the same thing." *Friends of Frame Park, U.A. v. City of Waukesha*, 2022 WI 57, ¶ 23, 976 N.W.2d 263. The trouble with the Court's logic in its decision is timing. Section 19.37(2)(a) was enacted in 1982. Under the textual approach embraced by this Court, the Court looks to the broadly accepted meaning of a term at the time the statute was enacted – here, in 1982. *See State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 40, 271 Wis. 2d 633, 681 N.W.2d 110 ("Generally when legislative intent is employed as the criterion for interpretation, the primary emphasis is on what the statute meant to members of the legislature which enacted it.") (quoting 2A Norman J. Singer, *Sutherland Statutory Construction* § 45.08, at 40 (6th ed. 2000)); *Wis. Cent. Ltd. v.*

*United States,* 138 S. Ct. 2067, 2070 (2018) (The Court's "job is to interpret the words consistent with their 'ordinary meaning . . . at the time Congress enacted the statute.'") (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

Under the "fixed meaning" canon that comprises part of the textual analysis, words in a statute must be "given the meaning they had *when the text was adopted.*" Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (2012) (emphasis added). This is important to statutory interpretation because "[w]ords change meaning over time, and often in unpredictable ways"; accordingly, "misunderstand[ing]" and "misrepresent[ation]" arises if meanings are not held constant. *Id.*

The fixed meaning canon requires this Court to focus on what the Wisconsin Legislature, and the public, understood "prevailed" to mean in 1982, when the statute was enacted, not what the United States Supreme Court held nearly twenty years later when it decided *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human*

*Resources*, 532 U.S. 598 (2001). And what the Wisconsin legislature understood "prevailed" to mean in 1982 was undoubtedly the common meaning ascribed to the term by every Federal Court of Appeals to decide the issue. Interpreting the fee-shifting provision under FOIA, courts had uniformly held by 1982 that a party could seek fees if there was a "causal nexus" between the litigation and the government's disclosure of the requested records.

Indeed, while the majority opinion here focused on *Cox v. United States Department of Justice*, 601 F.2d 1 (D.C. Cir. 1979) (*per curium*), which had adopted the "causal nexus" rule, there was no dispute among the federal circuits on this issue. *See Crooker v. U. S. Dep't of Just.*, 632 F.2d 916, 917 (1st Cir. 1980); *Vt. Low Income Advoc. Council, Inc. v. Usery,* 546 F.2d 509, 513 (2d Cir. 1976); *Lovell v. Alderete*, 630 F.2d 428 (5th Cir. 1980); *Ginter v. Internal Revenue Service*, 648 F.2d 469, 471 (8th Cir.1981); *Clarkson v. Internal Revenue Service*, 678 F.2d 1368, 1371 (11th Cir.

1982); *see also Kaye v. Burns*, 411 F. Supp. 897, 902 (S.D.N.Y. 1976).

Further, while the United States Supreme Court overturned these cases years later in *Buckhannon*, that Court had also weighed in on this question a mere four years after the Wisconsin legislature acted in 1982. In *Hewitt v. Helms*, 482 U.S. 755, 760–61 (1987), the Court addressed the meaning of "prevailed" under another fee-shifting statute, observing:

> It is settled law, of course, that relief need not be judicially decreed in order to justify a fee award under § 1988. A lawsuit sometimes produces voluntary action by the defendant that affords the plaintiff all or some of the relief he sought through a judgment—e.g., a monetary settlement or a change in conduct that redresses the plaintiff's grievances. When that occurs, the plaintiff is deemed to have prevailed despite the absence of a formal judgment in his favor.

Although the United States Supreme Court eventually reversed course in *Buckhannon,* the question before this Court in this case is not one of federal law. The Court's

responsibility here is not to interpret what the United States Congress meant when it enacted FOIA in 1967. Nor is it the Court's responsibility to follow the ruling of the United States Supreme Court in *Buckhannon*. This Court's task is to determine Wisconsin law based on what the Wisconsin Legislature understood when it enacted the Open Records Law in 1982. And in 1982, the Wisconsin Legislature used the term "prevail" at a time when every federal court to address the question had embraced the "causal nexus" rule to decide whether a party had "prevailed."

## CONCLUSION

For the reasons stated above, the News Media *Amici* ask the Court to grant the Plaintiff's Motion for Reconsideration and order additional briefing on the appropriate test to determine whether a party has "prevailed" under Wis. Stat. § 19.37(2).

Dated: August 4, 2022.

Respectfully submitted:

By: _____

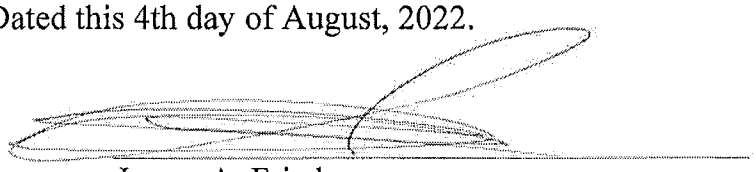
James A. Friedman, State Bar No. 1020756
Daniel C.W. Narvey, State Bar No. 1104663
Godfrey & Kahn, S.C.
1 East Main St., Suite 500
Madison, WI 53703
(608) 257-3911
jfriedman@gklaw.com
dnarvey@gklaw.com

*Attorneys for Non-Parties Wisconsin Broadcasters Association, the Wisconsin Freedom of Information Council, the Wisconsin Newspaper Association, the Wisconsin Transparency Project, and the Reporters Committee for Freedom of the Press*

## CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. § 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 1,891 words.

Dated this 4th day of August, 2022.



James A. Friedman

## CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

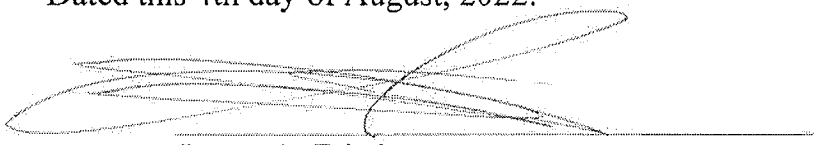
I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 4th day of August, 2022.



James A. Friedman

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