STATE OF WISCONSIN
SUPREME COURT

BEATRIZ BANUELOS,

Plaintiff-Appellant,

v. Appeal No. 2020-AP-1582

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

Defendant-Respondent-Petitioner.

Dane County Case No. 2020-CV-903
The Honorable Juan B. Colás, Presiding

NON-PARTY BRIEF OF AMICI CURIAE THE WISCONSIN HOSPITAL ASSOCIATION, INC., THE WISCONSIN MEDICAL SOCIETY, INC., THE WISCONSIN DENTAL ASSOCIATION, INC., LEADINGAGE WISCONSIN, INC., THE RURAL WISCONSIN HEALTH COOPERATIVE, THE WISCONSIN HEALTH CARE ASSOCIATION/WISCONSIN CENTER FOR ASSISTED LIVING, AND THE WISCONSIN HEALTH INFORMATION MANAGEMENT ASSOCIATION, INC. IN SUPPORT OF PETITION FOR REVIEW

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[1] Available at https://docs.legis.wisconsin.gov/misc/lfb/budget/2011_13_biennial_budget/102_budget_papers/367_health_services_fees_for_patient_health_care_records.pdf.

[2] Available at https://docs.legis.wisconsin.gov/2009/related/veto_messages/2009_wisconsin_act_28_details.pdf.

STATEMENT OF AMICI'S INTEREST

Under federal law, health care providers are entitled to charge a cost-based fee for providing patients and other requesters with copies of electronic patient health records. In the decision appealed here, the Court of Appeals held that Wisconsin's health care providers are cut off from the federal rules on fee collection and are instead prohibited from recovering any costs associated with providing copies of electronic patient health records. The simple absence of any state statute overlapping federal law on this topic should not be interpreted as such a drastic policy statement by Wisconsin's legislature.

The Wisconsin Hospital Association, the Wisconsin Medical Society, the Wisconsin Dental Association, LeadingAge Wisconsin, the Rural Wisconsin Health Cooperative, The Wisconsin Health Care Association/Wisconsin Center for Assisted Living, and the Wisconsin Health Information Management Association (collectively, the "Associations") are not-for-profit member organizations representing the interests of health care providers across Wisconsin. Together, the Associations represent hospitals, health systems, physicians, residents, dentists, dental hygienists, skilled nursing and therapy centers, personal care agencies, community-based providers and facilities that provide long-term care, assisted living, and

senior housing. As providers of accessible, high-quality, patient-centered care, the Associations' members are committed to delivering cost-effective care to the patients they serve in full compliance with the state and federal laws governing their practices and their processing of patient health records. To do so, however, the Associations' members need clarity on the interpretation and application of WIS. STAT. § 146.83(3f) to requests for electronic copies of health care records. Clarity is required because for more than a decade these providers believed, as the Circuit Court held below, that the statute does not govern requests for or the delivery of electronic health records. By contrast, and in complete disregard of the statute's plain language and its place in the context of related federal law, the Court of Appeals issued a decision that prohibits any charge for records delivered in electronic format. In so doing, the appellate court not only has precluded providers from recovering costs associated with the provision of electronic copies of health records but also has placed these providers at risk of significant liability for adhering to the statute's terms. The Associations therefore support this Court's review of the appellate court's decision, and submit this brief in support of the Petition.

INTRODUCTION

With respect to patient health care records, Wisconsin providers are subject to a variety of state and federal laws regulating the use and disclosure of such records and the legally permissible fees that may be charged for responding to records requests. These laws include WIS. STAT. §§ 146.81–146.84, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), the Health Information Technology for Economic and Clinical Health ("HITECH") Act, the 21st Century Cures Act, and their implementing federal regulations.

The issue presented for the Court's review is whether a health care provider may 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. The answer hinges on a determination of the legislature's intent in revising the statute in 2011 to remove the reference to electronic copies of health care records in the medical record fees statute and whether that action was intended to prohibit the charging of fees to requestors entirely, as the Court of Appeals held, or was intended to leave regulation of such fees to the expanding body of federal law expressly addressing the issue, as the Circuit Court held. Strong evidence supports the Circuit Court's conclusion that the legislature's

simultaneous repeal of the electronic copies of medical records mandate and of the reference to electronic medical records in the fees statute was intended to get Wisconsin out of the business of regulating such fees, leaving the Wisconsin statutes to govern only the release of the enumerated forms of medical records and their related fees.

For the reasons herein, this Court should grant review pursuant to WIS. STAT. § (RULE) 809.62(1r)(c)2.-3.

ARGUMENT

I. The issue presented in this case is likely to recur unless resolved by this Court, warranting review pursuant to WIS. STAT. § (RULE) 809.62(1r)(c)3.

Whether Wisconsin health care providers may charge a fee for providing electronic copies of patient health records is a question "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," warranting review pursuant to WIS. STAT. § 809.62(1r)(c)3. In recent years there has been a significant increase in the number of cases arising in Wisconsin regarding the medical records fee statute resulting in confusion related to its interpretation. The Court of Appeals' decision causes greater confusion and invites litigation challenging invoices for copies of records in an electronic form. At least two class actions are already pending asserting the same theory as the Plaintiff-Respondent

here, Beatriz Banuelos ("Banuelos"). *See* ***Schutte v. Ciox Health LLC,*** No. 2:21-cv-00204-LA (E.D. Wis.)(filed Feb. 17, 2021); ***Rockweiler v. Aurora Health Care, Inc.,*** No. 21-CV-604 (Wis. Cir. Ct., Milwaukee Cty., filed Jan. 29, 2021). More are likely to follow.[3]

The Court of Appeals' decision is not supported by the text (or omission) in the statute or by the statutory history. Section 146.83(3f)(b) states that a health care provider can charge "no more than" the listed fees for providing physical copies of health records in the form of paper copies, microfiche or microfilm copies, or printed x-ray film images, plus certification and retrieval fees (depending on the identity of the requester) and shipping costs. While Wisconsin's Department of Health Services "does not track information on the total amount of fees charged for medical records by Wisconsin health care providers, or other information on medical records requests," information available from a Wisconsin firm that provides medical record copying services to health care providers indicates that, prior to the rate increase in 2011 Wis. Act 28, "the average request totals 61 pages in length at an average direct processing cost of $62.22, with the total fee that

[3] The ***Schutte*** case was filed in the United States District Court for the Eastern District of Wisconsin and can be accessed via PACER at: https://ecf.wied.uscourts.gov/cgi-bin/DktRpt.pl?882371248927502-L_1_0-1; the ***Rockweiler*** case was filed in the Milwaukee County Circuit Court and can be accessed via CCAP at: https://wcca.wicourts.gov/caseDetail.html?caseNo=2021CV000604&countyNo=40

can be charged for this average request equaling $36.35." Legislative Fiscal Bureau, Joint Fin. Cmte., Paper #367 (May 18, 2011) at 6.[4] The updated statutory fee schedule in § 146.83(3f) still only allows recoupment of approximately $49.25 plus shipping—which is a smaller loss to providers only if one makes the unreasonable assumption that the processing costs are unchanged since 2011.

By simultaneously eliminating both the mandate to provide electronic copies of medical records and the corresponding fees provision for electronic medical records, the legislature implicitly recognized (1) the success of federal and state incentives for providers to adopt electronic health records meant that copies of medical records were increasingly being provided in electronic form, and (2) a substantial body of federal law regulating electronic copies of medical records and the associated fees was growing to address these developments. In short, the provision of medical record copies is now discussed in terms of portals and licensing fees rather than pages, and by 2011 Wisconsin's legislature could comfortably defer regulation of electronic health records to federal agencies dedicated to these new technological issues.

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[4] The Joint Committee on Finance report is available at: https://docs.legis.wisconsin.gov/misc/lfb/budget/2011_13_biennial_budget/102_budget_papers/367_health_services_fees_for_patient_health_care_records.pdf.

Section 146.83 was amended in 2011 to remove the mandate to provide electronic copies (*see* 2011 Wis. Act 32, § 2660 (repealing § 146.83(1k))) at the same time the reference in Wis. Stat. § 146.83 to fees for electronic copies was deleted (*see* 2011 Wis. Act 32, §§ 2655 and 2659y (repealing §§ 146.83(1f)(c) and (1h)(b), respectively, which allowed unspecified fees for providing "copies in digital or electronic format.")). However, the Court of Appeals' decision now wrongfully reads WIS. STAT. § 146.83(3f)(a) as applicable to electronic health information in order to apply the fee limitations in § 146.83(3f)(b), and finding no pertinent provisions, the decision concludes that such information should be provided for free. This conclusion ignores the national context of electronic patient health records at the time. The statute's prior mandate—that electronic records be provided for an unspecified fee—was passed in the biennial budget bill in 2009 (*see* 2009 Wis. Act 28),[5] the same year that Congress

[5] Wisconsin Governor Doyle partially vetoed the proposed provisions in 2009 Wis. Act 28 that would allow only a $5 fee for provision of electronic health records and would prohibit any charge for the electronic media on which such records were provided, saying: "I am partially vetoing this provision to eliminate the deadlines and the associated penalties for providing copies of and access to records, with the intent of maintaining current law requirements provided under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). The impact on health care providers of creating state regulations that are significantly more restrictive than federal requirements has not been adequately analyzed. Further, this partial veto will eliminate 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. The fee limitation is a deterrent to providers adopting electronic health records." 2009 Wis. Act 28, § D.11 at 37 (June 29, 2009) Veto Message Details, *available at* https://docs.legis.wisconsin.gov/document/vetomessages/2009/AB75Details.pdf

passed the HITECH Act, which was created to motivate the implementation of electronic health records (EHR) and supporting technology across the United States. Two years later, during Governor Walker's administration, Wisconsin repealed those provisions through the 2011 biennial budget bill. (*See* 2011 Wis. Act 32 § 2660). The more reasonable inference is that the legislature saw no further need for a separate state mandate and state regulation of associated fees where federal regulations were now solidly in place.

This interpretation of the 2011 statutory changes as getting Wisconsin out of the business of regulating electronic access and copies is further supported by the fact that the Applicability section at WIS. STAT. § 146.836, which is the only statute in Chapter 146 in which a reference to electronic health information remains, states that only "Sections 146.815, 146.82, 146.83(4)[6] 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." In its drafting of § 146.836, the legislature expressly stated

[6] This subsection prohibits any person from falsifying, withholding, concealing, destroying or damaging a patient health care record.

which provisions would continue to impact electronic health information, and WIS. STAT. § 146.83(3f) is not among them.

Even if it does not misinterpret the statute, the scope of the Court of Appeals' decision is overbroad and untenable. For example, the decision does not address: (1) whether the provider must maintain patient health care records electronically for the fee prohibition to apply; (2) whether providers are responsible for any costs of converting paper records to an electronic form in order to provide the records electronically; or (3) whether the provider bears the cost of the media on which electronic copies are provided (USB, flash drive, CD, etc.). Or does the appellate court's decision merely stand for the proposition that, similar to federal law, a provider is only prohibited from charging a fee for providing electronic copies where no manual effort is required in producing them for the requestor, for example, because they are transmitted automatically through an Application Programming Interface ("API")? *See* 45 C.F.R. § 171.302(b)(2). If so, can the provider pass through any fees incurred that were required to license such API if it is not one that is already provided by the provider for such purpose (such as a patient portal)? *See* 45 C.F.R. § 171.302(a). If a health care provider is not permitted to charge any fee for the provision of an electronic copy of medical records under any circumstance, such providers will face

numerous costs that will instead be passed through to other patients when assessing the fees for care. Additionally, if there is no limit on the number of times a requestor can obtain a free electronic copy, these costs could increase rapidly. This is particularly true now when federal laws such as HIPAA, the HITECH Act and the 21st Century Cures Act *require* that health care providers provide requestors with electronic copies of their electronic health information unless very narrow exceptions apply, *see* 45 C.F.R. § 164.524(a)(1), but balance that obligation by permitting health care providers to charge reasonable, cost-based fees and licensing fees if special technologies are required to provide the information in the manner requested, *see id.* § 164.524(c)(4).

This Court has the opportunity to set the record straight and correctly interpret the legislature's repeal both the electronic copy mandate and the related fees provision during the 2011 term as evidence that no Wisconsin fee prohibition exists rather than as an implied act excluding all Wisconsin health care providers from fees available to them under federal law. If this Court were to exercise its authority as Wisconsin's "law-declaring court" and make such matters certain now, it would deter years of litigation and save Wisconsin health care providers from being left in a state of legal uncertainty and litigatory risk. ***Seitzinger v. Community Health Network***, 2004 WI 28,

¶18, 270 Wis. 2d 1, 676 N.W.2d 426. Given that this is a problem that is likely to recur, this Court's review is critical to resolving these important issues of law. ***Id***; *see also* WIS. STAT. § 809.62(1r)(c)3.

II. The question presented is a novel one of substantial importance to health care providers across the State of Wisconsin, warranting review by this Court to clarify the law pursuant to WIS. STAT. § (RULE) 809.62(1r)(c)2.

The question presented is also a novel one of substantial importance to health care providers across Wisconsin, warranting review by this Court to clarify the law pursuant to WIS. STAT. § 809.62(1r)(c)2. The Court of Appeals' published decision in this case will have an enormous impact on Wisconsin health care providers statewide as it fundamentally alters the health care industry's understanding of the statute for the last ten years, which has informed providers' and their vendors' processes, policies and procedures for release of information. Since the legislature's 2011 repeal of the language related to copies of electronic records, health care providers and their vendors have understood the statutes to not regulate requests for electronic copies of records or the related charges.

Health care providers and their vendors have invested time and resources in conforming their practices, policies and procedures to the growing body of relevant federal law that requires the provision of electronic access to or copies of medical records and the permissible cost-based fees for

such requests, including HIPAA the HITECH Act, the 21st Century Cures Act, and their implementing federal regulations. *See, e.g.,* 45 C.F.R. Parts 164 and 171. The Court of Appeals' holding that the legislature's omission of fees for electronic copies of medical records requires that such copies be provided for free is a significant and substantial deviation from the national norm. Under relevant federal law at least a reasonable, cost-based fee is permitted whenever manual effort is required in producing the records in an electronic format, subject to certain delineated exceptions in those federal regulations. *See, e.g.,* ***Ciox Health, LLC v. Azar***, 435 F. Supp. 3d 30, 30-40 (D.D.C. 2020). Moreover, the D.C. District Court aptly observed:

> [T]he whole point of placing a limit on fees was to ensure that individual patients would not be foreclosed or inhibited from accessing their PHI [protected health information] by excessive fees. That same rationale does not apply when the PHI is directed to and paid for by a third party, like an insurance company or a law firm.

Id. at 58 (citations omitted).

Requiring health care providers to bear the cost of providing such records instead of allowing them to recoup such costs from the requestors will increase the health care providers' operational costs, such as staff time, vendor contracts, media and other supplies necessary to provide the electronic copies. Needing to account for such costs in their budgets will ultimately increase the cost of health care and shift this burden to other

patients, insurers and government payors or require other cutbacks that could impact patient care and services.

Additionally, Wisconsin health care providers are now at risk for substantial liability for complying with an industry practice that the Court of Appeals' decision makes illegal. Unlike the referenced federal laws, Wisconsin law provides for a private right of action for violations of the medical record laws, which can create significant liability for health care providers and even subject them to potential punitive damages. WISCONSIN STAT. § 146.84(1)(b) provides that "[a]ny person, including the state or any political subdivision of the state, who violates s. 146.82 or 146.83 in a manner that is knowing and willful shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not more than $25,000 and costs and reasonable actual attorney fees." The next subdivision provides that "[a]ny person, including the state or any political subdivision of the state, who negligently violates s. 146.82 or 146.83 shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not more than $1,000 and costs and reasonable actual attorney fees." WIS. STAT. § 146.84(1)(bm). Under the Court of Appeals' reasoning, then, a provider who charges a reasonable cost-based fee for electronic copies (which is often a $6.50 flat

rate based on federal HIPAA guidance), could face thousands of dollars in potential liability if, the appellate court as held, such copies were to have been provided free of charge. This could result in an extraordinary windfall to requestors for what amounts to only nominal actual damages. For these reasons, review is warranted.

CONCLUSION

The Court of Appeals' decision misinterprets the legislature's decision in 2011 to rely on the growing body of federal law to regulate appropriate fees for the provision of electronic access or electronic copies of medical records as a decision to prohibit fees for the provision of such records entirely, which was a policy the legislature had rejected when revising the statute. Further, it results in creating various questions surrounding the scope of the interpretation, which will ultimately lead to continued litigation regarding these issues. Finally, the decision inappropriately transfers the costs of handling such medical records requests away from the requestor to other patients, insurers, and government programs, which exacerbates public policy concerns regarding the cost of health care and will have a statewide impact on Wisconsin health care providers, business affiliates, and vendors. For these reasons, this Court should grant review.

Dated this 10th day of November, 2021.

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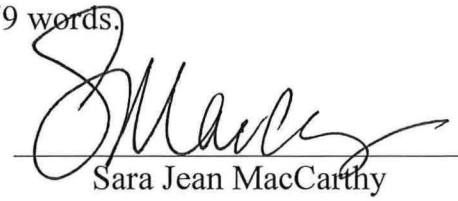
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,779 words.

Signed: 
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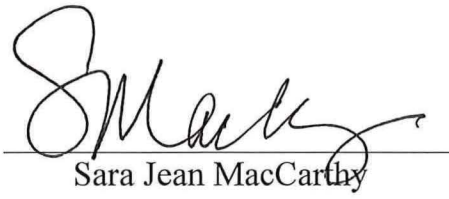
Signed: 
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