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STATE OF WISCONSIN
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DISTRICT IV

BEATRIZ BANUELOS,

Plaintiff-Appellant,

v.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY,

Defendant-Respondent,

Appeal No. 2020AP001582
(Dane Co. Case No. 20-CV-903)

ON APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY,
DANE COUNTY CASE NO. 20-CV-903
THE HONORABLE JUAN B. COLÁS PRESIDING

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY'S RESPONSE BRIEF

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December 7, 2020

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INTRODUCTION

Plaintiff Beatriz Banuelos ("Banuelos") sought damages, a declaratory judgment, and injunctive relief based on allegations that Defendant University of Wisconsin Hospitals and Clinics Authority ("UW Health")[1] charged her a fee for electronic medical records. She claims that Wis. Stat. § 146.83(3f) prohibits health care providers from charging any fees for electronic records. Under Banuelos' theory, if UW Health spent 20 person-hours painstakingly scanning paper records but delivered them in electronic format, it would not be able to charge a cent, even though it is clear that it would be able to charge for the same work if the records were delivered in paper copy. As the circuit court correctly held, after a thorough review both of the statute and its legislative history, all of Banuelos' claims fail because the legislature chose not to regulate electronic copies of health care records. *See* Wis. Stat. §§ 146.83, 146.836.[2] Banuelos is asking this Court to create positive law that the legislature affirmatively rejected.

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[1] Banuelos incorrectly named UW Health as "University of Wisconsin Hospital and Clinics Authority."

[2] Those seeking medical records in Wisconsin are protected from fees for electronic delivery that they believe are too high because they have the option of simply requesting that they be delivered in paper format, which is subject to the State's fee limitations.

First, the circuit court correctly held that nothing in the text of Wis. Stat. § 146.83(3f) (the statute that sets fee caps) suggests it applies to electronic records, and its legislative history indicates it was designed *precisely* to get out of the business of regulating requests for electronic copies of medical records. In his 2011 biennial budget request, Governor Walker asked the legislature to repeal the 2009 requirement to provide medical records in electronic form. Consistent with that request, it repealed both the mandate to provide electronic copies and the corresponding fee provision, which had been inserted together in 2009. The legislature, in short, unequivocally chose not to apply the Wisconsin fee statute to electronic medical records, leaving fee regulation for electronic medical records, if any, to federal law. There was no need to second-guess the legislature's decision to do so. Judge Colás thus correctly held the fee statute did not prohibit the fees that Banuelos challenges.

Second, the medical records statutes' "Applicability" section, Wis. Stat. § 146.836, further confirms that the legislature did not intend the fee regulations of Wis. Stat. § 146.83(3f) to apply to electronic records. It states that the term "patient health care record" includes electronic records in respect to three identified sections and one additional subsection. Tellingly, the provision Banuelos contends applies here, Wis. Stat. § 146.83(3f), is *not*

among them—even though the very next subsection, Wis. Stat. § 146.83(4), is. The unambiguous text, then, demonstrates that Wis. Stat. § 146.83(3f) is not applicable to electronic records, and does not prohibit charging fees for providing copies of them.

Finally, even if the Wisconsin fee statute applied to electronic records—which it clearly does not—records providers such as UW Health are still plainly entitled to charge a fee for providing copies of electronic records based on the rate for providing paper copies. The fee statute recognizes the need for health care providers to recover reasonable costs, and it sets out a fee for the provision of paper copies as a baseline, while microfilm, microfiche and X-ray prints cost more. Nowhere does the statute state that any other type of copy should be provided for free: if this is what the legislature meant, it would have said so expressly. Rather, the legislature intended that the paper pricing should be the baseline.

COUNTERSTATEMENT OF THE ISSUES

1. May a health care provider charge a fee for providing an electronic copy of a patient's health care record, where neither Wis. Stat. § 146.83(3f) nor any other provision of state or federal law prohibits such a fee?

Circuit court answered "Yes," because Wis. Stat. § 146.83(3f) does not regulate electronic copies of health care records.

2. Is a health care provider permitted to charge a fee for providing electronic copies of patient health care records that is based on the per page rate for paper copies listed in Wis. Stat. § 146.83(3f)(b)(1)?

   Circuit court answered "Yes," based on its conclusion that Wis. Stat. § 146.83(3f) does not regulate charges for electronic copies of health care records.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

UW Health supports oral argument and publication. No published opinion expressly addresses whether Wis. Stat. § 146.83(3f) prohibits fees for providing electronic copies of health care records, and the issue is relevant to a number of other lawsuits against health care providers and their vendors in state and federal court. Additionally, the outcome of this case would likely affect the terms of many hospitals' and other health care providers' contracts with vendors that manage requests for medical records, making a published opinion important in ensuring commercial certainty in this area.

STATEMENT OF THE CASE[3]

A. Wisconsin's Medical Records Statutes.

In Wisconsin, medical records are regulated both by federal laws such as HIPAA and by certain additional provisions of state law, including Wis. Stat. §§ 146.81-146.84. Thus, in addition to the provisions of HIPAA's implementing regulations governing individuals' access to protected health information, *see* 45 C.F.R. § 164.524, certain categories of people seeking access to certain "health care records" may also have additional rights under a state law provision for health care providers to provide such records in return for certain prescribed fees, *see* Wis. Stat. § 146.83(3f).

That state-law requirement, in its current form, largely originates from the 2011 biennial budget bill. During the 2011 budget process, Governor Walker's budget submission urged repeal of a 2009 mandate to provide medical records in electronic form:

> *Inspection of Records* . . . Repeal provisions that require a health care provider to do the following: (a) upon request of the person requesting copies, provide the copies in a digital or electronic format unless the record system cannot create or transmit records in a digital or electronic format; and (b) if the copies cannot be provided in an electronic format,

[3] The allegations underlying this appeal were accepted as true at the pleading stage. By reciting them, UW Health does not concede their accuracy.

> provide a written explanation of why the copies cannot be provided in a digital or electronic format.

Joint Committee on Finance Paper # 367, Fees for Patient Health Care Records (DHS – SSI and Public Health) (May 18, 2011), p. 3 (S.App.090).

Accepting the Governor's request, in Act 32, the legislature repealed the mandate to provide electronic medical records, former Wis. Stat. § 146.83(1k) (2009–10), and its corresponding fee provisions, former Wis. Stat. §§ 146.83(1f), (1h) (2009–10). *See* S.App.103. Both of these provisions—the mandate and the fee provision—had been added for the first time in the 2009 budget act. *See* S.App.009-10. Prior to 2009, the Wisconsin Statutes did not address requests for electronic copies of medical records at all, and upon repealing these provisions in 2011, the legislature enacted in their place Wis. Stat. § 146.83(3f), which contains no reference to electronic records.

The current provision reads as follows:

> (a) Except as provided in sub. (1f) or s. 51.30 or 146.82 (2), if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records.
>
> (b) Except as provided in sub. (1f), a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a):
>
> 1. For paper copies: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above.

> 2. For microfiche or microfilm copies, $1.50 per page.
>
> 3. For a print of an X-ray, $10 per image.
>
> 4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge.
>
> 5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested.
>
> 6. Actual shipping costs and any applicable taxes.

Wis. Stat. § 146.83(3f) (S.App.001).

Additionally, two sections later, the medical records statutes provides in a section entitled "Applicability" that "[s]ections 146.815, 146.82, 146.83(4) and 146.835 apply to all patient health care records, including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics." Wis. Stat. § 146.836. While the "Applicability" section refers to Wis. Stat. § 146.83(4)—which prohibits falsifying, concealing, or destroying records—it does *not* refer to the immediately preceding section, § 146.83(3f). *See* S.App.002.

B. Banuelos Requests Electronic Copies of Health Care Records for Her Personal Injury Attorneys.

Banuelos requested "copies in electronic format of medical records" from UW Health on February 27, 2020. R.1:4; A.App.15. She claims she "directed and authorized that the medical records be transmitted to her

[personal injury] lawyers," *id.*, and that UW Health's vendor, Ciox, complied with the request and sent her lawyers "the medical records electronically," R.1:5; A.App.16. Banuelos claims that UW Health was required to transmit these records in electronic format based on the federal HITECH Act. R.1:2; A.App.13. But Banuelos never specifies whether the medical records she requested and received are even "electronic health record[s]," within the meaning of the HITECH Act.

What Banuelos takes issue with, however, is the price on the invoice, issued on March 18, 2020, which "reflect[ed] the per page rate for *paper* copies permitted by Wisconsin Statutes § 146.83." R.1:5; A.App.16 (emphasis in original), R.1:15; A.App.24 (Invoice). As noted above, Banuelos' request cited the federal HITECH Act, 42 U.S.C. § 17935(e)(1). On January 23, 2020, the United States District Court for the District of Columbia ruled (among other things) that the HITECH Act does not limit fees charged for copies of medical records directed to personal injury attorneys. *Ciox Health, LLC v. Azar*, 435 F. Supp. 3d 30 (D.D.C. 2020). Accordingly, when Banuelos made her request on February 27, 2020, UW Health and its vendor were not required to charge the federal patient rate; instead, they needed only comply with fee caps (if any) imposed by state law. R.1:5; A.App.16; *see* Wis. Stat. § 146.83(3f)(b)(1).

C. Banuelos Sues UW Health, and the Circuit Court Dismisses Her Claims.

Banuelos sued UW Health in Dane County Circuit Court, alleging that these charges were impermissible because the records were supplied electronically. She does not dispute that these charges would have been proper for paper copies. R.1:5-6; A.App.16-17. UW Health moved to dismiss the complaint on the grounds of failure to state a claim pursuant to Wis. Stat. § 802.06(2)(a)6. R.6:1. UW Health contended that Wis. Stat. § 146.83(3f) does not govern fees for electronic records, or alternatively, that if Wis. Stat. § 146.83(3f) applied, UW Health's methodology of billing for electronic records by the number of paper pages they comprise is permissible. R.7:1-13. Judge Colás granted UW Health's motion on September 1, 2020, concluding in an oral ruling that the statute's text and legislative history did not support applying it to electronic records. R.26:1-8; A.App.2-9

STANDARD OF REVIEW

This Court "review[s] a trial court's decision to grant or deny a motion to dismiss for failure to state a claim de novo." *Lane v. Sharp Packaging Sys., Inc.*, 2001 WI App 250, ¶ 15, 248 Wis. 2d 380, 635 N.W.2d 896. Similarly, "[t]he interpretation of a statute presents a question

of law, which we review de novo." *Meriter Hosp., Inc. v. Dane Cty.*, 2004 WI 145, ¶ 12, 277 Wis. 2d 1,689 N.W.2d 627. But "[a]lthough we consider this question independent of the decisions of the circuit court . . ., we nevertheless benefit from [its] analys[i]s." *Id.*

ARGUMENT

I. The Circuit Court Correctly Held That the Text and Legislative History of Wisconsin's Medical Records Fee Statute Demonstrate That It Does Not Apply to Electronic Records.

This is a straightforward case of statutory interpretation. Wis. Stat. § 146.83(3f), consistent with Governor Walker's request in the 2011 biennial budget, was enacted as part of the repeal of the 2009 requirement to provide medical records in electronic form and its corresponding fee provision, thus leaving fees for electronic records unregulated at the state level. That made particular sense given that the HITECH Act was not in effect in 2009 and its passage made overlapping (and perhaps conflicting) state-level regulation unnecessary.

Banuelos seeks to achieve exactly what the legislature amended the medical records statutes to avoid. Treating Wis. Stat. § 146.83(3f) as an exclusive list of what can be charged for *any* medical records request, she contends that the effect of the 2011 legislature's repeal of the mandate to provide electronic medical records and the corresponding fee provision was

not to deregulate fees for electronic copies but to render them free of charge. The legislature is certainly free to pass such a law. But it has not done so at this time.

Since 2010, federal law has required electronic copies to be provided if a covered entity uses or maintains an "electronic health record" (i.e., a natively electronic record) with respect to protected health information of a patient, and the patient so requests. 42 U.S.C. § 17935(e)(1). It authorizes reasonable cost-based fees for providing such a copy to a patient, while not regulating fees for copies sent to personal injury attorneys and other third parties. 42 U.S.C. § 17935(e)(3). Yet Banuelos contends that the *state* statute, which was deliberately amended to get out of the business of electronic records, actually requires them to be provided for free. That is an implausible reading of the statute's text. The circuit court's decision should be affirmed.

A. Because the Legislature Repealed the Duty to Provide Electronic Copies of Medical Records *at All*, Wis. Stat. § 146.83(3f) Does Not Require Free Electronic Copies of Medical Records.

In Wisconsin, "statutory interpretation focus[es] primarily on the language of the statute." *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110. "Statutory language

is given its common, ordinary, and accepted meaning" and is "interpreted in the context in which it is used; not in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Id.* ¶ 45-46.

Here, the core duty that Banuelos contends exists—to provide electronic medical records for free—is entirely absent from the statute. The legislature could have inserted into Wis. Stat. § 146.83 a line saying "For electronic copies, no charge"—but it did not. That is a telling omission. When the legislature has created rights to have documents provided for free, it has done so explicitly. *E.g.*, *State v. Dresel*, 136 Wis. 2d 461, 462–63, 401 N.W.2d 855 (Ct. App. 1987) (statute providing that public defendant "may request that the court reporter or clerk of courts prepare and transmit any transcript at county expense" held to "unambiguously require[] the county to provide the state public defender with a copy of the transcript of the preliminary examination"); *see also* Wis. Stat. § 19.25 (enumerated state officers may require searches of certain records and "require copies thereof and extracts therefrom without the payment of any fee or charge whatever"); Wis. Stat. § 227.14(5) ("An agency, upon request, shall make available to the public at no cost a copy of any proposed rule, including the analysis, fiscal estimate and any related

form."). Indeed, federal law governing natively-electronic medical records explicitly authorizes a cost-based fee for providing such records even to patients, 42 U.S.C. § 17935(e)(3), and imposes no restrictions on records sent to third parties such as personal injury attorneys, *Azar*, 435 F. Supp. 3d 30.

There is a simple reason for this omission: Wisconsin does not require health care providers to produce medical records in electronic format *at all*—because the legislature *repealed* a prior mandate to provide records electronically and its corresponding fee provision, both of which had been added to the statute in 2009. Since the statute's amendment in 2011, the Wisconsin medical records statute only requires that records be provided in the hard copy formats set out in Wis. Stat. § 146.83(3f)(b). Specifically, Wis. Stat. § 146.83(3f)(b) applies to "copies requested under par. (a)." Wis. Stat. § 146.83(3f)(a), in turn, requires a health care provider to send copies of a patient's health care record if the person makes a request, provides informed consent, and pays the applicable fees under par (b). But importantly, both provisions were enacted as part of the *repeal* of a mandate to furnish records in electronic format when feasible, and to pay a corresponding fee. *See* 2009 Wis. Act. 28, § 2433h, p. 490 (creating

§ 146.83(1k) (S.App.010) (requiring records be provided "in a digital or electronic format" subject to narrow exceptions)).

As the supreme court observed in the context of this very statute, this Court may consider a statute's "past iterations" to understand its plain meaning, *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, ¶ 28, 375 Wis. 2d 38, 894 N.W.2d 405, and even where a statute is unambiguous, courts "may consult extrinsic sources to confirm our understanding of the plain language of a statute." *Id.* Here, the statute's prior iterations and extrinsic sources tell exactly the same story: the legislature, at Governor Walker's request, sought to get out of the business of mandating electronic copies of medical records.

Removing the electronic record mandate was a central purpose of the statute's repeal and reenactment in amended form as part of the 2011 biennial budget bill. Governor Walker's budget submission specifically requested repeal of the mandate:

> *Inspection of Records* . . . Repeal provisions that require a health care provider to do the following: (a) upon request of the person requesting copies, provide the copies in a digital or electronic format unless the record system cannot create or transmit records in a digital or electronic format; and (b) if the copies cannot be provided in an electronic format, provide a written explanation of why the copies cannot be provided in a digital or electronic format.

Joint Committee on Finance Paper # 367, Fees for Patient Health Care Records (DHS – SSI and Public Health) (May 18, 2011), p. 3 (S.App.090).

Accordingly, the Joint Committee on Finance's substitute amendment, Assembly Substitute Amendment 1 to 2011 Assembly Bill 40 ("ASA 1"), accepted Governor Walker's recommendation that Wisconsin law cease requiring providers to furnish electronic copies of records. ASA 1, § 2660, p. 1114 (S.App.099). That remains Wisconsin law today.

In the same 2011 statute, the legislature repealed the corresponding provision governing fees for electronic medical records, Wis. Stat. §§ 146.83(1f), (1h) (2009–10), which had been enacted with the electronic records mandate in the 2009 budget act, and replaced it with Wis. Stat. § 146.83(3f)(b). 2011 Wis. Act 32, §§ 2660, 2663m, pp. 405–406 (S.App.103-104). Having repealed the requirement to provide electronic medical records, the legislature removed the prior statute's reference to fees for electronic medical records because they were no longer covered by Wis. Stat. § 146.83(3f) in the first place.

Banuelos' reading of the statute thus suffers a fundamental flaw: her request was not a request under Wis. Stat. § 146.83(3f)(a). If electronic records were covered by Wis. Stat. § 146.83(3f)(a), then health care providers would be required to produce them on request. *See* Wis. Stat.

§ 146.83(3f)(a) (S.App.001) ("Except as provided in sub. (1f) or s. 51.30 or 146.82 (2), if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records."). That would make the legislature's repeal of former Wis. Stat. § 146.83(1k) (2009–10) meaningless; in passing a bill designed specifically to abolish the mandate to provide electronic records whenever requested, the legislature would have created a mandate to provide electronic records whenever requested.[4] But "[w]e are to avoid interpretations that render parts of statutes meaningless." *Norda, Inc. v. Wisconsin Educ. Approval Bd.*, 2006 WI App 125, ¶ 12, 294 Wis. 2d 686, 693, 718 N.W.2d 236, 240. In short, Banuelos' proposed reading would transform the legislature's efforts to get out of the business of mandating electronic copies of medical records into a mandate to provide them *for free*.

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[4] Indeed, it would have made former Wis. Stat. § 146.83(1k) (2009-10) meaningless too. The former statute contained a counterpart to current Wis. Stat. § 146.83(3f) in the form of former Wis. Stat. § 146.83(1f). *See* S.App.005. If former Wis. Stat. § 146.83(1f) already required copies of electronic medical records upon request, then former Wis. Stat. § 146.83(1k) achieved nothing more than what the statute already required.

That is why the circuit court was right and Banuelos is wrong: even assuming (as Banuelos contends at length, Appellant Br. at 6-10) that Wis. Stat. § 146.83(3f)(b)'s fee provisions are the only fees that may be charged "for providing the copies requested under par. (a)," her request was not such a request. Nor is there any conflict with the supreme court's ruling in *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405. That case involved the definition of a person authorized in writing by the patient in cases where all parties agreed that Wis. Stat. § 146.83(3f) applied. It did not deal with a circumstance, as here, where the legislature had specifically amended the medical records fee statutes to *exclude* electronic medical records from the scope of § 146.83(3f)(a)'s mandate—and thus § 146.83(3f)(b)'s fee limits. In *Moya*, the supreme court held that "had the legislature intended to place parameters of the kind . . . on a person authorized in writing by the patient, 'it would have done so.'" 2017 WI 45, ¶ 25. Here, the legislature "d[id] so" in 2011 Act 32: it removed the requirement that existed under Wis. Stat. § 146.83(3f)'s predecessor to provide electronic medical records, making such records outside the scope of Wis. Stat. § 146.83(3f) altogether.

It is thus Banuelos, and not the circuit court, who seeks to undermine the statute the legislature actually passed. Banuelos—as her request

expressly stated—invoked a *federal* mandate for certain health care providers to provide electronic copies of natively-electronic medical records. *See* R.1:4; A.App.23 (citing 42 U.S.C. § 17935(e)(1)).[5] But dissatisfied with federal law's lack of fee restrictions for this type of personal injury attorney request, *see Azar*, 435 F. Supp. 3d 30, she seeks to turn Act 32 on its head by treating its *elimination* of a state-law electronic records mandate as a *creation* of a mandate to provide them for free when *federal* law requires. The mishmash of state and federal requirements she proposes nullifies Act 32 and should be rejected. She is entitled to electronic copies of certain natively electronic medical records only because of federal law; she cannot use state law *rejecting* a mandate to provide electronic copies to demand that electronic copies of any medical record be provided for free.

Judge Colás concluded from the legislature's failure to specify that electronic medical records should be provided for free that "the legislature has failed to cover the situation where records are requested in electronic form and provided in electronic form. And therefore, the charge that was

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[5] To be clear, this federal statute governs only "electronic health record[s]," a term that only includes natively electronic records as opposed to scans of hard copy documents. *See* 42 U.S.C. § 17921(5).

made or demanded is not a violation." R.26:4; A.App.5. That was correct: the legislature decided not to require electronic copies of medical records in Wis. Stat § 146.83(3f)(a). It thus decided not to cover fees for electronic copies in the fee schedule of Wis. Stat. § 146.83(3f)(b). And, because the legislature intentionally excluded electronic medical records from the scope of Wis. Stat. § 146.83(3f), it is not appropriate for a court to re-write the statute to include electronic records within the fee caps. *See State v. Richards*, 123 Wis.2d 1, 12, 365 N.W.2d 7 (1985) (Courts may not "rewrite" a statute "by judicial fiat."); *LaCrosse Lutheran Hosp. v. LaCrosse Cty.*, 133 Wis. 2d 335, 338, 395 N.W.2d 612 (Ct. App. 1986) ("If a statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts.").

B. The Legislature Specified Precisely Which Provisions of the Medical Records Statutes Apply to Electronic Records—and Wis. Stat. § 146.83(3f) Is Not Among Them.

The legislature's intent that Wis. Stat. § 146.83(3f) not govern electronic medical records in light of Act 32's repeal of the electronic copy mandate is further confirmed by the statute's applicability section. Just two statutory sections later, the legislature provided that "*Sections 146.815, 146.82, 146.83(4) and 146.835* apply to all patient health care records,

including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics." Wis. Stat. § 146.836 (emphasis added). That provision unambiguously makes four provisions—generally ones involving confidentiality, unauthorized access, falsification, concealment, or destruction—applicable to electronic health records. Yet it strikingly declines to include Wis. Stat. § 146.83(3f) even while including the very next subsection. The legislature knows how to make a statutory provision pertaining to medical records unambiguously cover electronic records, but it plainly chose not to extend that coverage to Wis. Stat. § 146.83(3f).

Banuelos cannot just ignore the legislature's specific list of sections for which medical records include "electromagnetic or digital information," because that would contravene the basic rules of how legislation is interpreted. "Statutory language is read where possible to give reasonable effect to every word, in order to avoid surplusage." *Kalal*, 2004 WI 58, ¶ 46. Where the legislature makes a distinction, as it did in Wis. Stat. § 146.836, "it is the task of this court to give effect and meaning to that distinction." *Estate of Miller v. Storey*, 2017 WI 99, ¶ 42, 378 Wis. 2d 358, 903 N.W.2d 759. Likewise, where, as here, the legislature enumerates specific provisions, the principle that "[t]he expression of one thing implies

the exclusion of others (*expressio unius est exclusio alterius*)" implies that "no other [provisions] are intended" to be covered by Wis. Stat. § 146.836's provisions regarding electronic records. *State v. Dorsey*, 2018 WI 10, ¶ 29, 379 Wis. 2d 386, 906 N.W.2d 158. Indeed, if every provision of Wisconsin's medical records laws—even provisions like Wis. Stat. § 146.83(3f) that expressly enumerate mediums like "paper," "microfilm," "microfiche," and "print[s] of an X-ray"—*already* included medical records in electronic format, then Wis. Stat. § 146.836 would "have no consequence." *Matter of D.K.*, 2020 WI 8, ¶ 40, 390 Wis. 2d 50, 937 N.W.2d 901.

Banuelos treats these sections as unrelated statutes, but in fact they are almost consecutive and Wis. Stat. § 146.836 expressly refers to § 146.83(4) while omitting § 146.83(3f). *See* Appellant Br. at 26. That is not importing terms out of context; it is an applicability section governing the very same topic, medical records. Banuelos thus cannot just wish away the language the legislature used to define when electronic medical records are subject to statutory regulations affecting medical records. In fact, the case Banuelos relies on makes it clear that two statutory provisions should *not* be analyzed independently where they "address[] closely related subjects that consideration of one would logically bring the other to mind".

Kopke v. A. Hartrodt S.R.L., 2001 WI 99, ¶ 18, 245 Wis. 2d 396, 629 N.W.2d 662. This is especially true here, where in considering which sections to include in § 146.836, the legislature clearly considered and passed over § 146.83(3f) in deciding to include a reference to § 146.84(4).

Banuelos argues that Wis. Stat. § 146.836 deals only with confidentiality laws. Appellant Br. at 28. But that would just substantiate UW Health's point: the legislature could just as easily have stated that the fee rules applied to electronic records, but conspicuously failed to do so. Further, Banuelos' assertion that § 146.836 "confirms" that "patient health care records" include electronic records is at odds with her assertion that her interpretation "leaves no provision or term superfluous." Appellant Br. at 27-28. Banuelos argues that "the plain language and purpose of § 146.836 is to ensure that all electronic records, paper records, diagnostic films, spoken recordings, audio recordings, visual recordings, handwritten notes, and drawings are preserved and subject to confidentiality." *Id.* at 28. But Banuelos also contends that using the term "patient's health care records" covers all types of records, including electronic records, pointing to Wis. Stat. § 146.81(4)'s general definitions. Banuelos cannot have it both ways: if "patient health care records" included electronic records whenever that term appears, then there was no need for the legislature to specify,

under the heading of "Applicability," that "[s]ections 146.815, 146.82, 146.83(4) and 146.835 apply to all *patient health care records*, including those on which written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics." Wis. Stat. § 146.836 (emphasis added). Every single one of the four provisions cited in Wis. Stat. § 146.836 uses the term "patient health care records." Wis. Stat. §§ 146.815, 146.82, 146.83(4), 146.835. If "patient health care records" already included electronic records in every context, every one of those sections would already have the scope Wis. Stat. § 146.836 dictates, and Wis. Stat. § 146.836 would be entirely devoid of meaning. Despite Banuelos' attempts, characterizing § 146.836 as providing a "confirmation" of which records are covered does not give the section any meaningful work to do.

Longstanding precedent stands against interpreting Wis. Stat. § 146.836 to mean and do precisely nothing. The supreme court has repeatedly warned against interpretations whereby a statutory provision "would be rendered meaningless surplusage." *In re Washington*, 2007 WI 104, ¶ 30, 304 Wis. 2d 98, 735 N.W.2d 111; see also *State v. Quintana*, 2007 WI App 29, ¶ 11, 299 Wis. 2d 234, 729 N.W.2d 776 ("When we construe statutes, we seek to avoid rendering parts meaningless

surplusage"), *aff'd*, 2008 WI 33, 308 Wis. 2d 615, 748 N.W.2d 447. Indeed, this rule applies to interpreting any written instrument. *E.g. Pulkkila v. Pulkkila*, 2020 WI 34, ¶ 69, 391 Wis. 2d 107, 941 N.W.2d 239, ("[C]ourts must avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage.") (quoting *Goebel v. First Fed. Sav. & Loan Ass'n of Racine*, 83 Wis. 2d 668, 680, 266 N.W.2d 352 (1978)). Accordingly, the common-sense way to reconcile § 146.83(3f) and § 146.836 is to (1) construe Wis. Stat. § 146.836 as stating the provisions for which patient health care records includes electronic records—unsurprisingly, largely confidentiality-based provisions—and (2) interpret provisions not listed—often provisions where federal law addresses the same topic—as not included in deference to the federal scheme.

Banuelos also makes a nonsensical argument that § 146.836 "obvious[ly]" could not apply to § 146.83(3f) because if it did, "the medical provider would be obligated to produce "all records" every time a request is made, regardless of what the patient asks for." Appellant's Br. at 31. This argument makes no sense even on its own terms, and Banuelos is tying herself up in knots in trying to read the legislation in this way. If, as she argues, § 146.836 is merely a "confirmatory" section which does not change the meaning of "patient health care records" in § 146.83(3f), then

having this section apply to § 146.83(3f) would not change the effect of the statute. On a plain reading of the statutes, there is no reason that including § 146.83(3f) in § 146.836 would result in a medical provider being obligated to produce all records every time a request is made: the provider is clearly only obligated to provide "copies of the requested records" under § 146.83(3f)(a). Including § 146.83(3f) in § 146.836 would merely have clarified that "patient health care records" that can be requested under § 146.83(3f)(a) include electronic records. There is no sensible reason why the legislature could not have included § 146.83(3f) in § 146.836 —in fact, it could easily have done so. The reason that it did not do so is because, as explained above, it intended to exclude electronic records from § 146.83(3f) when it repealed former § 146.83(1k).[6]

C. Legislative History Confirms That the Legislature Meant What It Said When It Repealed the Electronic Records Mandate and Corresponding Fee Provision.

As explained above, the statute is clear on its face and the inquiry should end there. But to the extent it is necessary to turn to the legislative

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[6] Banuelos incorrectly states that the circuit court rejected UW Health's argument regarding § 146.836. Appellant Br. at 26, 30, 34. The ruling says no such thing. To the contrary, consistent with UW Health's position, the circuit court rejected Banuelos' argument that "patient health care records" covers electronic records when used in the context of § 146.83(3f). That the circuit court did not distinctly refer to § 146.836 as the basis for this conclusion is hardly a rejection—and certainly far less of one than the court's explicit disagreement with Banuelos' position.

history for further guidance, that history strongly supports UW Health's argument and demonstrates an affirmative intent *not* to regulate the provision of electronic copies of records. Banuelos' effort to paint Act 32 as a *repeal* of authorization to charge for electronic records flips the statute on its head. Governor Walker called for a repeal of the state-law electronic copy mandate; the legislature did so, removing the requirement and thus excluding electronic records from the new Wis. Stat. § 146.83(3f)'s scope altogether.

Before 2009, Wisconsin's statutes did not address electronic copies of medical records at all, merely providing a patient with the right to receive "a copy" of their health care records, upon payment of fees prescribed by the Department of Health Services by rule. Wis. Stat. § 146.83(3m) (2007–08) (S.App.007). Such fees were to be "based on an approximation of actual costs," and listed factors the department could consider for determining the approximation of actual costs. *Id.* In 2009, the biennial budget ended DHS's rulemaking authority and enacted two provisions addressing electronic copies of medical records. 2009 Wis. Act 28 (S.App.009-10). One provision required health care providers to furnish, upon request, copies of medical records "in a digital or electronic format unless the health care provider's record system does not provide for the

creation or transmission of records in a digital or electronic format, in which case the health care provider shall provide the [requester] a written explanation for why the copies cannot be provided in a digital or electronic format." 2009 Wis. Act. 28, § 2433h, p. 490 (S.App.010) (creating § 146.83(1k)). The other provision would have directed providers to supply such electronic copies for "a single charge of $5 for all copies requested." *Id.*, §§ 2433d, 2433f, p. 489 (S.App.009) (creating § 146.83(1f)(c)3m. and § 146.83(1h)(b)3m.). However, Governor Doyle used his line item veto authority to strike the $5 cap from that provision, finding it was "a deterrent to providers adopting electronic health records." Veto Message, § D.11, p. 37 (June 29, 2009) (S.App.073).

As a result, the enacted bill retained the Act's provision requiring health care providers to furnish records in electronic format when feasible. Wis. Stat. § 146.83(1k) (2009–10) (S.App.005). And, as amended by the partial-sentence line item veto, it allowed providers to collect "a charge for all [electronic] copies requested," without imposing any specific cap on that charge. Wis. Stat. §§ 146.83(1f), (1h) (2009–10) (S.App.005).

Importantly, the 2011 biennial budget reversed Act 28. From its first drafts, it proposed repealing Wis. Stat. § 146.83(1k), which required providers to make copies available in electronic format. 2011 Assembly

Bill 40, § 2660, p. 1020 (S.App.086). As initially proposed, however, it sought to restore DHS's pre-2009 authority to determine what fees could be charged for copies of health care records. 2011 Assembly Bill 40, § 2663, p. 1021 (S.App.087). Governor Walker supported the repeal of the electronic copy mandate, Joint Committee on Finance Paper # 367, Fees for Patient Health Care Records (DHS – SSI and Public Health) (May 18, 2011), p. 3 (S.App.090), and the Joint Committee on Finance's substitute amendment retained the repeal language. ASA 1, § 2660, p. 1114 (S.App.099). Instead of restoring DHS's pre-2009 authority to regulate fees, however, it continued the post-2009 approach of regulating certain categories of fees by statute. *Id.*, § 2663m, p. 1115 (S.App.100) (creating § 146.83(3f)). But given that there was no longer to be a requirement under the state statute to provide electronic copies, the 2009-2010 provision governing what could be charged for complying with that requirement was also removed from the statute. *See id.*; 2011 Wis. Act. 32, §§ 2660, 2663m, pp. 405–406 (S.App.103-104).

Thus, since 2011, the Wisconsin statute—by design—has not regulated the provision of electronic copies of records. During 2009–2010, the statute required providers to furnish electronic copies when asked to do so, and also authorized them to collect a charge when complying with that

requirement. Due to Governor Doyle's 2009 veto, no $5 cap was ever imposed on that charge. In 2011, however, Governor Walker and the legislature repealed the "electronic copies" requirement altogether, as well as the associated provision governing what could be charged for complying with it. The current statute neither requires that electronic copies be provided, nor regulates what providers can charge when providing electronic copies pursuant to other law. *See* Wis. Stat. § 146.83(3f).

The legislative history thus makes abundantly clear that a request for electronic copies of a patient's health care records is *not* a request made under Wis. Stat. § 146.83(3f)(a), and thus is not governed by the fee limits set out in Wis. Stat. § 146.83(3f)(b). Rather, if limits on fees for copies of electronic medical records exist at all, they are governed exclusively by the federal HITECH Act. 42 U.S.C. § 17935(e)(3). If Banuelos contends that UW Health is violating that federal law, she is free to assess whatever federal remedies she may have, but she cannot invoke Wis. Stat. § 146.84's cause of action for violations of *state* medical records law.

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In short, Banuelos' attempts to characterize the 2011 repeal of the section allowing a charge for electronic records as a removal of permission to charge fees for electronic records requests are directly contrary to what

the legislature actually did. If the legislature had intended to remove any permission previously granted to charge fees in relation to electronic records requests, it knows how to do that with express language but it did not do so here. Instead, what the legislature did in 2011 was make a deliberate and documented decision to get out of regulating requests for electronic copies of medical records.

II. Even If Wis. Stat. § 146.83(3f) Applied to Electronic Records, the Legislature Set Paper as the Baseline Fee.

Even if Wis. Stat. § 146.83(3f) were applicable to electronic records—and for the reasons above, it is clearly not—UW Health's billing practices are consistent with the statute. The statute sets three levels of fees—one for paper, a higher one for microfilm or microfiche, and a much higher one for X-rays. *See* Wis. Stat. § 146.83(3f)(b)(1)-(3). That does not mean—as Banuelos contends—that the legislature intended that requests for records in any other medium be free. To the contrary, as Wis. Stat. § 146.836 notes, "patient health care records" may include those on which "written, drawn, printed, spoken, visual, electromagnetic or digital information is recorded or preserved, regardless of physical form or characteristics." Under Banuelos' reading, then, the legislature recognized the multiplicity of forms in which information can be stored—and yet

supposedly directed that every medium except paper, microfilm, microfiche, and X-ray prints must be provided at no cost whatsoever.

Banuelos' reading defies basic principles of statutory interpretation. In Wisconsin, statutes are read "in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." *Kalal* 2004 WI 58, ¶ 46. Banuelos' interpretation ignores that Wis. Stat. § 146.836 recognizes multiple forms of medical records and asks the court to infer that the legislature inexplicably singled out four media for charges while requiring copies of every other type of medical record be provided for free.

Quite aside from the costs providers and their vendors indisputably do incur in processing requests for records, even if delivered electronically, Banuelos ignores the range of mediums that medical records may come in other than paper, microfilm, microfiche, and X-ray image. Audio and video recordings, for example, are not specified in Wis. Stat. § 146.83(3f), even though making copies of them—particularly if stored in analog formats—involves significant effort and expense. There is no evidence that the legislature intended to make copies of records free if they happen not to be kept in paper, microfilm, microfiche, or X-ray image form.

The most logical interpretation of the statute is the one UW Health followed: treating the paper fee as the baseline price, to be charged if a record is requested in a format as to which the legislature has not specified another price. This interpretation harmonizes these statutory provisions and avoids inexplicably different treatment of forms of medical records. It is also consistent with the legislature's practice of saying so expressly and unequivocally when it is directing records be provided for free. *See supra* section IA. Further, this interpretation is consistent with the legislative history of § 146.83(3f). As outlined above, when the governor used his line item veto in 2009 in respect of the charge for electronic copies, he explained that he was vetoing the $5 fee limit on electronic record copies "with the intent that providers may charge a reasonable fee rate for providing copies in an electronic or digital format that is no more than the paper copy rate.". Veto Message, § D.11, p. 37 (June 29, 2009) (S.App.073). In the absence of an applicable federal provision, this clearly encapsulates the legislature's intent with respect to what charge should be applicable to electronic records. This is the most common sense and pragmatic approach to the statutes, and one which has been adopted as a common view across the industry. Thus, even if § 146.83(3f) covers

records in formats other than those it specifies, it was proper to charge the baseline paper fee for copies of those records.[7]

To be clear, the question here is not about providing equitable individual patient access to their health information—such access remains available to individual patients under the federal scheme—but rather a question of how the cost of providing electronic records access should be apportioned as between the health care provider and commercial third parties such as law firms and insurance companies. Under Banuelos' interpretation, health care providers would have to spend money maintaining medical records, paying for adequate cybersecurity, and searching for and transmitting records to third parties such as personal injury law firms (or hiring vendors to do the same), while not being entitled to recoup anything to defray that cost. That cannot be the correct construction.

CONCLUSION

For the foregoing reasons, this Court should affirm the circuit court's dismissal of Banuelos' complaint.

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[7] The paper copy price also functions as a baseline in a more practical sense, in that, if the price for electronic copies were higher than the paper copy price, then a patient would simply request paper copies instead.

Dated this 7th day of December, 2020.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Brief of Defendant-Respondent conforms to the rules contained in Section 809.19(8)(b) and (c) of the Wisconsin Statutes for a brief produced with a proportional serif font. The length of this brief is 7,301 words.

Dated this 7th day of December, 2020.

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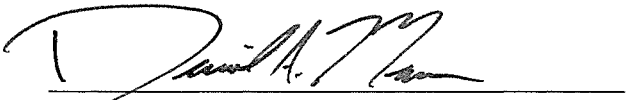

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this response brief, which complies with the requirements of Section 809.19(12). I further certify that this electronic response brief is identical in content and format to the printed form of the response brief filed as of this date. A copy of this certificate has been served with the paper copies of this response brief filed with the Court and served on the opposing party.

Dated this 7th day of December, 2020.

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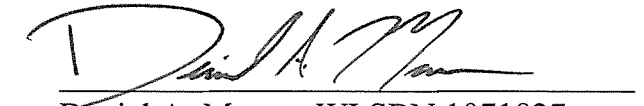

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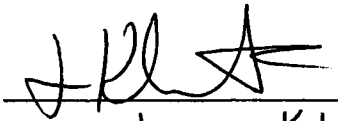
CERTIFICATE OF FILING

I hereby certify that this Response Brief and Supplemental Appendix of Defendant-Respondent was delivered by hand to the Clerk of the Court of Appeals on December 7, 2020.

Dated this 7th day of December, 2020.



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I hereby certify that on December 7, 2020, I filed with the Court by hand-delivery and served copies of the Response Brief and Supplemental Appendix of Defendant-Respondent upon counsel by first class mail:

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