STATE OF WISCONSIN
IN SUPREME COURT

No. 2014AP2360

Dennis A. Teague,

Plaintiff-Appellant-Petitioner,

Linda Colvin and Curtis Williams,

Intervening Plaintiffs-Appellants-Petitioners

v.

J.B. Van Hollen, Walt Neverman, Dennis Fortunato

And Brian O'Keefe

Defendants-Respondents-Respondents.

PETITION FOR REVIEW OF A DECISION OF THE WISCONSIN COURT OF APPEALS (DISTRICT IV) FILED FEBRUARY 11, 2016

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INTRODUCTION

The plaintiffs are innocent. They have no criminal records. The Wisconsin Department of Justice (DOJ) knows they are innocent. Yet, when a member of the public requests a name-based criminal background check on the plaintiffs, the DOJ does not send the one page report DOJ sends for other innocents. Instead, the DOJ sends lengthy rap sheets containing some other person's criminal history. DOJ could, with minimal effort, send out true, clean, criminal history reports, or seek further information to determine whose record the requestor is actually seeking, but DOJ claims they have no duty to do so. The Court of Appeals concluded that plaintiffs cannot challenge DOJ's policy on open records

grounds and have no constitutional right to expect better of the government. This petition asks the Court to review those conclusions.

The plaintiffs have demonstrated, by submitting fingerprints to the DOJ, that they have never been arrested for, or convicted of, any crime in Wisconsin. They challenge the DOJ's admitted policy of responding to name-based background checks made by potential employers, landlords, and other members of the public with record returns that associate them with someone else's criminal history. (See, Pet. App. 59-160) This policy deprives petitioners of what all other innocent individuals subject to similar background checks receive from the DOJ: a simple return that states "No Criminal history" or "No Criminal History Found." (Pet. App. 162

The DOJ's policy, described throughout this litigation as the alias policy, is the result of the agency's decision to associate the plaintiffs' names and dates of birth with some variant of a name used at some time by some real criminal during police contact. Real names (or master names) are associated with fingerprints in the DOJ's criminal history database. After that association, DOJ responds to name-based requests for records about guilty individuals, with a report (or "CIB") that includes a full history of that individual's arrests and convictions. However, in responding to requests about innocent individuals – persons DOJ knows are innocent because they have submitted fingerprints to establish their innocence -- whose names whose names and dates of birth resemble a name and approximate a date of birth used by a criminal, the DOJ produces a report including only the guilty person's record. Even after the innocent people prove they have no criminal history, the DOJ continues to associate them with someone else's criminal history in response to background-check requests from the general public.

This policy is subject to no review. The association it creates is permanent. DOJ does not distinguish between individuals whose names were used in a warrant pick-up two decades ago by a teen-aged cousin and

those who were recent victims of formal identity theft. DOJ does not inform requestors that the individual about whom a request is being made is the victim of identify theft. DOJ does not ask requestors to provide more information about the individual for whom a request is made in order to provide a more accurate result. DOJ does not inform requestors that there are two people who might be associated with their request, one of whom is an innocent victim of identity theft, so that the requestor can determine who they are seeking a report for. Rather, DOJ always responds to name-based requests about innocent individuals who are subject to the policy with a record that contains someone else's criminal history.

Over the past decades, jurists, scholars, academics and politicians have acknowledged the growing array of collateral consequences associated with criminal records. There is wide recognition of the economic and social costs imposed on individuals and communities by these collateral consequences. Today, the stigmatizing effect of a criminal record is amplified by the ready availability, through commercial and state-run databases, of criminal history information. We are "background checked" when we apply for schools, seek professional licenses, search for employment, look for apartments, and sign up to volunteer for our children's activities. As potential landlords, employers, and other interested parties, most of us are also consumers of background checks, seeking accurate information to make decisions that are important to our economic and social interests.

The questions posed by this case are thus important to all residents of this state: under what circumstances can the DOJ lawfully impose on innocent individuals many of the burdens of actually having a criminal record? This Court should grant this petition in order to address these novel and significant questions.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Does Wis. Stat. § 19.356 preclude petitioners from seeking a declaratory judgment that the DOJ's alias name policy violates Wisconsin's public records law?

According to the Court of Appeals, Wis. Stat.§ 19.356 precludes seeking a declaratory judgment that DOJ's alias policy violates the public records law. The Court of Appeals reasoned that the only persons entitled to any judicial remedy are those identified in one of the three narrow categories defined by Wis. Stat. § 19.356(2)(a)(1-3). Pet. App. 9-21. The Court of Appeals decided this question, which was first raised by DOJ at oral argument, after formal briefing was concluded, on supplemental letter briefs and without the opportunity for a reply.

II. Does Wis. Stat. § 19.70 require DOJ to correct or supplement the criminal history reports it produces in response to name-based requests about innocent subjects once those subjects demonstrate to DOJ they have no criminal history?

The Court of Appeals acknowledged that the concept of accuracy involves a continuum that begins with demonstrable errors of fact and runs to information that is likely to mislead, but nevertheless found that the reports produced in response to name-based background checks about petitioners were not "inaccurate" in a way that allowed them to seek relief under Wis. Stat. §19.70. Pet. App. 26, ¶¶ 52-53.

III. Does the DOJ's alias name policy violate equal protection by discriminating irrationally against one class of "innocent" persons?

The Court of Appeals concluded that the policy of associating innocent people with criminal records belonging to other people had a "rational relationship to a legitimate government interest in providing accurate information that may assist requestors." Pet. App 29, ¶¶ 60-61.

IV. Does the DOJ's alias name policy violate substantive due process by knowingly identifying innocent people with criminal records that are not their own?

The Court of Appeals declined to address this question because petitioners did not cite "useful legal authority" for this "apparently novel substantive due process" argument. Pet. App. 30, ¶63. The Court of Appeals did not explain why Supreme Court cases extending or extrapolating fundamental rights based on changes in historical circumstances were not "useful" authority.

V. Is the DOJ's criminal history database sufficiently like other government databases that courts must apply the constitutional principles developed in those cases?

The Court of Appeals held that the "plus" requirement of "stigma plus" doctrine requires an individual to demonstrate it is "virtually impossible" to find employment in "his chosen field." Pet. App. 33, ¶68. The Court rejected petitioners' argument that evolving federal precedent requires application of a different test--the "tangible burden" test—in cases were the stigma-creating engine is a government-run database. Pet. App. 33, ¶69.

CRITERIA WARRENTING REVIEW

The Court should grant review to clarify the relationship between Wisconsin public records law and the Declaratory Judgment Act. Wis. Stat. § 809.62(1r)(2)(c). If the Court of Appeals decision stands, Wisconsin citizens will be deprived of all statutory mechanisms for challenging agency policies, like the one at issue in this case that appear, on their face, to violate Wisconsin public records law.

This statutory question is a novel one which will have statewide impact. Wis. Stat.§ 809.62(1r)(2). The DOJ produces almost 800,000 name-based background check reports a year, indicating how important the reports are to individuals seeking employment, housing, volunteer opportunities, and occupational and professional licenses and to the individuals attempting to make decisions about who to hire, rent to, or license. Pet. App. 42 Reliance on DOJ criminal history reports is a central, and significant, aspect of modern life. A decision on the issues in this case will thus clarify what legal avenues subjects of record reports have to challenge records' policies that affect all aspects of their lives.

Second, this Court should grant review because this case presents real and significant questions of federal constitutional law. Do individuals have a right to any kind of process to challenge the criminal history reports produced by government entities engaged in large-scale sale of such reports to the general public? Federal and state cases have explored the constitutionality of state-run databases that provide reports about particular charges/findings (such as child abuse and sex offender registries), but no court has determined what kind of process is due when the database in question produces "general" criminal history reports. No state or federal court has decided whether the kind of policy at issue in this case has any rational relation relationship to a legitimate government end. Finally, no court has decided whether official reports associating innocent persons with

criminal records that are not their own implicates a fundamental right protected by the substantive component of the Due Process clause.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is an action for declaratory and injunctive relief—on behalf of individuals who have no criminal record. Innocent petitioners challenge a policy that will subject them for life to the burden of being associated in name-based criminal history record reports with a criminal history that is not their own. This burden includes trying to counteract the effects of the misleading criminal history report in every context in which they might be subject to a back-ground check, having to obtain fingerprint background checks, and pay for those checks, because confused requestors have no way of knowing who is the real victim of the misidentification is, and having to regularly renew or replace DOJ letters "certifying" one's innocence.

B. PROCEDURAL HISTORY

Petitioners, Dennis Teague, Linda Colvin, and Curtis Williams discovered, in various ways, that DOJ was not producing clean background checks in response to name-based record requests about them requests. Each of the plaintiffs attempted to correct their record through DOJ's existing challenge process. They submitted fingerprints and DOJ confirmed that they are, in fact, innocent. Pet. App. 002-003, 042-043. Rather than correcting the record reports it produced, however, DOJ sent them a letter stating that they had no criminal records and that they were not the people associated with the record DOJ was producing. Pet. App.002-003, 163 DOJ thus continues to send out the criminals' record each time a new background check request is made on one of the plaintiffs. DOJ never sends requestors copies of plaintiff's letters certifying their

innocence or includes information about those letters in CIBs. Pet. App. 006, 044-045.

The first plaintiff, Teague, filed a complaint for declaratory and injunctive relief in Dane County on April 29, 2010. (R.2) On December 17, 2010, a motion to intervene was filed on behalf of Colvin and Williams Pet. App. 002,n2. Decision on the motion to intervene was deferred pending discovery and dispositive motions. On December 19, 2011, the circuit court denied Teague's motion for summary judgment and granted in part and denied in part CIB's motion for summary judgment. Pet. App. 045-058. The decision dismissed Teague's statutory claims, including his open records act claims. Pet. App. 057 It also dismissed Teague's Equal Protection challenge. Pet. App. 057. The circuit court denied defendants' motion to dismiss the substantive and procedural Due Process Clause claims. Pet. App. 057. The circuit court reasoned that there was a dispute of fact about the reasonable interference that can be drawn from the undisputed content of the reports. Pet. App. 055-056.

On January 30, 2012, the circuit court granted the deferred motion of Colvin and Williams to intervene. (R.54). The First Amended Complaint, including Teague's original claims and adding Colvin and Williams as intervening plaintiffs making the same claims was filed on March 19, 2012. (R.57). On March 23, 2012, the circuit court entered plaintiffs' proposed Order Applying Decision and Order on Motions for Summary Judgment Entered December 19, 2011 to the amended complaint. (R. 61)

The trial took place in early June, 2014. On July 2, 2014, the circuit court entered Findings of Fact and Conclusion of Law and Judgment dismissing the case. Pet. App. 041-44. Timely Notice of Appeal was filed on September 30, 2014.

After briefing was completed, the Court of Appeals held oral argument on November 18, 2015. During oral argument, the DOJ for the

first time argued that Wis. Stat. § 19.356 prohibited petitioners from seeking a declaration that CIB's alias name policy violated Wisconsin's public records law. The Court of Appeals ordered both parties to brief the issue (with no reply) and the parties submitted letter briefs addressing the question.

On February 11, 2016, the Court of Appeals issued a decision, with two concurrences. Pet. App. 001-040. The Court of Appeals concluded (1) petitioners were prohibited by Wis. Stat. § 19.356(1) from requesting a declaration that DOJ's global balancing in its alias name policy violated the public records law; (2) Wis. Stat. § 19.70 provided no mechanism for relief for the kind of dispute at issue in this case; the DOJ's alias name policy did not (3) violate equal protection or (4) substantive due process; and (5) that there was no "clear" error in the trial courts finding that petitioners did not establish the necessary "stigma plus" for procedural due process purposes.

Petitioners now seek review of that Court of Appeals decision.

C. RELEVENT FACTS NOT ADDRESSED IN THE COURT OF APPEALS DECISION.

The Court of Appeals decision summarizes many of the relevant facts about the DOJ's criminal history archive, the procedure by which fingerprints, master names, and alias names become part of the criminal history archive, and the DOJ's alias policy. Pet. App. 003-007

The Court of Appeals decision does not clearly state that DOJ's alias name policy applies to individuals other than those whose actual names and dates of birth were once deliberately used by someone in the context of a police encounter. Curtis Williams' name and date of birth were never actually used by Kirk Owens, the person whose record is returned in response to a name-based background check on him. Pet. App. 126 Mr. Williams' name and date of birth produce a hit with an alias name once

used by Kirk Owens, because DOJ deems those two identifiers "close enough" to be returned as a match. Pet. App. 042. The Court of Appeals' decision similarly does not include relevant facts, established by trial testimony, about the specific burdens imposed on Linda Colvin by the DOJ's alias name policy. Pet. App. 164-169

ARGUMENT AS TO MERITS FOR REVIEW

I. DOJ's ALIAS NAME POLICY VIOLATES WISCONSIN'S PUBLIC RECORDS LAW

DOJ admits that it has decided, through its alias name policy, that it is always better to release a criminal history even when it knows that there is an innocent victim of identity theft. Pet. App. 30 The Court of Appeals did not address the merits of petitioners' argument that this kind of "global" balancing of interests violates Wisconsin's common law balancing test. Rather, the Court of Appeals concluded that Wis. Stat. § 19.356 precludes any review of this claim. Pet. App. 009, ¶19, 19-21, ¶¶ 39-42 The Court of Appeals' decision thus precludes any resort to the judicial branch to conduct the common law balancing test as to whether sensitive information in the government's possession should be released. Supreme Court review of this part of the Court of Appeals decision is particularly important because the issues was raised so late in the process of this litigation and decided on such limited briefing.

More than 35 years ago, this Court recognized the **public** interest in protecting private reputations when an open records request is made to law enforcement. In *Newspapers Inc. v. Breier*, 89 Wis. 2d 417, 279 N.W.2d 179 (1979), the Court applied the common law balancing test to hold that the presumption of openness associated with a daily police "blotter" comprised of dates, names, and arrest charges – outweighed the public interest in reputation of the person arrested. The public interest included disclosure as a check on law enforcement's behavior, either in arresting

citizens on questionable charges, or by a prosecutor's purported dereliction in charging. 89 Wis. 2d at 436-437.

While upholding disclosure of blotters, *Breier* explicitly recognized that some law enforcement information can be so damaging to private reputations that the common law balance could be struck differently in other contexts. Specifically, *Breier* noted the differences between a daily "blotter," with no identifying information other than a name, and a "rap sheet."

> An entirely different issue would be presented to this court if a right of access were claimed to the "rap sheets," the alphabetical records, by the name of the arrested person, which show all arrests of and police contacts with individuals, regardless of whether an arrest or conviction resulted.

89 Wis. 2d at 432.

Breier explained that one of the "exceptions to the general rule of openness is when financial, medical, social or personal histories and disciplinary data **which may unduly damage reputations** are to be considered." *Breier,* 89 Wis. 2d at 430 (emphasis added). "Hence we have concluded that there is a **public policy interest** in protecting the reputations of citizens." 89 Wis. 2d at 430 (emphasis added). Wisconsin courts have repeatedly affirmed that public interest in protecting private reputations. *Zellner v. Cedarburg School District,* 2007 WI 53, ¶50, 300 Wis. 2d 290, 731 N.W.2d 2400; *Linzmeyer v. Forcey*, 2002 WI 84, ¶ 31, 254 Wis. 2d 306, 646 N.W.2d 811, ¶ 31

In this case, the DOJ is not only disclosing information that damages the private reputations of innocent people, it is doing so without balancing interests in each case-for each record released. DOJ has instead globally balanced the competing public interests, resulting in a fixed policy of disclosure.

The Court of Appeals never decided whether such global balancing violated the public records law, however, because it held that the legislature has prohibited any litigation arguing that the public interest in protecting reputation outweighs the presumption of disclosure unless that litigation is brought by individuals who fall into one of three narrow categories. Pet. App. 20-21

DOJ never raised this argument in the trial, and therefore there is no brief or analysis. DOJ did not raise the argument in its appellate brief. DOJ raised the argument only at oral argument. The Court of Appeals ordered one supplemental letter brief from petitioner no more than five pages to address this new argument. The Court of Appeals allowed a response, but no reply. The issue is too important to be decided in this manner in a decision recommended for publication.

Petitioner' letter brief made three statutory construction arguments on the meaning of 19.356(1) which reads:

> (1) 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.

Petitioners argued that DOJ's interpretation was incorrect because of (1) the language, (2) the context, and (3) the absurd result occurring if all other litigation is barred.

First, petitioners argued that DOJ misconstrued the phrase "judicial review." 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. 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 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). Because all invocations of the power of the judiciary to "review" a government decision are not "judicial review," the term should be given its common meaning of one type of litigation contesting a government agency's decision-making. Read in this way, Wis. Stat. § 19.356(1) bars one kind of "judicial review" but does not create a bar to all types of litigation.

Second, petitioners argued that "judicial review" must be interpreted in the context of the entire statute. The phrase occurs in the last half of a sentence that **starts** by articulating a newlycreated statutory right **requiring** public record custodians to give to advance notice to some people in three specific situations. Under Wis. Stat. § 19.356(2), those entitled to notice are the "record subjects" of the following records:

> 1. A record containing information relating to an employee that is created or kept by the authority and that is the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute, ordinance, rule, regulation, or policy of the employee's employer.
>
> 2. A record obtained by the authority through a subpoena or search warrant.
>
> 3. A record prepared by an employer other than an authority, if that record contains information relating to an employee of that employer, unless the employee authorizes the authority to provide access to that information.

The authority must, under § 19.356(2)(a), give written notice to the "record subject" of one of those records. After notice, under § 19.356(3), that record subject has five days to notify the public record authority of his or

her intent to seek a court order restraining the authority from providing access. Once that notice of intent is given, under § 19.356(4), the record subject must, within 10 days commence the action. Under § 19.356(7), the circuit court must decide the case within 10 days of filing proof of service, unless there is cause for an extension.

In that context, petitioners argue, §19.356(1) clearly refers to the "judicial review" that is provided later in the section, or some other statute, such as a statute protecting student record privacy, with its own judicial review provision. "Judicial review" does encompass all litigation. Under § 19.356(1), for example, a business that has disclosed trade secrets in some context to the government, and learns that a competitor is going to make an open records request for the trade secret, is not barred from seeking a declaration – in advance of the harm – that the trade secret must be protected. Yet, under the Court of Appeals decision, such litigation would be barred.

Petitioners' third argument was that the DOJ's proposed interpretation yields absurd results. Petitioner's letter brief used this example. The act that created § 19.356 also created §§ 19.36 (10)-(12), provisions preventing disclosure of personally identifying information such as Social Security Numbers and home addresses. If §19.356(1) bars all litigation other than the judicial review of §19.356(4), the absurd result is that some private employees may have their Social Security Numbers and home addresses protected, but not government employees employed by an "authority."

It is true, as the Court of Appeals noted in ¶ 40, that **private employer's** employees can, probably, sue to keep private Social Security Numbers and home addresses the record custodian possesses. Pet. App. 20, ¶ 40. That is because records of employees of private employers come within the records exception 19.356(2)(a)3. But, government employees, almost all of whom are employed by a public record "authority," do not come within the

§19.356(2)(a)3 exception. Significantly (and ignored by the Court of Appeals) **nor** do the government employee's Social Security Numbers and home addresses come within § 19.356(2)(a)2 or (a)1. Those records were not obtained through a search warrant under (a)2. Finally, those records obviously intended to remain private do not come within §19.356(2)(a)1 either, because the government employees' Social Security Numbers and home addresses are not "the result of an investigation into a disciplinary matter involving the employee or possible employment-related violation by the employee of a statute."

If a government employer announced that it was selling its employees' home addresses, those employees cannot, according to the Court of Appeals, sue to stop the illegal disclosure. Frustratingly, the Court of Appeals' decision dismisses this manifestly absurd result. [1]

The meaning of § 19.356(1) is too important to allow it to be decided in a published decision on a supplemental letter brief for an argument that DOJ never even raised in writing before Teague was required to respond to it in one, and only one, written argument.

II. WISCONSIN STAT. § 19.70 REQUIRES DOJ EITHER TO START PRODUCING ACCURATE NAME-BASED CRIMINAL HISTORY REPORTS AFTER A SUCCESSFUL CHALLENGE OR TO ADD A STATEMENT TO THE RECORD SETTING FORTH THE REASONS FOR THE CHALLENGER'S DISAGREEMENT WITH THE DISPUTED PORTION OF THE RECORD

The Court of Appeals concluded that petitioners could not seek relief under Wis. Stat. 19.70 because they did not challenge the accuracy of

[1] Other parts of the Court of Appeals decision are equally frustrating. Paragraph 41 for example faults Teague for not amending his complaint to anticipate an argument that would not be raised until oral argument on appeal.

any record maintained by DOJ that is "susceptible to correction." Pet. App. 26. The Court of Appeals is wrong.

The report that DOJ issues in response to a name-based request for Teague's name and Teague's date of birth does not list "list Teague's name as an alias for the person whose fingerprints are linked to the record" Pet. App. 23. Instead, the report **starts** with Dennis Teague's name and date of birth and then includes the full list of someone else's arrests and convictions. Pet. App. 059, 61-69. If the subject of the record request is the real Dennis Teague, an accurate record report would include the response "No criminal history found". Pet App 161-162 If the subject of the record request is the real criminal, an accurate record report would begin with the criminal's name and date of birth and include the criminal's criminal history.

The Court of Appeals concludes that Wis. State. § 19.70 is unavailing because what the plaintiffs' seek is "not a correction, but an explanation that contains additional information." Pet. App. 25, ¶51. That conclusion conflates two questions. Petitioners did not ask the Court of Appeals to order the DOJ to correct the records in question in a particular way. Petitioners rather asked the Court to determine that Wis. Stat. § 19.70 was an available mechanism to challenge the reports produced under the DOJ's alias name policy.

Adding an explanation that "contains additional information" is not contrary to the statute, it is one of the possible responses to a challenge expressly permitted by the statute. If DOJ continues to assert, after a challenge, that the records on question are correct, then the statute entitles the individual to supplement the record with a "concise statement setting forth the reasons" for his or her disagreement with the record. No litigant can "make clear" which alternative he seeks because the government control the decision to correct or not correct the information.

Further, the plain language of Wis. Stat. § 19.70 does not, despite the Court of Appeals' attempts to distinguish between some kinds of factual errors and information almost certain to produce a false impression, limit challenges to a particular kind of simple factual error. Pet. App. 26, ¶52. The plain language of the statute similarly does not limit challenges to simple errors. It does not exclude errors caused by the government's presentation of the records.

III. DOJ' ALIAS NAME POLICY VIOLATES EQUAL PROTECTION.

The basic concern of Equal Protection is with state legislation whose purpose or effect is to create discrete and objectively identifiable classes. *See San Antonio Independent School Dist. v. Rodriquez*, 411 U.S. 1,60 (1973)(Stewart, J., *concurring*) *See also Doering v. WEA Ins. Grp.*, 193 Wis. 2d 118, 138, 532 N.W. 2d 439 (1995)(The first task for any court considering an equal protection challenge is to identify "the classification" created).

The DOJ's alias name policy creates two distinct and objectively identifiable classes of innocent people. One class gets a clean report – a no criminal history statement– each time a request for information about them is submitted to DOJ by a member of the general public. Petitioners belong to the other class. That class includes all those whose names and dates of birth (or rough approximations of both) were once used by another individual during a police encounter and all those whose names and birth dates are sufficiently "like" names and birth dates used as aliases to satisfy whatever computer algorithms DOJ's Information Technology staff chooses to use. This second class cannot receive a "No Criminal History" report-even when they prove to DOJ that they are innocent.

This case asks whether there is a rational basis for subjecting these classes to the substantially different treatment they receive under the

current policy. *See, e.g., Aicher ex rel. LaBarge v. Wisconsin Patients Comp. Fund*, 237 Wis.2d 99, 130, 613 N.W.2d 849 (2000). This Court should reverse the Court of Appeals and hold that the alias name policy irrationally distinguishes among innocent people.

The Court of Appeals identified a legitimate end for a policy about records production — providing "accurate information that may assist requestors" Pet. App. 29. The problem with this reasoning is that the CIB's policy does not "reasonably" serve that end. The DOJ's alias name policy fails to satisfy three of the five criteria associated with the five-factor test. *Aicher*, 237 Wis.2d at 130.

The first criterion is whether there is a substantial distinction between the two classes of innocent people. For the purposes of the criminal history archive, which maintains actual criminal histories, verified by the powerful certainty of fingerprints, with unique SID identity numbers, all innocent people are the same. They do **not** have fingerprints or SIDs or arrests or convictions in the database.

DOJ policy creates the different treatment. DOJ policy choses the computer algorithm that decide which combinations of "close enough" name and "close enough" date of birth are close enough. The fact that a criminal may have used a name that may be matched through algorithms or individual choice with the name of an innocent person does not substantially distinguish that individual from other innocent individuals.

In *Nankin v. Village of Shorewood*, 2001 WI 92, 245 Wis. 2d 86, 630 N.W.2d 131, this Court struck down the legislature's different treatment of property owners depending on the size of the community ("populous counties do not present any special problems or concerns such that it is rational to restrict such circuit court actions in populous counties."). 2001 WI 92, ¶ 41. *Nankin* indicated that "substantial differences in procedure" were enough to offend equal protection if those differences

were irrational. *Id.*, at 45. Like the regulation invalidated by *Nankin*, the DOJ's alias name policy focuses on groups of innocent people whose behavior does not present any problems of concerns that make it rational to restrict their liberties.[2] And like residents of populous counties, there is no rational basis for denying individuals in petitioners' class to access procedures that other innocent people can use, demonstrating that they have no arrests that led to convictions, to produce a clean criminal history record report.

The policy also fails to satisfy the second criterion: it is not is not germane to a permissible government end or goal. The relationship between a permissible goal and the challenged classification must be one that is "close" and appropriate. The Court of Appeals reasoned that disclosing the criminal's record as the background report of an innocent person is "a useful first step" for detecting the "trick" if a criminal seeks to dupe the requester by re-using a false identity. Pet App. 029. While identifying criminals trying to steal another's identity is a permissible end, DOJ's policy is not germane (in close relationship or appropriate) to that end. The policy does not alert requesters to the existence of two individuals-one guilty and one innocent. DOJ's reports do nothing to help the requester determine if Dennis Teague is the criminal who has stolen an identity or the criminal has stolen Dennis Teague's identity. DOJ does not even try to determine if the requester is seeking information about an innocent Dennis Teague or the criminal who has stolen his identity.

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[2] Discrimination against innocent parties in order to impact the behavior of third parties has generally been disfavored by the United States Supreme Court. *See, e.g. Trimble v. Gordon*, 430 U.S. 762, 770 (1997)(invalidating an Illinois probate statute disfavoring illegitimate children, noting that "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status."). That same logic applies to innocent record subjects like Teague.

A policy that allowed requestors to choose between truthful information about Teague – that he has proven to he is not the person in the DOJ records – and the false record about Teague – that someone has used some variant of his name and some date of birth somehow sort of close enough, could be argued to be a "germane" fit. DOJ policy, however, is to harm the innocent, and wash its hands. That policy is not germane to any legitimate governmental purpose.

Finally, the characteristics of the two classes of innocent people are not so different as to suggest the propriety of substantially different treatment. The fact that one group of innocent people once had their names and dates of birth, or something like their names and dates of birth, used by a criminal is not a characteristic that suggests the propriety of treating the whole class differently forever. The distinguishing characteristic could be a one-time use decades ago or a pattern of very recent use. Given the very obvious differences of risk associated with that characteristic, a blanket policy is not a reasonable basis for imposing a burden that applies equally and forever to all victims both of identity theft and DOJ information systems design choices.

IV. THE CIRCUIT COURT'S PROCEDURAL DUE PROCESS DECISION DEPENDED ON A CLEARLY ERRONEOUS FACTUAL DETERMINATION AND A MISAPPLICATION OF RELEVANT LAW.

Stigma plus analysis does not, as the Court of Appeals opinion suggests, begin and end with the formulation of the test articulated in *Dupuy* and *Doyle*, a test associated with databases used for a single kind of determinations. *See Doyle v. Camelot Care Centers, Inc.*, 305 F.3d 603, 605 (7th Cir. 2002) and *Duprey v Samuels*, 397 F.3d 493, 511 (7th Cir. 2005)

Courts have recognized that, for example, the obvious stigma of being labeled a sex offender can satisfy the "plus" of "stigma plus" even when inclusion in the database does not cut off a specific field of employment. *See e g. Smith v. Doe,* 538 U.S. 84, (Stevens, J., concurring) ("[T]here can be no doubt that the widespread public access to this personal and constantly updated information has a severe stigmatizing effect. In my judgment, these statutes unquestionably affect a constitutionally protected interest in liberty."); *see also Doe v. Department of Public Safety,* 271 F.3d 38, 55 (2d Cir.2001), *rev'd on other grounds,* 538 U.S. 1 (2003)(sex offender database inclusion is "plus" because it is "some material indicium of government involvement beyond the mere presence of a state defendant to distinguish his or her grievance from the garden-variety defamation claim").

Sex offender databases/registries typically pass constitutional muster because information about sex offenders is "true" and the label sex offender has only been applied after the offender received the process he or she was entitled to. But neither of those factors are true in this case. Petitioners have no criminal records and they have not received any opportunity to challenge their identification with criminal records not their own.

In *Humphries v. County of Los Angeles,* 554 F.3d 1170, 1188 (9th Cir. 2008), *rev'd on other grounds Los Angeles, Cal. v. Humphries*, 562 U.S. 29 (2010), the Ninth Circuit addressed the constitutionality of a state abuse registry policy that mandated that once a substantiated report had been entered into the database, it had to remain there even when Humphries proved multiple times not to have committed the alleged abuse. *Humphries* identifies two changes in status that satisfy the "plus" component of the stigma plus doctrine. First, because some state licensing agencies were required to consult the database and conduct an investigation on person named therein, the Humphries would always be investigated (even if they were not ultimately barred from getting any child-related

license). 554 F.3d at 1187-1188. Second, because others, although not mandated to consult the registry, could consult the database and then make some decision – even a decision as innocuous as whether to allow the Humphries to volunteer at a local community center – the Humphries status was changed and the "plus" present. 554 F.3d at 1188. The plus was satisfied when a state created both a stigma, through database inclusion, and a tangible burden on the ability to obtain rights or status. Under *Humphries*, plus did not require " preclusion from employment in an entire occupational field." *Humphries* has been cited, for this standard, by s variety of courts, including the Seventh Circuit. *See Bryn Mawr Care, Inc. v. Sebelius*, 749 F.3d 5929 (7th Cir. 2014).

The Court of Appeals decision focused exclusively, and without explanation, on two of the ten stigma-plus government database cases cited in Teague's appellate brief, *Doyle* and *Duprey*. Pet. App. 033 Based on those decisions, the Court of Appeals apparently concluded that "plus" must involve either "unique circumstances" or a database record that made it "*virtually impossible*" to find new employment in a chosen field. Pet. App. 33 . That conclusion is wrong. It ignores the weight of later authority and it depends on selective mischaracterizations of *Duprey* and *Doyle.* The *Duprey* "unique circumstances" language, 397 F.3d at 511 refers to *Valmonte v. Bane*, 18 F.3d 993 (3rd Cir. 1994), the first of the government database cases, which characterized the problem as unique at the time of decisions. 18 F.3d at 1002. Sadly, the stigmatizing effect of government databases is no longer "unique" 20 years later. The "virtually impossible" language from *Doyle*, relied on in ¶ 68 of the Court of Appeals decision, is not the legal standard; it is the recognition that the use by private citizens of government database information can burden the stigmatized person's freedom even when the government takes no further direct action against the stigmatized person.

A variety of other cases cited by petitioners demonstrate that, contrary to the Court of Appeals' decision, the plus of stigma plus can be established/satisfied without proving the "virtual impossibility" of obtaining employment in a single chosen field." *See, e.g., Brown v. Montonya*, 662 F.2d 1152, 1167-68 (11th Cir. 2011)(allegedly incorrect requirement to register as sex offender triggers protected interest); *Kirby v. Siegel man* 195 F.3d 1285, 1291-92 (11th Cir. 1999)(falsely labeling a convicted prisoner a sex offender is "stigma plus) In a 2013 case, *Kelley v. Mayhew*, 973 F.Supp.2d 31 (D. Me. 2013), the court found that the government informing plaintiff's private employer that she did not qualify to be counted in the staff-to-child ratio was enough of a change in status to satisfy the "plus." 973 F. Supp.3d at 43-44.

Although no federal or state court has yet determined how the tangible burden test should be applied when the "mistaken" stigmatizing information is provided by a state criminal history archive that provides background checks to all members of the general public, both the trial court and the Court of Appeals applied the wrong legal standard in holding that the "plus" of "stigma plus" requires some sort of "unique circumstance" or "virtual impossibility." Pt. App. 033 The Wisconsin Supreme Court should grant this petition for review to provide a clear answer to how the tangible burden test should apply in this novel factual situation.

V. CIB'S ALIAS NAME POLICY VIOLATES SUBSTANTIVE DUE PROCESS.

The Court of Appeals rejected petitioners' substantive due process claim on the ground petitioners did not provide "useful authority" for a claim the Court described as novel. Pet. App. 031 The Court's decision does not reflect relevant Supreme Court opinion supporting petitioners' substantive due process claim.

The United States Supreme Court has repeatedly recognized that fundamental rights may manifest themselves in different ways in the wake of historical and technological changes. In, *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 787 (2010), the Court affirmed that the Second Amendment, incorporated through the Fourteenth, protects an individual's right to possess handguns in the home because self-defense is a right separable from militias and because the handgun is the modern choice for individual self-defense. The right to self-defense through the ownership of handguns was not, according to the Supreme Court, a new fundamental right, but a necessary corollary, in today's world, of the core right protected by the Second Amendment; *see also Obergefell v. Hodges*, 135 S. Ct. 2584 (recognizing that courts have not always associated the fundamental right to marry with same-sex couples: "[This]Court, like many institutions, has made assumptions defined by the world and time of which it is a part."). Like *McDonald, Obergefell* demonstrates that a fundamental right cannot be identified by merely naming it; fundamental rights are identifiable, despite historical changes, by an analysis of why the right is fundamental to the Constitution or our system of laws.

The right petitioners seek to vindicate is, like the rights construed in *McDonald* and *Obergefell*, a necessary corollary to a right deeply rooted in America's history and tradition—the right not to be deprived of liberty, on the grounds one is allegedly criminal, in an arbitrary fashion. The rights to a jury trial, to the presumption of innocence, and to the prohibition against coerced confession are not rights of substantive value in and of themselves. Those rights are rather procedural brakes on the government's power to turn citizens into criminals. That right has always been understood to extend beyond the mere protection from loss of physical liberty. *See, e.g.*, *Jordan v. State*, 512 N.E.2d 407, 409 (Ind. 1987) ("when an adult is convicted of a crime, the conviction is a stigma that follows him through life, creating many roadblocks to rehabilitation."); *United States v. Dancy*,

510 F.2d 779, 782, (D.C. Cir. 1975) ("The stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth.")

Even if a sentence is a fine or probation, the stigma of criminalization means the Constitution prohibits the affixing of that label through conviction if the conviction results from arbitrary or irrational abuses of government power

> [B]ecause of the certainty that [one found guilty of criminal behavior] would be stigmatized by the conviction . . . a society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is reasonable doubt about his guilt."
>
> "It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty."

In re Winship, 397 U.S. 358, 363-64 (1970).

The right not to be "adjudged" a criminal, in the absence of a non-arbitrary exercise of the state's powers, is logically inseparable from the right not to be labeled as a criminal when one is not. That right is also deeply rooted in American legal traditions. In *Beauharnais v. Illinois,* 343 U.S. 250, 255-56 (1952), Justice Frankfurter noted that "[l]ibel of an individual was a common-law crime, and thus criminal in the colonies. Indeed, at common law, truth or good motives were no defense." The same opinion noted the unquestioned link between defamation[3] and false accusations of criminality: "No one will gainsay that it is libelous falsely to

[3] The First Restatement of Torts reflects the historic rule that publication of written material tending "so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" – subjected the publisher to liability although no special harm to reputation was actually proved. Restatement of Torts 559 (1938)

charge another with being a rapist, robber, carrier of knives and guns, and user of marijuana." *Id.*

In the past, false associations with criminality generally occurred in the context of individual statements made by individual government employees or figures. With the advent of modern internet technology, and the emergence of government entities engaged in the business of selling background checks to the public, the right to be free of false associations with criminality must include the right to be free from the kind of labeling that occurs under the DOJ's alias name policy unless the policy is narrowly tailored to "serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-02)(reaffirming that governments cannot infringe "fundamental" liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.)); *see also In re Termination of Parental Rights to Kendall J.*, 2000 WI App 116, ¶11, 235 Wis. 2d 277, 616 N.W. 2d 525

DOJ's alias policy is not narrowly tailored to serve a compelling government end. The policy is applied to any and all matches associated with the use of an alias, regardless of whether the alias use happened decades ago or was created by computer algorithm The fact that CIB engages in no risk assessment prior to creating alias name tables similarly demonstrates the entire absence of tailoring. A policy that applied to aliases used by convicted sex offenders or to aliases used in the past three years might pass muster but not a policy applied mechanically, without any discretion or limitation. The policy is similarly not narrowly tailored because greater certainty about the true subject of a record request could be accomplished in any number of ways that do not burden the due process rights of innocent people.

CONCLUSION

Based on the foregoing, petitioners respectfully request that this Court grant their petition for review.

Dated at Milwaukee, Wisconsin this 11th day of March 2016.

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in § 809.62(4) for a petition for review produced with a proportional serif font. The length of this brief is 7753 words.

Dated at Milwaukee, Wisconsin this 11th day of March, 2016

Sheila Sullivan
State Bar #1052545

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of a petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that**:**

The electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated 11th Day of March, 2016 in Milwaukee, Wisconsin.

Sheila Sullivan
State Bar #1052545

CERTIFICATE OF COMPLIANCE WITH
WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

The electronic appendix is identical in content to the printed appendix filed as of this date.

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

Dated this 11th day of March 2016 in Milwaukee, Wisconsin.

_____
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CERTIFICATION OF SERVICE

I hereby certify that:

Ten (10) copies of Petition and Appendix were hand delivered to the Clerk of the Supreme Court on or by March 11, 2016 and a copy of this Petition and Appendix were similarly deposited with a courier, Federal Express, for delivery to the Respondents by first class mail or other class of mail that is as expeditious on March 11, 2016. I further certify the packages were correctly addressed and postage was pre-paid.

Dated this 11th day of March, 2016 in Milwaukee, Wisconsin.

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