STATE OF WISCONSIN

IN SUPREME COURT

APPEAL No. 2006AP1143-AC

ROBERT ZELLNER
Plaintiff-Appellant,
vs.

CEDARBURG SCHOOL DISTRICT and DARYL HERRICK,
Defendants-Respondents,
and

MILWAUKEE JOURNAL SENTINEL and KATHARINE GOODLOE,
Intervenors-Respondents

On Certification By The Court of Appeals, District II,
Of An Appeal From An Order Entered April 21, 2006
In Ozaukee County Circuit Court, Case No. 06-CV-117,
Hon. Paul V. Malloy, Presiding

AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, THE E.W. SCRIPPS COMPANY, GANNETT CO., THE NEWSPAPER ASSOCIATION OF AMERICA, THE NEWSPAPER GUILD-CWA, AND THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, IN SUPPORT OF INTERVENORS-RESPONDENTS

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SUMMARY OF ARGUMENT

Robert Zellner has no standing to challenge the copyright status of the public records at issue in this case because he has no copyright interests that would be injured by their distribution, and section 19.356 of the Wisconsin Open Records Law is not designed to alter this jurisprudential calculus by allowing public school teachers investigated for viewing pornography on a school computer to assert claims they would otherwise be barred from bringing through courthouse door. This case is not the appropriate vehicle for determining the precise scope of the copyright exemption to the Wisconsin Open Records Law, because an interest that might be affected – that of the copyright holder – is not adequately represented by the parties, especially Zellner.

Though *amici*'s argument focuses on Mr. Zellner's lack of standing, *amici* strongly support the position of the *Milwaukee Journal-Sentinel* as to the scope of the copyright exception in Wisconsin Open Records Law and urge the Court, if it chooses to address the question of scope, to adopt the narrow construction favored by states with similar

provisions. *See, e.g., Lindberg v. Kitsap County*, 948 P.2d 805, 813 (Wash. 1997); *County of Suffolk v. First Am. Real Estate Solutions*, 261 F.3d 179, 191-193 (2d Cir. 2001); *State ex rel. Rea v. Ohio Dep't of Educ.*, 692 N.E.2d 596, 601-02 (Ohio 1998).

ARGUMENT

I. ZELLNER'S POTENTIAL INJURY HAS NOTHING TO DO WITH A COPYRIGHT VIOLATION AND THUS CANNOT SUPPORT STANDING UNDER WISCONSIN LAW.

The requirement of standing in Wisconsin reflects the "sound judicial policy" of only opening the courthouse door to litigants who, unlike Zellner, show government action has had "a direct effect on his legally protected interests" worthy of resolution through judicial resources and attention. *See Wisconsin's Envtl. Decade, Inc. v. Public Serv. Comm'n of Wisconsin*, 69 Wis. 2d 1, 9, 230 N.W.2d 243, 248 (1975) (hereinafter *WED*). If Zellner has a legally protected interest here, it is in his privacy and reputation. But because Zellner does not own the copyrights and is not liable for the distribution of the copyrighted material, he lacks standing under Wisconsin law to challenge the release of the records

based on their purported legal copyright protections. *See Linden Land Co. v. Milwaukee Elec. Ry. & Lighting Co.*, 107 Wis. 493, 502-03, 83 N.W. 851, 854 (1900) ("The private person so suing must show something more than a mere speculative or theoretical wrong or illegal act. He must show an actual or threatened invasion or destruction of a distinct right belonging to himself . . . .").

Wisconsin courts have articulated the standing requirement in several ways, with one Wisconsin court explaining "the formulation for analyzing the issue of standing has varied somewhat in the case law, in part depending on the nature of the claim asserted." *See Chenequa Land Conservancy v. Vill. of Hartland*, 2004 WI App 144, ¶¶13-14, 275 Wis. 2d 533, 544-45, 685 N.W.2d 573, 579 (hereinafter *Chenequa*). Here, Zellner is challenging the action of a government entity, specifically the decision of the school board to release a public record, and thus the two-part standing test developed in *WED* and its progeny applies. *See WED,* 69 Wis. 2d at 10, 230 N.W.2d 243; *State ex rel Parker v. Fiedler*, 180 Wis. 2d 438 (Ct. App.

1993), *rev'd on other grounds*, 184 Wis. 2d 668 (1994) (applying the *WED* test to an administrative agency action not brought under chapter 227). The first step under the *WED* test is to determine whether the decision of an agency "directly causes injury to the interest of the petitioner." *See Fox v. Wisconsin Dep't of Health*, 112 Wis. 2d 514, 524, 334 N.W.2d 532, 537 (1983), *quoting WED,* 69 Wis. 2d at 10, 230 N.W.2d 243. The second *WED* step is to determine whether the interest arguably falls within the zone of interests to be protected by law. *See Chenequa*, 275 Wis. 2d 533, ¶15, 685 N.W.2d 573, *quoting WED,* 69 Wis. 2d at 10, 230 N.W.2d 243. Even though standing is to be construed liberally in Wisconsin, Zellner's copyright claim fails both steps.

First, there is insufficient "directness" between Zellner's claim and the actions of the Cedarburg School District in this case. The school district's decision to release purportedly copyrighted material could only directly affect the pecuniary interests of the owner of the alleged copyright, and, assuming the unlikely scenario that the "fair use" provision of copyright did not apply to this release to the news media, could

conceivably expose the district to liability for improper distribution. Zellner has not been accused of peddling the porn for profit, and thus the requisite directness between challenged government action and his interest is lacking. Zellner simply cannot mount a challenge to a public records release based on the interests of a third party. *See Chenequa*, 275 Wis. 2d 533, ¶17, 685 N.W.2d 573. ("The injury asserted must be such that it gives the plaintiff a personal stake in the outcome of the controversy.").

Furthermore, Zellner fails the second step of the *WED* test because his alleged reputational interest is not within the "zone of interests" the Wisconsin legislature sought to protect when it passed the copyright exemption to the public records law.

The United States Constitution establishes the need for copyright protection in order "to promote the progress of science and useful arts." *See* U.S. CONST. art. I, § 8, cl. 8. While the federal government may not establish a copyright in its own work, no similar exclusion applies to the states. *See* 17 U.S.C. § 105 (2000). Wisconsin Open Records Law

shields "materials to which access is limited by copyright" which protects authors, including the State of Wisconsin, from ***improper*** distribution of their protected works. Wis. Stat. § 19.32(2). The limit on release of certain copyrighted materials was not designed as a shield for public employees to stop the release of adult pictures allegedly viewed on public school computers.

In his brief, Zellner attempts to breeze by his lack of direct injury to a protected interest by offering conclusory statements and a two-case string cite to support his standing argument. *See* Appellant Brief at 20-21, *citing Klein v. Wisconsin Res. Ctr.*, 218 Wis. 2d 487, 582 N.W. 2d 44 (Ct. App. 1998) and *Mut. Servs. Cas. Ins. Co. v. Koenigs*, 110 Wis. 2d 522, 329 N.W.2d 157 (1983).

Klein v. Wisconsin Resource Center offers a narrow right of review for the "target" of an investigation to seek judicial review of the release of his "personnel records." *See* 218 Wis. 2d at 495, 582 N.W.2d 44. The right to challenge was predicated on the individual's privacy interest in protecting the safety of her and her family members by restricting

sexually violent persons in a civil detention facility from accessing her personnel records. *Id.* at 490-91. Zellner has asserted a claim wholly outside the privacy/reputational framework that underlies the right of review in *Klein*. *See* Part II, *infra*. Most importantly, *Klein* predates the Wisconsin Legislature's pronouncement on this issue, the adoption of section 19.356 of the Wisconsin Open Records Law, which significantly narrows who may seek judicial review and under what circumstances. *Id.*

Zellner's reliance on *Mutual Services Casualty Ins. Co. v. Koenigs* is similarly misplaced. In that case, the Wisconsin Supreme Court recognized a right of appeal for the "party aggrieved" by a lower court decision, ruling that a statute delineating such a right to appeal was unnecessary because such a law would merely state "a fundamental and well understood concept upon which *standing to appeal* was predicated." *See* 110 Wis. 2d at 526, 329 N.W.2d 157 (emphasis added). The case simply does not stand, as Zellner asserts, for the broad proposition that any time a person feels

"aggrieved" in some way by a government action he is entitled to avail himself of judicial review in the circuit court.

Finally, Zellner cannot sustain standing based on an alleged violation of copyright law by the Cedarburg School District. *See Linden Land Co.*, 107 Wis. at 503, 83 N.W. 851 ("He cannot sue to prevent an act merely because it is illegal. Any other rule would render the transaction of municipal business well-nigh impossible."). In other words, any potential liability incurred by the district in improperly releasing the records cannot be the foundation of a justiciable case brought by Zellner, because he has no protectable interest in forcing the government to comply with copyright law.

It is the records custodian of the Cedarburg School District who has been entrusted under Wisconsin Open Records Law to determine which exemptions apply to a given public record. While this court has *de novo* review of the records custodian's decision, the exceptions ***she*** relies upon in releasing or not releasing a public record carry weight, not Zellner's opinion of what exemptions he thinks she should

have relied upon. *See Vill. of Butler v. Cohen*, 163 Wis. 2d 819, 825, 472 N.W.2d 579, 581 (Ct. App. 1991) ("A primary reason for requiring the custodian to state specific policy reasons for refusal is to provide the court with a basis for its review."); *see also Tribune Co. v. Cannella*, 458 So. 2d 1075, 1079 (Fla. 1984) ("[T]he purpose of the [Public Records] Act would be frustrated if, every time a member of the public reaches for a record, he or she is subjected to the possibility that someone will attempt to take it off the table through a court challenge.").

II. SECTION 19.356 ALLOWS A PUBLIC EMPLOYEE SUBJECT TO A MISCONDUCT INVESTIGATION A LIMITED RIGHT TO ASSERT ONLY ALLEGED PRIVACY OR REPUTATIONAL INTERESTS IN A CHALLENGE TO A PUBLIC RECORDS RELEASE.

The Wisconsin legislature's decision in 2003 to limit the scope of *Woznicki v. Erickson,* 202 Wis. 2d 178, 549 N.W.2d 699 (1996), by enacting section 19.356 of the Wisconsin Open Records Law, allows public employees accused of wrongdoing to go to court to assert narrow privacy and

reputational interests, not to vindicate the alleged rights of non-party copyright owners. *See* Wis. Stat. § 19.356.

In *Woznicki*, this Court created a procedure for employees to challenge the release of personnel records held by a District Attorney based on the employee's "inherent" reputational and privacy interests. *See* 202 Wis. 2d 178, 185, 549 N.W.2d 699, 702 (1996) ("Woznicki's interests in privacy and reputation would be meaningless unless the district attorney's decision to release the records is reviewable by a circuit court.").

In *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.*, this Court extended this procedural right to challenge the release of records threatening personal privacy held by any custodian. *See* 227 Wis. 2d 779, 792, 596 N.W.2d 403, 409 (1999) ("It would defy common sense to give an individual the opportunity to *present arguments in favor of protecting his or her privacy and reputational interests* when a district attorney holds such records only to turn around and deny that individual the same opportunity if

the records are in the hands of another custodian.") (emphasis added).

In both *Woznicki* and *Milwaukee Teachers' Educ. Ass'n*, the sole focus was on protecting personal privacy and the court did not purport to allow challenges to public records requests based on any other ground. Subsequent cases confirm this point that the court-derived procedural protections existed solely to ensure protection for the privacy and reputational interests of public employees. *See, e.g.*, *Armada Broad. Inc. v. Stirn*, 183 Wis. 2d 463, 475 516 N.W.2d 357, 361 (1994); *Kraemer Bros. v. Dane County*, 229 Wis. 2d 86, 103, 599 N.W.2d 75, 83 (Ct. App. 1999).

Seeking to reaffirm the presumption of openness in the Wisconsin Open Records Law, the state legislature took the narrow procedural protections of *Woznicki* and its progeny and placed further restrictions upon them with the adoption of section 19.356. *See Local 2489 v. Rock County*, 2004 WI App. 210, ¶2, 277 Wis. 2d 208, 214, 689 N.W.2d 647; Wis. Atty. Gen. Op., OAG 1-06, 6 (Aug. 3, 2006). That amendment clarified that "no person is entitled to judicial

review of the decision of an authority to provide a requester with access to a record" unless the record contains information relating to an employee resulting from an investigation into a disciplinary matter. *See* Wis. Stat. §§ 19.356(1) and (2)(a)(1).

In his cursory treatment of the issue of standing in his brief, Zellner seeks to transform § 19.356 into a blank check for public officials accused of wrongdoing to assert "any . . . legal arguments that support his position." *See* Appellant Brief at 20. This ignores the explicit intent of section 19.356 to limit *Woznicki* and misstates the law of standing, which is to a ensure petitioner has a personal stake in the outcome of the controversy, and that the dispute touches upon the legal relations of parties having adverse legal interests. *See Flast v. Cohen*, 392 U.S. 83, 101 (1983) (internal citations and quotations omitted).[1]

It would be quite curious if, as Zellner alleges, the Wisconsin Legislature sought to use this amendment to the Open Records Law, a body of law designed in part to allow

[1] In assessing the adequacy of Zellner's standing, federal law, while not binding in Wisconsin, is "certainly persuasive as to what the rule should be." *See WED*, 69 Wis. 2d at 11, 230 N.W.2d 243.

the public to ferret out government wrongdoing, to empower those government officials accused of wrongdoing to lodge challenges to the release of public records based on arguments such as copyright that they would otherwise never have standing to bring.[2] *See Linzmeyer v. Forcey*, 2002 WI 84, ¶¶14-15, 254 Wis. 2d 306, 318, 646 N.W.2d 815.

Section 19.356 is a provision narrowly tailored to provide government officials accused of wrongdoing a limited right of review. Section 19.356 is not designed to reward a public school teacher with the ability to raise third-party claims he would otherwise have no legal basis to bring in a Wisconsin court.

III. BECAUSE ZELLNER DOES NOT HAVE A COPYRIGHT INTEREST THIS LAWSUIT IS THE IMPROPER VEHICLE THROUGH WHICH THE WISCONSIN SUPREME COURT SHOULD PROPERLY DEFINE THE SCOPE OF THE COPYRIGHT EXEMPTION TO THE WISCONSIN OPEN RECORDS LAW.

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[2] Even if it wanted to, separation of powers considerations cast doubt on the power of the Wisconsin legislature to empower litigants to lodge complaints in which they have no legally protectable interest. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) ("Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental to the separate and distinct constitutional role of the Third Branch . . . .").

Amici endorse the argument of intervenor-respondent *Milwaukee Journal-Sentinel* that Zellner's conception of the scope of the copyright exemption of the Wisconsin Open Records Law would eviscerate the effectiveness of the law. But because this case does not provide the proper vehicle, this court need not go down the road of articulating the precise contours of the copyright exemption. *See Schmidt v. Dep't of Resource Dev.*, 39 Wis. 2d 46, 61, 158 N.W.2d 306, 314 (1968) ("It would be a violation of sound judicial policy for the court to probe the constitutionality of a statutory provision which is not brought directly in issue by the facts presented in the case at bar.").

The potential interested parties in this case are the requester, the alleged copyright owners, who have been completely absent from the litigation, and possibly the School District, who could theoretically be liable for an improper release of copyrighted materials, but who in this case determined that disclosure was proper.[3] *See Sierra Club v.*

[3] This is a legally sound decision given the interplay between the copyright exemption of the Wisconsin Open Records Law and the Fair Use doctrine of federal copyright law, which allows for reproduction of copyrighted materials for the purpose of news reporting. Because the

Morton, 405 U.S. 727, 732 (1972) ("[T]he question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy, as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.") (internal quotations and citations omitted).

The copyright owners are absent from this litigation, and there is no indication that Zellner is capable of asserting the arguments to give the proper scope and effect to the copyright exemption such that it properly reflects the legislative intent to protect the holders of copyrights. Zellner has absolutely no pecuniary interest in any arguably affected copyright and his arguments are inevitably tainted by this fact, making him an ill-suited champion of this issue, especially considering that any decision by this court will be binding not just on pornography peddlers but authors of more wholesome copyrighted material.

Court of Appeals explicitly declined to certify this fair use question, *amici* will confine itself to the observation that a determination of "fair use" is an indispensable step to defining whether "access to a work is limited by copyright" under § 19.32(2). Wisconsin Open Records Law does not contemplate its copyright exemption being applied in a vacuum.

CONCLUSION

For the above state reasons, *amici* urge this court to adopt the arguments of intervenor-respondent *Milwaukee Journal-Sentinel* and affirm the order of the circuit court.

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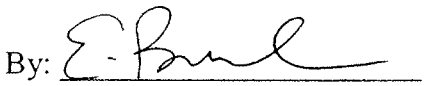
By: 

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,876 words.

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Statements of Interest:

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that work to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970.

The following organizations have endorsed the Reporters Committee's amicus brief:

The American Society of Newspaper Editors is a professional organization of approximately 750 persons who hold positions as directing editors of daily newspapers in the

United States and Canada. The purposes of the Society include assisting journalists and providing unfettered and effective press in the service of the American people.

The Associated Press is a global news agency organized as a mutual news cooperative under the New York Not-for-Profit Corporation Law. AP's members include approximately 1,500 daily newspapers and 5,000 broadcast news outlets throughout the United States. AP has its headquarters and main news operations in New York City and maintains bureaus in 240 cities worldwide. AP news reports in print and electronic formats of every kind reach a subscriber base that includes newspapers, broadcast stations, news networks and online information distributors in 121 countries.

The E.W. Scripps Company is a diverse media enterprise with 18 daily newspapers and numerous weekly publications reaching approximately 1 million readers, nine broadcast television stations, five national cable networks that reach more than 90 million households, an electronic

commerce and interactive media division and licensing and syndication division.

Gannett Co., Inc. is an international news and information company that publishes ninety daily newspapers in the U.S., including USA TODAY and newspapers in Appleton, Fond du Lac, Green Bay, Manitowoc, Marshfield, Oshkosh, Sheboygan, Stevens Point, Wausau and Wisconsin Rapids. Gannett owns nearly 1,000 non-daily publications, including USA Weekend, a weekly newspaper magazine, and a number of weekly newspapers in Wisconsin. The company also owns twenty-two television stations and a national news service, and operates over 130 web sites, including www.wisinfo.com.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United Sates and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to

advance newspapers' First Amendment interests, including the ability to gather and report the news.

The Newspaper Guild – CWA is a labor organization representing more than 30,000 employees of newspapers, newsmagazines, news services and related media enterprises. Guild representation comprises, in the main, the advertising, business, circulation, editorial, maintenance and related departments of these media outlets. The Newspaper Guild is a sector of the Communications Workers of America and is America's largest communications and media union, representing more than 700,000 men and women in both private and public sectors.

The Radio-Television News Directors Association is the world's largest and only professional organization devoted exclusively to electronic journalism. RTNDA is made up of news directors, news directors, news associates, educators and students in radio, television, cable and other electronic media in more than 30 countries. RTNDA is committed to encouraging excellence in the electronic

journalism industry and upholding First Amendment freedoms.