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STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 2020AP001582

BEATRIZ BANUELOS

Plaintiff-Appellant-Respondent,

vs.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY

Defendant-Respondent-Petitioner.

Appeal from the Circuit Court of Dane County,
Honorable Juan B. Colas Presiding

RESPONSE TO PETITION FOR REVIEW

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STATEMENT OF ISSUES

Wisconsin Statutes §146.83(3f)(b) establishes "the universe of fees that may be charged for the service of providing patient health care records." *Banuelos v. University of Wisconsin Hospitals and Clinics Authority* ("UW Health"), 2021 WI App 70, ¶19, __ Wis.2d __, __ N.W.2d __. Can UW Health charge unlimited fees for transmitting electronic copies of "patient health care records" to Banuelos when the plain language of the statute does not allow it?

Answered by the Court of Appeals: No.

STATEMENT ON CRITERIA FOR REVIEW/ SUMMARY OF ARGUMENT

UW Health's arguments in support of review bear little relationship to the issue that the Court of Appeals decided or the issue it asks this Court to examine. At the Court of Appeals, UW Health agreed that "[t]his is a straightforward case of statutory interpretation." (UW Health Appellate Respondent Brief, p. 10). It agreed that the ***only issue*** is whether §146.83(3f)(b) permits a health care provider to charge unlimited fees for providing electronic copies of patient health care records. (*Id*., p. 4).

UW Health's petition focuses on other issues outside of the record that have no bearing on this "straightforward" statutory analysis, such as a discussion of unrelated class-action lawsuits and fear-mongering about the economic cost and alleged unfairness of applying §146.83(3f)(b) pursuant to its plain language. If this Court were to accept this case, none of those issues could be considered. To the extent UW Health wishes to make ***fairness*** arguments about §146.83(3f)(b) or the remedies afforded by §146.84, those arguments must be addressed to the legislature, not this Court, and provide no basis for further review. The fairness of §146.83(3f)(b) is not a "a policy within [this Court's] authority" to review. *See* §809.62(1r)(b).

The petition should be rejected because this case does not present a "novel" issue, but instead involves "merely the application of well-settled principles to the

factual situation." §809.62(1r)1-2. Here, UW Health (through its national business associate, CIOX)[1] attempted to charge exorbitant per-page fees for electronic copies, not permitted by §146.83(3f)(b).

Noticeably absent from UW Health's petition is any analysis of the language of §146.83(3f), which undisputedly controls the issue. This issue is not "novel" because it simply required the Court of Appeals to apply the plain language of the operative statute. The text and operation of §146.83(3f) is simple, unambiguous, and easy to follow. Under §146.83(3f), when a patient requests "copies of patient health care records," the provider may charge "***no more than the total of***" items listed in the statute. These items include retrieval and certification fees in limited circumstances, per page fees for "paper copies," shipping, and tax. *Id*. The list of permissible charges has no relevant exceptions. As the Court of Appeals stated, the statute "defines the total universe of fees that a provider may collect from a requester for the service of fulfilling a request for patient health care records...." *Banuelos*, 2021 WI App 70, ¶15. Charges for electronic copies, particularly per page fees, are not listed and therefore not permitted.

The Court of Appeals' construction was not "novel," because this Court recently applied it in *Moya v. Aurora Healthcare, Inc.*, 2017 WI 45, 375 Wis. 2d 38, 894 N.W.2d 405. There, this Court agreed that charges for items not included in §146.83(3f)(b) are ***disallowed*** and cannot be charged by the provider. *Id*., ¶¶4-5, 31. Specifically, *Moya* prohibited charges for certification and retrieval fees because those charges were not included within §146.83(3f)'s permissible list. *Id*. There is no need for further review, because this Court applied the same construction just a few years ago.

Moreover, ***UW Health conceded*** that the plain language of §146.83(3f)(b) prohibits the per-page charges it attempted to impose for electronic copies. *Banuelos,* 2021 WI App 70, ¶¶32-34. The Court of Appeals stated that "***UW Health***

[1] (R.1:4;App.141).

does not offer any argument that contradicts our plain language analysis....” *Id*. ¶32 (emphasis). UW Health never made any argument that the relevant statutory language was ambiguous. UW Health’s petition does not explain how the text of §146.83(3f) could even plausibly support its position. Since the language of the operative statute is plain, unambiguous, and undisputed by UW Health, the “inquiry stops there.” *Moya*, 2017 WI 45, ¶¶ 17-19.

Likewise, there is no dispute that the scope of the statute includes electronic records and electronic copies. “Patient health care records” include “***all records*** related to the health of a patient” and the legislature previously stated that “copies” includes those “in digital or electronic format.” *Compare* §§ 146.81(4), 146.83(1f)(2009), 146.83(3f)(b)(2011) (emphasis); *Banuelos,* 2021 WI App 70, ¶¶ 40-41. The legislature repealed the permission to charge for electronic copies in 2011 but left the scope of the statute and all definitions unchanged. *Id*. As the Court of Appeals stated, UW Health’s “scope argument is essentially a conclusory assertion, not a developed argument.” *Banuelos,* 2021 WI App 70, ¶32. As to the application of the statute, there is no legitimate dispute for this Court to review.

True, the Court of Appeals decision involves a legal issue, but not one requiring this Court to “develop, clarify or harmonize the law.” §809.62(1r)(c)3. The unambiguous text of §146.83(3f) and this Court’s prior decisions more than adequately state the law. The only real uniqueness in this case is factual – namely the type of illegal charge that UW Health attempted. This situation is only of “state-wide importance” or likely to recur if providers continue to impose charges that the legislature prohibited.

UW Health’s petition mostly focuses on attacking the policy chosen by the legislature as burdensome and unfair. Banuelos could just as easily argue:

- The federal government paid for providers’ electronic records systems, and 96% of providers have adopted such systems, including UW Health, undercutting any argument that technological infrastructure costs are burdensome.[2]

[2] (R.20:4).

- There is little or no cost involved in clicking a mouse a few times to provide the patient access to the requested records through an online portal.

- From 2011-20, prior to a federal court decision, providers had been supplying patients with electronic records for nominal or no cost.[3]

- Providers likely experienced a huge cost savings from eliminating paper records systems.

- Patients should not be burdened with hundreds or thousands of dollars of costs for obtaining access to their own electronic medical records.

While that policy debate may be interesting, it has no relationship to any issue this Court can consider if it reviews this case. As the Court of Appeals stated, "[a]ny concern that health care providers are unfairly or unreasonably burdened by the costs of providing patients with electronic copies of their patient health care records without being able to charge a fee is properly addressed to the legislature." *Banuelos,* 2021 WI App 70, ¶44. Accordingly, review is inappropriate here.

STATEMENT OF THE CASE

This case presents a simple issue of whether health care providers, like UW Health, are permitted under Wisconsin law to charge exorbitant fees for transmitting ***electronic copies*** of health care records to patients. The question here is undisputedly controlled by Wisconsin Statutes §146.83(3f)(b). The Court of Appeals determined that the plain language of §146.83(3f)(b) does not permit such charges. *Banuelos,* 2021 WI App 70, ¶¶11-21.

A. Background on Federal and State Law Governing Medical Records.

UW Health agrees that "[i]n Wisconsin, medical records are regulated both by federal laws... and by certain additional provisions of state law, including Wis. Stat. §~ 146.81-146.84." (Petition, p. 4). UW Health implies that Banuelos has improperly sought relief under state law because federal law also regulates medical

[3] (R.1:5;App.142).

records requests.[4] Banuelos has never alleged that UW Health violated federal law, neither party has ever presented any federal question for review, neither party has ever argued that there is a question of federal preemption to address, and there has never been any dispute that §146.83(3f)(b) applies to Banuelos' request for "copies of patient health care records." The only dispute ever adjudicated in this case is whether §146.83(3f)(b) allows unlimited charges for electronic copies as UW Health contends or prohibits those charges as the Court of Appeals determined.

For background, it is helpful to have some understanding of the scope of federal and state regulation of medical records. Since 2009, 96% of major health care providers, including UW Health and all major hospital systems in Wisconsin, have adopted electronic medical records systems after the passage of the HITECH Act, where the federal government paid providers to implement electronic medical records systems. (R.20:4). The regulatory trade-off for having their technological infrastructure underwritten by the federal government was that providers were required to provide patients with electronic copies of their medical records for little or no cost.[5] The federal government considers obtaining electronic access to medical records a part of the care the patient has paid for and recommends that electronic copies be made available for free.[6]

For nearly 10 years until 2020, major providers complied with federal law, charging $6.50 or less to fulfill such requests. (R.1:5;App.142). In 2020, however, a federal district court in *Azar v. CIOX*, No. 18-cv-0040 (D.C. Cir. Jan. 20, 2020), held that when a patient requests that the copies be forwarded to a lawyer, HITECH requires the provider supply the electronic copies, but the federal cost limitations do not apply. While HITECH pre-empts less stringent state laws, more stringent state

[4] The requester does not choose ***either*** federal or state law, just as one cannot choose to pay either federal or state income taxes. Both apply, and providers are obligated to comply with applicable law.

[5] *See* DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html).

[6] *Id*.

regulations governing access to patient health care records are not preempted. 45 C.F.R. §160.203. Pertinent to this case, federal law required UW Health to supply the electronic copies, but state law now governs the permissible charge following *Azar*. *See Id*. UW Health has never disputed this analysis.

In 2009, Wisconsin Statutes §146.83(1f) allowed providers to charge "a fee" for providing copies of patient health care records in "digital or electronic format." Following the implementation of HITECH in 2011,[7] the Wisconsin legislature did two things: (1) it stopped requiring providers to supply electronic records (presumably because that requirement was now redundant of and potentially in conflict with HITECH's similar requirement) and it also repealed the permission to charge for copies in "electronic or digital format." *See* §146.83(3f)(b). The legislature did so without modifying the scope of §146.83 or the definitions of "patient health care records," or "copies." There is nothing in either the language of the statute or the legislative history showing that the legislature excluded "electronic copies" from §146.83(3f)(b)'s cost controls. The drafting file for the 2011 changes to §146.83 indicates that the legislature understood the opposite – that the statute establishes the "maximum allowable fees." (App.125).

B. Facts, Procedural Status, and Disposition by the Lower Courts.

Banuelos alleged that UW Health violated §146.83(3f) by charging her a "per page fee" for electronic copies of her patient health care records. (R.1:6-7, App.43-44). UW Health moved to dismiss the Complaint, arguing that such charges do not violate §146.83(3f). (R.6; App.153). The circuit court misread §146.83(3f) to allow for fees not listed in the statute and granted the motion. (R.26:4; App.029). As the appellate court observed, the circuit court's misreading cannot be correct because it would allow providers to entirely avoid the statute and charge anything they want in response to requests for copies of medical records. *Banuelos,* 2021 WI App 70, ¶20. Apparently recognizing this was incorrect, UW Health ***did not adopt the***

[7] The drafting file shows that the legislature was aware of and considered the impact of the federal law. (App.124).

circuit court's reasoning on appeal, instead relying on another, unrelated statute and legislative history to argue for a judicially-created exception for electronic copies. (*See* UW Health Appellate Respondent Brief); *Banuelos,* 2021 WI App 70, ¶¶31-44. Neither the circuit court nor the Court of Appeals agreed with UW Health's reasoning. *Id*.; (R.26; App.26-32). The Court of Appeals corrected the circuit court's error, relying on the plain language of the statute and this Court's decision in *Moya*.

ARGUMENT

UW Health's argument for review under §§809.62(1r)(c)2 and 809.62(1r)(c)3 should be rejected. This case does not present a "novel" issue meriting review under §809.62(1r)(c)2, because (1) the Court of Appeals merely applied the plain language of the controlling statute, (2) this Court has already confirmed how the critical statutory language operates in *Moya*, and (3) UW Health ***offered no contrary interpretation of the plain language of §146.83(3f), thereby conceding the issue.*** *Banuelos*, 2021 WI App 70, ¶¶32-34. The paramount legal principle – that §146.83(3f) only allows providers to impose specific, limited charges for providing copies of patient's medical records – is uncontroversial. It is established by the unambiguous language of the statute and this Court's prior precedent. This is not a "novel" issue or "new doctrine." It is merely the application of well-settled law to a new factual situation – a provider imposing a different type of charge that violates §146.83(3f)(b).

The case also does not merit further review under §809.62(1r)(c)3, because the issue of law is well-settled, and only recurred in this case because UW Health, through its business associate CIOX, chose to ignore it. The issue in this case boils down to simple enforcement of the plain language of §146.83(3f), over which UW Health is unable to offer any dispute. Instead, UW Health offers policy arguments that ask this Court to usurp the legislature's judgment and ignore the statutory text. UW Health's primary argument that disallowing charges for electronic copies of

records is ***unfair*** should be directed at the legislature, not this Court. Therefore, this Court's intervention is not needed to develop, clarify, or harmonize the law.

I. SUPREME COURT REVIEW PURSUANT TO §809.62(1r)(c)2 IS INAPPROPRIATE AS THE ISSUE HERE IS NOT "NOVEL;" RATHER IT INVOLVES "MERELY THE APPLICATION OF WELL-SETTLED PRINCIPLES TO THE FACTUAL SITUATION" IN THIS CASE.

While this Court may accept review where "[t]he question presented is a novel one, the resolution of which will have statewide impact," it generally does not review issues involving "merely the application of well-settled principles to the factual situation." *Compare* §§809.62(1r)(c)2, 809.62(1r)(c)1. Here, applying the plain language of §146.83(3f)(b) is not a "novel" legal issue that merits this Court's review. Rather, the Court of Appeals' decision merely applied the text of the statute, which is unambiguous and well-settled. Section 146.83(3f)(b) "defines the total universe of fees that a provider may collect from a requester for the service of fulfilling a request for patient health care records." *Banuelos,* 2021 WI App 70, ¶15. While the type of charge UW Health attempted to impose on Banuelos may be different than the illegal charges imposed in prior appellate cases, the interpretation and application of §146.83(3f) is not "novel." The scope of the legislature's directive in §§146.83 and 146.84 has statewide impact, but the "resolution" of this case does not. Therefore, review should be denied.

A. The Controlling Language of §146.83(3f)(b), Which is Plain and Unambiguous, Does Not Require Further Review.

"Access to patient health care records is governed by Wis. Stat. § 146.83." *Moya*, 2017 WI 45, ¶4. The statute allows health care providers to "impose certain costs on the person requesting health care records...." *Id*., ¶5. Section 146.83(3f)(b) limits what providers can charge for providing "patient health care records" to those items it lists:

> (a) . . . 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) . . . ***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.

(emphasis added). "This language also makes clear that para. (b) defines the total universe of fees that a provider may collect from a requester for the service of fulfilling a request for patient health care records under para. (a)." *Banuelos,* 2021 WI App 70, ¶15.

There was never any dispute that Banuelos requested copies of her "patient health care records" as defined by §146.83(3f)(a). "Patient health care records" broadly includes "***all records related to the health of a patient prepared by or under the supervision of a health care provider***;…" §146.81(4) (emphasis). "***All records,***" by its plain and inclusive language, must include those created and copied electronically. There was never any dispute that Banuelos' requested "copies" of her "patient health care records." The Court of Appeals stated "§ 146.83(3f) addresses 'copies' of health care records, and UW Health points to no language limiting 'copies' to any particular format." *Banuelos*, 2021 WI App 70, ¶39.

In responding to the request for copies of patient health care records, the costs restrictions in §146.83(3f)(b) are all-inclusive and mandatory: "a health care provider ***may charge no more than*** the total of all of the following that apply for providing the copies requested…." (emphasis). The Court of Appeals logically stated: "Accordingly, the language and grammatical structure of para. (b) instruct that a health care provider may charge no more than the total of the amount of those fees enumerated in the statute that apply to the particular request. If a charged fee is

not one of the enumerated fees and applicable to the particular request, it is not permitted." *Banuelos,* 2021 WI App 70, ¶17.

The unambiguous language of § 146.83(3f)(b) does not allow a charge for providing ***electronic copies*** of "patient health care records." Again, as the Court of Appeals stated: "Because para. (b) does not enumerate any fees that apply to the provision of electronic copies of patient health care records, under para. (a) a health care provider that complies with a request to provide electronic copies of a patient's health care records may not charge a fee for doing so." *Banuelos,* 2021 WI App 70, ¶18.

There is no legitimate argument for further review because the plain language is uncontroverted and dispositive of the issue. When the statute is plain and unambiguous, as it is here, the "inquiry stops there." *Moya,* 2017 WI 45, ¶¶17-19. "…[T]he court is not at liberty to disregard the plain, clear words of the statute." *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110.

That courts begin and end their construction of statutes using the plain language is ubiquitous in our appellate jurisprudence and does not need further exposition here. That courts must apply the plain language of §146.83(3f)(b) is not a "novel" issue requiring this Court's review.

Further, ***UW Health conceded that the Court of Appeals' plain-language interpretation of §146.83(3f)(b) is correct.*** Throughout the litigation, UW Health never offered any other plausible interpretation of the language of §146.83(3f)(b): "UW Health does not offer any argument that contradicts our plain language analysis. . . UW Health does not offer any developed plain language interpretation of the statute." *Banuelos,* 2021 WI App 70, ¶¶32-34.

UW Health instead argues here that further review is warranted because the circuit court disagreed with the Court of Appeals. However, the circuit court simply misread §146.83(3f)(b) to ***allow for any charge not listed in the statute*** - the opposite of what the statute says. (R.26:4;App.029). Even ***UW Health did not adopt***

the circuit court's reasoning on appeal. The Court of Appeals reversal amounts to simple "error correction" of this plainly incorrect reading. *See Cook v. Cook*, 208 Wis. 2d 166, 188, 560 N.W.2d 246 (1997) (This Court primarily involves itself in "law development," where the Court of Appeals' primary function is "error correction").

The circuit court's interpretation would have allowed a provider to charge whatever it wanted as long as the charge is not identified in the statutory list – entirely defeating the purpose of the statute. *Banuelos*, 2021 WI App 70, ¶19. The Court of Appeals correctly stated:

> If WIS. STAT. § 146.83(3f)(b) does not establish the universe of fees that may be charged for the service of providing patient health care records, then nothing would prevent health care providers from charging any amount they wished for all items or services that do not correspond to an enumerated fee. For example, a provider might charge any amount for the service of providing a fax or a copy of a photograph because fees for those items are not enumerated in the statute, as well as charge high fees for providing electronic copies.

Id., ¶19. The circuit court's analysis is contrary to the statutory text and this Court's interpretation in *Moya*. The Court of Appeals properly corrected that error. That "error correction" does not provide a basis for further review here.

B. Prior Precedent Confirming the Statute's Plain Language Does Not Need to Be Revisited.

This case does not present a "novel" issue, because this Court has recently applied the correct interpretation of §146.83(3f) in *Moya*. The Court of Appeals applied that precedent to the alleged violation here. *Banuelos*, 2021 WI App 70, ¶28. UW Health's petition does not argue that *Moya* was wrongly decided or misapplied.

Only a few years ago, in *Moya*, this Court applied the same construction of §146.83(3f). 2017 WI 45, ¶¶4-5, 17-19, 31. There, this Court agreed that charges for copying patient health care records not specifically itemized in §146.83(3f) are disallowed by the statute's plain language. *Id*., ¶¶ 4-5, 31. More specifically, this Court held that the provider was not permitted to charge certification and retrieval fees to a person authorized by the patient under §146.83(3f)(b)4-5. *Id*. ¶ 25, 31.

Since those charges were ***not included*** within §146.83(3f)(b)'s permissible list, this Court held that ***they were disallowed***. *Id*. ¶25, 31; *Banuelos,* 2021 WI App 70, ¶28; *see also Harwood v. Wheaton Franciscan Servs., Inc.*, 2019 WI App 53, ¶¶42, 43, 388 Wis. 2d 546, 933 N.W.2d 654, (stating that §146.83(3f)(b) enumerates certain "allowable fees" and does not allow fees that are not explicitly authorized).

The same analysis must apply here. The legislature did not allow a charge for providing electronic copies of Banuelos' heath care records. §146.83(3f)(b). The legislature did allow a per page fee for "***paper copies"*** of the records but chose not to allow such fees for ***electronic copies***. §146.83(3f)(b)1.

This Court has also interpreted the nearly identical cost provision in the open records law in the same fashion. *See Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶35-36, 341 Wis. 2d 607, 815 N.W.2d 367 (where law authorized fees for four specific tasks the legislature's list demonstrated "that the legislature considered the imposition of fees and knew how to authorize particular types of fees" and statutory text did not "allow the imposition of a broad array of fees"; "the legislature knew how to draft that language and could have done so had it wished."); *Id*., ¶83 (Roggensack, J., concurring and noting that addressing concerns about costs not enumerated by statute "is a legislative function, not a function properly undertaken by the courts."). The correct interpretation of the plain language of §146.83(3f) is well-established and does not require further exposition.

C. UW Health's Arguments Do Not Merit Further Consideration By this Court Because They Were Results-Driven, Ignored the Plain Language of §146.83(3f), and Were Contrary to Legislative History.

UW Health advocated for a judicially-created "carve-out" from §146.83(3f)(b) for electronic copies, so providers can charge unlimited fees – despite the plain language to the contrary. It is a well-established maxim that when a statute is not ambiguous, "the court cannot, under guise of judicial statutory construction, rewrite the statute to reflect the intention the legislature might have had." *Harris v. Kelley*, 70 Wis. 2d 242, 250, 234 N.W.2d 628 (1975). The Court of

Appeals correctly dismissed this results-driven analysis. Arguments that ignore the plain language of §146.83(3f) do not require further review.

First, UW Health wrongly argued, contrary to the statutory text, that §146.83's legislative history showed that the legislature intended to exclude electronic copies from §146.83(3f)'s cost controls. Even if that were true, it is well established that it is inappropriate to rely on "limited legislative history, in order to support an interpretation contrary to the plain language of the statutes." *Kontowicz v. Am. Standard Ins. Co. of Wisconsin*, 2006 WI 48, ¶44, 290 Wis. 2d 302, 714 N.W.2d 105 *clarified on denial of reconsideration*, 2006 WI 90, ¶ 44, 293 Wis. 2d 262, 718 N.W.2d 111. Again, this argument does not merit further review as UW Health has never explained how it's desired construction could square with the text of the statute.

Moreover, the legislative history clearly demonstrated the opposite. In 2009 §146.83(3f) permitted a charge for providing "copies in digital or electronic format." Later in 2011, ***the legislature repealed that permission***. *Compare* §146.83(1f)(2009) *with* §146.83(3f)(b)(2011); *Banuelos*, 2021 WI App 70, ¶¶40-41. As the court of appeals stated:

> This history confirms our plain meaning interpretation in that it shows that the legislature permitted fees of any amount for electronic copies of patient health care records in 2009 for the purpose of encouraging the adoption of electronic health care records, but that the legislature deleted that permission in 2011, after the federal HITECH Act separately encouraged the adoption of electronic health care records. UW Health's reliance on the legislative history to purportedly show that it may charge unlimited fees for providing electronic copies of patient health care records is therefore unavailing.

Banuelos, 2021 WI App 70, ¶¶41.

When the legislature repealed that permissible charge in 2011, it ***left the scope of the Chapter undisturbed without redefining "patient health care records" or "copies,"*** which naturally still included "copies in digital or electronic format." Moreover, the 2011 drafting file confirms that the legislature understood that the items listed in §146.83(3f) constitute the "maximum allowable fees" providers can charge. (App.125). As the Court of Appeals stated, UW Health's proposed

construction renders both the 2009 and 2011 statutory changes "superfluous and meaningless" and would "require us to read language into the statute that is no longer there, which we cannot do." *Banuelos*, 2021 WI App 70, ¶¶24-25.

UW Health also grossly over-interpretated another unrelated change in §146.8(1k)(2009) in 2011, where the legislature removed the requirement for providing electronic copies but left the cost controls and definitions in place. The Court of Appeals correctly rejected it:

> UW Health does not explain why it follows from legislative repeal of the separate mandate requiring the provision of copies of patient health care records in electronic format and the corresponding fee provision, that § 146.83(3f) permits a provider to charge whatever it wishes for complying with a request for electronic copies of records. As we have emphasized, the legislature still maintains a list of enumerated fees for the provision of copies of health care records that does not include any fees for providing electronic copies."

Banuelos, 2021 WI App 70, ¶36. UW Health's undeveloped argument which lacked any relationship to the text of the statute cannot be the basis for further review.

Any argument that the legislature intended something different from the statute's language is an issue for the legislature, not this Court. *Buffham v. Racine*, 26 Wis. 449, 456 (1870) (holding that the legislature can correct its own mistakes, and "it would be very dangerous to put... a construction... that the legislature did not mean what it has expressed.").

Second, UW Health persists in arguing that an unrelated statute within the Chapter, §146.836, nullifies the cost controls imposed by §146.83(3f)(b). That is not how this Court evaluates independent statutes:

> There are limits as to how much and what kind of statutory context is relevant to the analysis of a particular word in an individual statutory section. "The risk of misunderstanding as a result of allowing irrelevant portions of a text to influence the meaning attributed to the segment of text being construed is probably just as risky as taking any statement out of context." . . . Without something more, such as one statute being incorporated into another, or two statutes addressing closely related subjects that consideration of one would logically bring the other to mind, "[e]very statute is an independent communication, for which either the intended or the understood meaning may be different."...

Kopke v. A. Hartrodt S.R.L., 2001 WI 99, ¶18, 245 Wis.2d 396, 629 N.W.2d 662. Again, this maxim is well-established and does not require further review here.

Section 146.836's plain language and purpose have no bearing on this case, except to support the Court of Appeals' construction. The language of §146.836 ***confirms*** that the definition of "patient health care records" includes "digital information." It ensures the patient's right to confidentiality of and access. *Banuelos,* 2021 WI App 70, ¶¶38-39. Nothing in its language alters or modifies the cost controls imposed by §146.83(3f)(b). The Court of Appeals pointed out that UW Health's expansive reading of §146.836 "is absurd," because "nothing in §146.836 changes the definition of patient health records, when that term is used elsewhere in the chapter, to exclude electronic records." Again, rejecting UW Health's interpretation of §146.836 beyond its plain language and purpose is not "novel." It merely involved application of well-settled principles established by this Court.

II. FURTHER REVIEW PURSUANT TO §809.62(1r)(c)3 IS INAPPROPRIATE BECAUSE THE LEGAL ISSUE RAISED IS WELL-SETTLED AND DOES NOT REQUIRE FURTHER DEVELOPMENT OR CLARIFICATION.

UW Health's claim that review is appropriate under §809.62(1r) because "the question presented is not factual in nature but rather is a question of law of the type that is likely to recur unless resolved by the supreme court" should likewise be rejected. While application of §146.83(3f) is a legal issue, the statute's interpretation is well-settled. UW Health identifies several current and prior cases in federal and state courts where medical providers' national business associates have violated §146.83(3f)(b). The only real distinction between this case and those other cases is ***factual*** - the type of violation at issue. That providers and their national records servicers like CIOX continue to violate §146.83(3f)(b) is not a basis for further review. Similarly, the remedy afforded by §146.84 is not at issue at this stage of the litigation. To the extent UW Health takes issues with statutory remedies, its argument should be brought to the legislature, not this Court.

A. Purported "Unfairness" in §146.83(3f)(b)'s Application Is an Issue for the Legislature, Not this Court.

As the Court of Appeals stated, "[a]ny concern that health care providers are unfairly or unreasonably burdened by the costs of providing patients with copies of their patient health care records in electronic format without charge is properly addressed to the legislature." *Banuelos,* 2021 WI App 70, ¶44. UW Health's submission is filled with wild prognostications outside of the record warning of imagined consequences of not allowing providers to charge unlimited fees for electronic copies of medical records. These arguments are largely disingenuous for numerous reasons:

- Most providers, like UW Health, do not fulfill the records requests. As in this case, they outsource that task to for-profit national business associates like CIOX. (R.1:5-8;App.142-44).
- The providers' electronic records infrastructure was paid for by the federal government when HITECH was enacted.[8]
- There is little or no cost involved in clicking a mouse a few times to provide the patient access to the requested records through an online portal. To the extent there is a labor cost involved in the "retrieval" of the records, the statute already prohibits those charges. §146.83(3f)(b)5; *Moya*, 2017 WI 45, ¶31.
- 96% of providers, including UW Health and every other major hospital system in Wisconsin, have electronic records systems. Charging hundreds or thousands of dollars in per page fees for electronic copies bears no relationship to any cost or effort providers spend. (R.20:4).
- Unlike physical paper copies, it makes no sense for providers to charge "per page fees" for electronic medical records when the batch of records is

[8] *See* DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html).

contained in a single electronic transmission, file, or electronic media, and the medical information within electronic records is repeated over and over in each subsequent medical visit, drastically increasing the number of pages.

- Before *CIOX v. Azar*, providers had been supplying patients with electronic records for nearly 10 years at costs between $0-6.50, which approximated the providers' actual cost. (R.1:5;App.142).
- The federal government considers obtaining electronic access to medical records a part of the care the patient has paid for and recommends that electronic copies be made available for free. [9]
- Providers likely experienced a huge cost savings in eliminating the paper records in favor of electronics systems.
- UW Health bemoans a hypothetical scenario, where it could be required to physically scan in physical records to transmit them to a patient without reimbursement. Setting aside that major providers have done away with paper records, neither federal nor Wisconsin law require a provider to physically scan in paper records to produce electronically.

While the debate over ***fairness*** in allowing providers to impose unlimited charges on their patients for transmitting electronic copies of medical records may be interesting, it is not one that this Court can address for two reasons: First, the record on appeal does not contain any information supporting the claims UW Health makes in its petition. UW Health never introduced any evidence or other materials to support any "fairness" arguments, much less subject them to the rigor of the discovery process.

Second, and more importantly, the ***fairness*** of the public policy chosen by the legislature is not a question for this Court. The debate that UW Health wishes to pursue, as evidenced by its petition, is misdirected. It should be argued to the

[9] *See* DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html).

legislature, not this Court. The fairness of legislature's chosen policy is not within this Court's authority to question. *See Progressive N. Ins. Co. v. Romanshek*, 2005 WI 67, ¶65, 281 Wis. 2d 300, 697 N.W.2d 417 (policy arguments are best addressed to the body charged with developing this state's public policy). As such, the petition should be denied.

CONCLUSION

For the foregoing reasons, Banuelos respectfully requests that the Court decline the petition.

Dated this 9th day of November, 2021.

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CERTIFICATE OF FORM, LENGTH, AND ELECTRONIC FILING

I hereby certify that:

This response to petition for review ("response") conforms to the rules contained in Wis. Stat. §§809.19(8)(b) and (d) and 809.62(4) for a response produced with a proportional font. The length of this response is 5,748 words.

I have submitted an electronic copy of this response which complies with the requirements of Wis. Stat. §§809.19(8)(b) and (d) and 809.62(4(b). The text of the electronic response is identical to the printed form of the response filed as of this date.

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

Dated this 9th day of November, 2021.

Electronically signed by: s/Jesse B. Blocher

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CERTIFICATION OF THIRD-PARTY COMMERCIAL DELIVERY

I certify that on November 9, 2021, this response to petition for review was delivered to a third-party commercial carrier for delivery to the Clerk of the Supreme Court within three calendar days. I further certify that the response to petition for review was correctly addressed.

Electronically signed by: s/Jesse B. Blocher
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