IN THE CIRCUIT COURT OF WAUKESHA COUNTY
STATE OF WISCONSIN

WISCONSIN MANUFACTURERS AND COMMERCE, et al., Plaintiffs, v. **TONY EVERS, et al.**, Defendants, & **MILWAUKEE JOURNAL SENTINEL**, Intervenor-Defendant.	Case No. 20-cv-1389

BRIEF OF AMICI CURIAE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 6 MEDIA ORGANIZATIONS IN SUPPORT OF INTERVENOR-DEFENDANT[1]

[1] Amici curiae file this brief pursuant to ¶ 4 of the Court's October 7, 2020 Briefing Schedule Order.

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INTRODUCTION AND INTEREST OF AMICI CURIAE

Amici curiae are the Reporters Committee for Freedom of the Press, The Center for Investigative Reporting (d/b/a Reveal), The E.W. Scripps Company, The Media Institute, National Press Photographers Association, Society of Environmental Journalists, and Society of Professional Journalists (collectively, "amici"). Amici are news media groups dedicated to defending the First Amendment and newsgathering rights of the press. Journalists and news organizations frequently rely on public records, including those obtained pursuant to Wisconsin's public records law, Wis. Stat. §§ 19.31–19.39 (the "Public Records Law" or the "Law"), to report on matters of significant public concern like the COVID-19 pandemic. As such, amici have a strong interest in this case.

After the Wisconsin Department of Public Health ("DHS") received public records requests seeking records about Wisconsin businesses whose employees had contracted COVID-19, DHS decided to release records containing the names of businesses employing at least twenty-five people, where at least two employees had tested positive for COVID-19, or had close contacts that were investigated by contact tracers. *See* Defs.' Br. in Opp'n ("Defs.' Br.") 2, Doc. No. 22. Plaintiffs Wisconsin Manufacturers & Commerce, Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and Visitors Bureau filed suit to bar the release of those records. *See* First Am. Compl., Doc. No. 43.

Amici agree with Defendants and Intervenor-Defendant that Plaintiffs' motion for a temporary injunction should be denied and their lawsuit dismissed because Plaintiffs cannot state a cognizable cause of action to obtain the relief they seek, and, further, Plaintiffs lack standing to bring this suit. *See* Defs.' Br. in Opp'n, Doc. No. 22; Milwaukee J. Sentinel's Br. in Supp. of

Mot. to Dismiss, Doc. No. 32 ("Milwaukee J. Sentinel Br."). Amici write to emphasize the substantive legal and policy considerations that necessitate disclosure of the records at issue.

The records that DHS seeks to disclose must be released because they are public records under Wis. Stat. §§ 19.31–19.39 to which no valid exemption applies. The records do not identify specific individuals or implicate the privacy concerns Plaintiffs purport to invoke. Additionally, public access to the records at issue will enable the news media to report important information about the spread of the novel coronavirus, allowing Wisconsinites to make more informed decisions during a public health crisis. Because a paramount goal of the Public Records Law is to ensure members of the public have access to the information they need to understand issues affecting their communities, amici respectfully urge the Court to deny Plaintiffs' motion for a temporary injunction and grant Defendant-Intervenor's Motion to Dismiss.

ARGUMENT

I. Records reflecting the names of businesses whose employees have tested positive for COVID-19 implicate no exemptions to the Public Records Law nor any other bar to disclosure.

The Public Records Law states:

> 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. To that end, ss. 19.32 to 19.37 shall be construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business. The denial of public access generally is contrary to the public interest, and only in an exceptional case may access be denied.

Wis. Stat. § 19.31. This provision "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, 315 (citation omitted). It establishes "a presumption of complete public access, consistent with the conduct of governmental business." Wis. Stat. § 19.31. Courts have recognized two types of exceptions to this strong presumption: statutory exceptions and common law exceptions. *Hempel v. City of Baraboo*, 2005 WI 120, ¶ 4, 284 Wis. 2d 162, 169. "If neither a statute nor common law creates a blanket exception, the custodian [of the record] must decide whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Id.* This determination turns on a weighing of the competing interests and a determination of whether a harm to the public interest outweighs the public interest in disclosure. *See Osborn v. Bd. of Regents of the Univ. of Wis. Sys.*, 2002 WI 83, ¶ 15, Wis. 2d 266, 282. "If the custodian gives no reasons or gives insufficient reasons for withholding a public record," the requested records must be disclosed. *Newspapers, Inc. v. Breier*, 89 Wis. 2d 417, 427 (Wis. 1979).

A. No statutory basis exists to withhold the requested records.

The Public Records Law enumerates fewer than a dozen statutory exemptions to disclosure. Wis. Stat. §§ 19.31–19.39. Here, Plaintiffs argue that Wis. Stat. § 19.36(1) ("Section 19.36") and Wis. Stat. § 146.82 bar disclosure of the records at issue. *See* Pls.' Br. in Supp. of Mot. for Ex Parte TRO & Temporary Inj. ("Pls.' Br.") 12, Doc. No. 6; Pls.' Combined Br. in Opp'n to Dismissal and Reply Br. in Supp. of Temporary Inj. 19–26, Doc. No. 38 ("Pls.' Comb. Br."). Plaintiffs' arguments fail.

Section 19.36 states that "[a]ny record which is specifically exempted from disclosure by state or federal law . . . is exempt from disclosure under s[ection] 19.35(1)" of the Public

Records Law. Plaintiffs argue that Wis. Stat. § 146.82, which requires confidentiality of "patient health care records," exempts records that would disclose the names of businesses where at least two employees have tested positive for COVID-19, or have had close contacts that were investigated by contact tracers.[2] However, Wis. Stat. § 146.82 does not prohibit release of the records at issue because—even assuming the records at issue could properly be considered "health care records" at all—Wis. Stat. § 146.82 does not prohibit the disclosure of health care records that do not identify individual patients. Wis. Stat. § 146.82(2)(a)20 (stating that patient healthcare records may be released if they "do not contain information and the circumstances of the release do not provide information that would permit the identification of the patient").

Plaintiffs argue that releasing the names of businesses where at least two employees have tested positive for COVID-19, or have had close contacts that were investigated by contact tracers, may allow someone to identify individuals who have tested positive for COVID-19. *See* Pls.' Br. 9; Pls.' Comb. Br. 22. Plaintiffs' position is unfounded. As Defendants explain, Plaintiffs' position is "purely speculative," Defs.' Br. 14, and speculative, nebulous allegations of harm do not support injunctive relief. *See id*. at 15. Moreover, federal law[3] and laws in other

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[2] Plaintiffs also argue that Wis. Stat. § 153.45(1)(b) specifically exempts these records from disclosure. As Defendants correctly point out, Wis. Stat. § 153.45(1)(b) is in no way relevant to this case, because the records at issue were collected under Chapter 252 of the Wisconsin Statutes as opposed to Chapter 153. Defs.' Br. 15–16.

[3] Plaintiffs claim that the Health Insurance Portability and Accountability Act ("HIPAA"), requires that covered entities "treat[] the name of a patient's employer as 'individually identifiable health information,' which may not be disclosed." Pls.' Comb. Br. 23; 45 C.F.R. § 164.514(b)(2). This is inaccurate. Under the "Safe Harbor" method of de-identification, information becomes de-identified when eighteen characteristics are removed, including the name of an employer. *See id*. However, that is but one method of ensuring de-identification of health data: under the "Expert Determination" method of de-identification, information may be disclosed when an expert "determines that the risk is very small that the information could be used, alone or in combination with other reasonably available information, by an anticipated recipient to identify an individual." *Id*. § 164.514(b)(1).

states commonly make personally identifiable information in health records confidential. *See, e.g.*, 45 C.F.R. § 164.514; Idaho Code § 74-106(12); Va. Code Ann. § 32.1-276.9. Yet jurisdictions across the country have released COVID-19 data at various levels of granularity—for example, by disclosing case counts at entities like schools and businesses[4]—without running afoul of laws intended to protect the privacy of individuals' protected health information.

In addition, Plaintiffs' argument that Wis. Stat. § 146.82(2)(a)20 does not allow for the release of the records, *see* Pls.' Comb. Br. 21–22, is based on Plaintiffs' overly broad interpretation of the term "permit" in that provision. *See* State Defs.' Reply Br. 15, Doc. No. 44 (explaining, *inter alia*, how and why "examination of the records themselves show no reasonable likelihood that an employee's medical record or diagnosis will be revealed"). Further, Plaintiffs' mistaken interpretation does not comport with authorities'—and courts'—obligations to broadly construe the Public Records Law in support of disclosure. *See, e.g.*, *Hathaway v. Joint Sch. Dist. No. 1*, 116 Wis. 2d 388, 397 (Wis. 1984) ("[The Public Records Law] must be broadly construed to favor disclosure."). Broad disclosure of public records and the narrow construction of any exemptions are cornerstones of freedom of information laws. For example, narrow construction of the exemptions in the federal Freedom of Information Act, 5 U.S.C. § 552 ("FOIA")—which courts in this state have looked to as instructive when deciding Public Records Law cases, *see, e.g.*, *Democratic Party of Wis. v. Wis. Dep't of Justice*, 2016 WI 100, ¶ 13 n.6, 372 Wis. 2d 460,

[4] *See, e.g.*, Idaho Dep't of Health & Welfare, *Weekly Summary of Long-term Care Facilities With Residents or Staff Positive for COVID-19* (Oct. 23, 2020), https://tinyurl.com/y5l253kx (tracking weekly data about COVID-19 at assisted living facilities, including listing specific facilities with current or resolved COVID-19 cases); Virginia Dep't of Health, *Nursing Homes, Assisted Living, and Multi-Care Facilities Reporting Outbreaks of COVID-19*, https://tinyurl.com/y6kqdht9 (providing a list of individual long-term care facilities that have had outbreaks of COVID-19 "to provide awareness of COVID-19 outbreaks among a vulnerable population"); *see also infra* at 7–10.

473 ("FOIA and the cases interpreting it can be used as persuasive authority in deciding Wisconsin Public Records cases.")—has been a fixture since FOIA's passage in 1966. *See, e.g.*, *Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989) (explaining that FOIA's exemptions "have been consistently given a narrow compass"). This is because FOIA's ability to facilitate the public's right to know is a "structural necessity in a real democracy," *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 172 (2004), and narrow construction of FOIA's exemptions comports "with the Act's goal of broad disclosure," *Dep't of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 8 (2001) (citation omitted). Such is likewise the case with Wisconsin's Public Records Law. *See, e.g.*, *Chvala v. Bubolz*, 204 Wis. 2d 82, 88–89 (Ct. App. 1996). And other state courts across the country, similarly, broadly interpret the disclosure provisions of their state's open records laws and narrowly construe exemptions, and other state freedom of information laws, like Wisconsin's Public Records Law, explicitly require such a construction.[5]

Plaintiffs' arguments also ignore the Wisconsin Supreme Court's longstanding holding that the Public Records Law requires disclosure of statistical, administrative, and other nonidentifying government records concerning health, medicine, and related topics. *State ex rel. Dalton v. Mundy*, 80 Wis. 2d 190, 197 (Wis. 1977) ("*Dalton*"). In *Dalton*, the Court held that data relating to abortions performed at a public hospital, including the identity of doctors performing the procedures and the numbers of abortions performed, were properly subject to the Public Records Law. *See id.* The Court's holding was predicated both on the fact that such

[5] *See, e.g.*, *DeLaMater v. Marion Civil Serv. Comm'n*, 554 N.W.2d 875, 878 (Iowa 1996) (Iowa Open Records Act); *Swickard v. Wayne Cty. Med. Examiner*, 475 N.W.2d 304, 307 (Mich. 1991) (Michigan Freedom of Information Act); Mo. Ann. Stat. § 610.011 (Missouri Sunshine Law).

records "are not individual patient medical records," *id*. at 195, and on the principle that "public policy, and hence the public interest, favors the right of inspection of documents and public records." *Id.* at 196 (quoting *Beckon v. Emery*, 36 Wis. 2d 510, 516 (Wis. 1967)). Similarly, here, the records at issue are squarely subject to the Public Records Law. Given that there is no statutory exception to disclosure, the analysis turns on whether the public interest in disclosure exceeds any interest in nondisclosure, which it does, as discussed below.

B. The public interest in disclosure outweighs any interest in nondisclosure.

Because there is no blanket exception applicable to the records at issue, the Court must also consider "whether the strong presumption favoring access and disclosure is overcome by some even stronger public policy favoring limited access or nondisclosure." *Hempel*, 2005 WI at ¶ 4, 284 Wis. 2d 162, 169. Here, public policy actually favors disclosure of these records; accordingly, Plaintiffs cannot meet their burden to overcome the strong presumption in favor of access.

Access to public records that communicate the scope of the coronavirus pandemic's toll on local communities—including on local businesses—will educate and inform Wisconsinites as they make decisions about daily life during the pandemic, and evaluate the performance of government officials in response to the novel coronavirus. Relatedly, the news media plays a central role in communicating information about COVID-19 to the public, often relying on information gleaned from public records. As Derek Kravitz, a journalist and lecturer with Columbia University's Brown Institute for Media Innovation, has explained, "Public disclosure of outbreaks are a matter of public interest, and a public health concern. Greater transparency leads to greater awareness and knowledge of what's happening in local communities, and better strategies for people in either avoiding or preventing further community spread." NC Watchdog

Reporting Network, *How NC chose cooperation over transparency on meatpacking plants with virus outbreaks*, News & Observer (Aug. 11, 2020), https://bit.ly/2TqLLGz.

Numerous government agencies and officials have recognized the unique power of the press to provide the public with information about the current public health crisis. *See Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936) ("The newspapers, magazines, and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity."). For example, the Iowa Attorney General's Office has explained that disclosures about positive cases of COVID-19 to the media can help reduce the spread of the virus. Iowa Dep't of Justice, Office of the Att'y Gen., *Frequently Asked Health-Related Legal Questions Regarding the COVID-19 Pandemic* (Apr. 20, 2020), https://perma.cc/X2MV-NQSE (answering the question, "What information can local public health disclose to the media about positive COVID-19 cases?"). Specifically, it advised that names of businesses that have experienced outbreaks of COVID-19 can be released to the public, as the "state epidemiologist has determined that it is necessary for protection of the health of the public to" identify such facilities. *Id.*

In other states, access to government records concerning COVID-19 cases at businesses has made possible meaningful reporting about the pandemic. For example, in Florida, state health administrators initially refused to disclose the names of the assisted living facilities in which residents had tested positive for COVID-19, despite numerous requests from journalists for this information. Daniel Chang, *Herald Drafted a Suit Seeking ALF Records. DeSantis Aide Pressured Law Firm Not to File It*, Miami Herald (Apr. 11, 2020), https://perma.cc/Z3L9-Z2XG. By mid-April 2020, a coalition of news media entities prepared to sue the governor for violating the state's public records law. Mary Ellen Klas & Lawrence Mower, *Under Pressure, DeSantis*

Releases Names of Elder Care Homes with COVID-19 Cases, Miami Herald (Apr. 18, 2020), https://perma.cc/KYH5-9KPQ. On the eve of the lawsuit, Governor DeSantis's administration released the information, after the governor ordered the state's surgeon general to "determine that it is necessary for public health to release the names of the facilities where a resident or staff member is tested positive for COVID-19." *Id.*

Release of this information helped Floridians make informed decisions about family members in assisted living facilities. As a spokesperson for AARP Florida explained, release of this information meant that "[f]amilies now have at least some idea if the disease is in the facility where their loved one is and, even better, families know where it's not. They have a greater level of peace of mind if they know their facility isn't on the list." *Id*. The release also informed the public about the overall spread of coronavirus in assisted living facilities in Florida. For example, *The Tampa Bay Times* used the data provided by the state to compile breakdowns of cases by geographical region. *See* Allison Ross et al., *Florida releases data on number of COVID-19 cases in each nursing home, assisted living facility*, Tampa Bay Times (Apr. 27, 2020), https://perma.cc/GPG8-LYJU. Such detailed information is "essential in helping the public know the scope of the problem." *Id*.

Industry groups, like the Florida Health Care Association—which represents 300 nursing homes—argued that releasing the information would violate patient privacy, *see* Klas and Mower, *supra*, an argument that Governor DeSantis apparently rejected in deciding to release the records. As explained in *The Miami Herald*: "[N]ews organizations [seeking disclosure] want one thing: to keep the public fully informed with current information so they can make good decisions about their loved ones. Period[.]" *Id.* To be sure, the goal of fostering an informed

citizenry—particularly in a public health crisis—is fully compatible with respect for personal privacy and protection of individualized health information.

In Wisconsin, La Crosse County, like other counties,[6] maintained a webpage which detailed local COVID-19 outbreaks, and identified businesses and other establishments as low, medium or high risk.[7] *See, e.g.*, Christa Westerberg, *Your Right to Know: Let the public see COVID-19 data*, Capital Times (Aug. 10, 2020), https://perma.cc/3S6W-J7ET. "La Crosse County's information lets people who may have visited an establishment during a high-risk period know they should get tested or quarantine for 14 days. Or it lets them know their risk for exposure was low, providing peace of mind." *Id*. These proactive disclosures are motivated by the principle that such disclosures can "help protect workers and incentivize businesses to do better." *Id*.

Individuals in Wisconsin need accurate, comprehensive information to navigate this pandemic effectively. Release of the names of businesses in Wisconsin employing at least twenty-five people where at least two employees have tested positive for COVID-19, or have had close contacts that were investigated by contact tracers, will provide valuable data for the press and the public.

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[6] *See* Milwaukee J. Sentinel Br. 18 n.12 (citing numerous Wisconsin counties that identify businesses where COVID-19 outbreaks have occurred).

[7] La Crosse County has temporarily suspended updating this list "due to a rapid influx of cases." La Crosse County, *COVID-19 Outbreaks and Investigations*, https://perma.cc/4YA2-FTUQ.

CONCLUSION

For the reasons set forth herein, amici respectfully urge the Court to deny Plaintiffs' motion for a temporary injunction and grant Defendant-Intervenor's Motion to Dismiss.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she caused to be served an Amicus Brief and Motion For Leave To File An Amicus Curiae Brief filed via the Circuit Court of Waukesha County's Electronic Filing System for *Wisconsin Manufacturers and Commerce, et al. vs. Tony Evers, et al.* (Case Number 2020CV001389) and via electronic mail on November 6, 2020, to counsel of record as follows:

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