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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.

**APPEAL OF A PUBLISHED DECISION BY
COURT OF APPEALS, DISTRICT IV, ON APPEAL FROM THE
CIRCUIT COURT OF DANE COUNTY, CASE NO. 20-CV-903,
THE HONORABLE JUAN B. COLÁS PRESIDING**

BRIEF OF DEFENDANT-RESPONDENT-PETITIONER UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Wisconsin Cases

Federal Cases

Wisconsin Statutes

Federal Statutes and Regulations

INTRODUCTION

This case presents an issue of great importance to health care providers in Wisconsin: whether, when a patient or their designee—such as a personal injury attorney—requests electronic copies of medical records, state law requires health care providers to provide those records free of charge. Both the text of the statute and its legislative history confirm that Wisconsin law creates no such mandate.

This case is also notable for what is *not* at issue: this Court is not faced with ensuring that patients in Wisconsin are given easy and affordable access to electronic copies of their medical records. This is because federal law regulates fees for electronic records and ensures that patients seeking copies of their medical records for their own use can access those records cheaply and easily. *See* 42 U.S.C. §§ 17935(e); 17921(5); *see generally* HHS, *Individuals' Right under HIPAA to Access Their Health Information 45 CFR § 164.524,* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html. Under prevailing federal guidance, such individual requests are fulfilled at a flat rate of $6.50 per request, or less.[1] Instead, at issue in this case is whether, on top of this existing federal regime, Wisconsin law mandates that Wisconsin health care providers must, on request, produce electronic copies entirely free of charge. The mandate at issue in this case extends not just to patients (who, as noted, already have substantial cost protection under federal law) but to commercial entities like personal injury law firms and insurance companies who choose, for their own business reasons, to obtain records directly from health care providers rather than from the patients who are their customers (and who, for that

[1] To be clear, this case also does not relate to patients' access to their EPIC records through portals such as MyChart, which is already free of charge.

very reason, were recently affirmed as being excluded from the federal law fee protections. *See Ciox Health, LLC v. Azar,* 435 F. Supp. 3d 30 (D.D.C. 2020)). At bottom, this case asks who should bear the cost of supporting these commercial entities' profit making: the Wisconsin health care system (and, ultimately, all Wisconsin patients) or the commercial entities themselves.

Were the answer not on its own self-evident, the relevant Wisconsin law settles it. Since 2011, when it repealed from the state statute both the mandate requiring health care providers to provide electronic copies when requested and the corresponding fee provision, the Wisconsin legislature has deferred to federal law on the regulation of electronic copies of medical records. Accordingly, for the last decade, health care providers and their vendors have understood that Wisconsin law does not itself regulate requests for, or the provision of, electronic copies of medical records. In 2020, a federal court concluded that the federal-law caps on the provision of electronic copies to individuals seeking access to records reflecting their own medical care do not apply to third parties (such as life insurance firms and law firms) seeking copies of others' medical records, *see Azar,* 435 F. Supp. 3d at 58. Since that decision, the Wisconsin legislature's deference to federal law on this topic has meant that there is no fee cap in Wisconsin for requests that electronic copies be sent to such third parties. The Wisconsin legislature has expressly chosen not to regulate these requests.

Two circuit court judges agreed, holding that the actions of the 2011 legislature reflected a choice not to regulate requests for electronic copies of health care records. The court of appeals, however, held that the statute's plain text—which now says nothing about electronic copies—not only *covers* electronic copies of medical records but also prohibits charging *any* fees for

retrieving and delivering them, requiring health care providers to produce such records for free. The court of appeals' decision is erroneous, will negatively impact the quality of health care in this state and should be reversed.

First, there is no dispute that the 2011 legislature repealed the electronic copy mandate and corresponding fee provision, both of which had been simultaneously enacted just two years earlier, in 2009. On Banuelos's and the court of appeals' reading, however, the repeal of this mandate actually made the regulations *stricter*. In holding that Wis. Stat. § 146.83 not only governs the provision of electronic copies of medical records but also mandates that those records be delivered at no charge—irrespective of the cost to the health care provider or the financial means of the for-profit records recipient—the court of appeals interpreted a statute whose stated purpose was to repeal a mandate as having nevertheless created an even broader one—to provide electronic copies of medical records for free. But the text of the resulting statute does not support the court of appeals' conclusion that § 146.83(3f) regulates the delivery of electronic copies of medical records. And the legislative history confirms that by repealing the mandate and corresponding fee provision, the legislature wished to return to the pre-2009 status quo whereby fees for electronic copies were not limited under state law and instead were controlled by the recently enacted federal HITECH Act.

Second, this conclusion is reaffirmed by the medical records statute's "Applicability" section, Wis. Stat. § 146.836, which makes clear that the term "patient health care record" includes electronic records in just three specifically enumerated sections and one additional subsection, but not including § 146.83(3f). The fact that the legislature did not incorporate

electronic records into the definition of "patient health care record" for purposes of § 146.83(3f), even though it did so with respect to several other provisions of the law, including the very next subsection, § 146.83(4), demonstrates that the court of appeals' interpretation of the statute is incorrect. Under the negative implication canon (*expressio unius est exclusio alterius*), listing those four provisions implies that no others were intended to be included. In short, as made clear by the legislature's careful crafting of the statute in 2011, federal law alone governs whether and what amount requesters may be charged for electronic copies of medical records in Wisconsin. This Court should accordingly reverse the court of appeals' decision.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

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

Answered by the Circuit Court: Yes. After the 2011 repeal of the 2009 electronic health records mandate and corresponding fee provision, Wis. Stat. § 146.83(3f) does not regulate requests for electronic copies of health care records.

Answered by the Court of Appeals: No. The effect of the 2011 biennial budget was *sub silentio* to prohibit fees for electronic copies of health care records.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

University of Wisconsin Hospitals and Clinics Authority ("UW Health") supports oral argument and publication. The outcome of this case will either confirm or overturn the court of appeals' published opinion regarding 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 in Wisconsin. Additionally, the outcome of this case will 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. UW Health believes that oral argument would be of assistance to the Court and would allow each party the opportunity to further clarify and develop the legal theories.

STANDARD OF REVIEW

Where, as here, a case "presents a question of law arising from a motion to dismiss based on a question of statutory interpretation, [this Court's] review is de novo." *Mueller v. TL90108, LLC*, 2020 WI 7, ¶ 11, 390 Wis. 2d 34, 938 N.W.2d 566 (citations omitted).

STATUTORY SECTIONS INVOLVED IN THE APPEAL

In Wisconsin, medical records are regulated both by federal laws such as HIPAA and HITECH and by certain additional provisions of state law, including Wis. Stat. §§ 146.81-84. The following sections of state law are of particular importance to the issue before the Court:

146.81 Health care records; definitions.

In ss. 146.81 to 146.84:

> . . . .
>
> (4) "Patient health care records" means all records related to the health of a patient prepared by or under the supervision of a health care provider; and all records made by an ambulance service provider, as defined in s. 256.01 (3), an emergency medical services practitioner, as defined in s. 256.01 (5), or an emergency medical responder, as defined in s. 256.01 (4p), in administering emergency care procedures to and handling and transporting sick, disabled, or injured individuals. "Patient health care records" includes billing statements and invoices for treatment or services provided by a health care provider and includes health summary forms prepared under s. 302.388 (2). "Patient health care records" does not include those records subject to s. 51.30, reports collected under s. 69.186, records of tests administered under s. 252.15 (5g) or (5j), 343.305, 938.296 (4) or (5) or 968.38 (4) or (5), records related to sales of pseudoephedrine products, as defined in s. 961.01 (20c), that are maintained by

pharmacies under s. 961.235, fetal monitor tracings, as defined under s. 146.817 (1), or a pupil's physical health records maintained by a school under s. 118.125.

. . . .

146.83 Access to patient health care records.

. . . .

(3f)(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.

. . . .

146.836 Applicability.

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.

STATEMENT OF THE CASE

I. Factual and Procedural Background

A. UW Health and Ciox Provide Electronic Medical Records to Patients in Wisconsin.

UW Health is a large institutional medical provider in Wisconsin that was created by the Wisconsin legislature. R. 1-3 to 4; App. 35-36. Ciox Health, LLC ("Ciox") is a health care information management company that aids health care providers, such as UW Health, in responding to and billing for requests for patient health care records, including electronic medical records. R. 1-4, 1-7; App. 36, 39.

B. Banuelos Requests and Receives Her Electronic Medical Records from UW Health.

Banuelos requested "copies in electronic format of medical records" from UW Health on February 27, 2020. R. l-6; App. 38. 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. l-7; App. 39.

Her request and complaint cited exclusively to the 2009 federal Health Information Technology for Economic and Clinical Health Act ("HITECH") and its implementing regulations, found at 45 C.F.R. § 164.524(c). R. 1-14; App. 46. That federal statutory regime authorizes (in certain circumstances) a patient to request that copies of electronic health records be provided in an electronic format to the patient, or to a designated third party, such as her personal injury attorney. 42 U.S.C. § 17935(e)(1) ("[I]n the case that a covered entity uses or maintains an electronic health record . . . the individual shall have a right . . . to direct the covered entity to

transmit such copy directly to an entity or person designated by the individual . . . ."); 45 C.F.R. § 164.524(c)(2)(ii) ("the electronic form and format requested by the individual" is mandatory "if it is readily producible in such form and format"). Banuelos asserted that these federal rights "preempt[] Wisconsin state law," R. 1-14; App. 46, and did not cite the Wisconsin Statutes as the basis for any right or obligation in her request.

Since 2016, the U.S. Department of Health and Human Services ("HHS")—the federal agency responsible for implementing HIPAA and HITECH—had maintained the position that the presumptive maximum charge for any HITECH request for electronic delivery of electronically stored documents was $6.50, no matter who was the intended recipient of the record copies. *See Azar*, 435 F. Supp. 3d at 42–43. Just a few weeks before Banuelos's request, however, in January 2020, a federal court rejected the position that the HITECH Act capped fees charged for copies of medical records directed to third parties (such as personal injury attorneys) and invalidated HHS's above-noted informal federal guidance that had purported to create such a cap. *See id.* at 66–69.

In the periods between Congress passing HITECH, HHS's imposition of the fee cap, and the *Azar* decision invalidating it as to third-party recipients, the Wisconsin legislature was also busy grappling with how best to regulate the delivery of electronic copies of medical records, if at all. As explained further below, *see infra* Legal Background Section, in 2009, the Wisconsin legislature inserted provisions into the medical records statute regulating and attempting to impose a fee cap on the delivery of electronic copies of medical records, but that fee cap was vetoed by the governor. In 2011, the legislature repealed those provisions relating to electronic copies

of medical records, thereby reverting back to the practice of deferring to the federal law's regulation of such electronic copies.[2]

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

Banuelos sued UW Health in the Dane County Circuit Court, alleging that these charges were impermissible because the records were supplied electronically. In an about-face from her request, she now contended that, while federal law provided the mandate to provide the copies in electronic format, it was Wisconsin state law that—although silent regarding electronic medical records—gave her personal injury attorneys the right to receive electronic copies of medical records at no cost. She does not dispute that these charges would have been proper had paper copies been delivered. R. 1-7 to 8; App. 39-40. 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-l. UW Health contended that Wis. Stat. § 146.83(3f) does not govern fees for electronic records. R. 7-l to 13.

On September 1, 2020, the circuit court granted UW Health's motion to dismiss, ruling that the charges made by UW Health did not violate the Wisconsin Statutes, because § 146.83 is silent on electronic records and what charge is permitted for delivery of electronic records, indicating that the legislature had chosen not to govern that conduct. R. 26-4 to 7; App. 30-33.

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[2] Accordingly, at the time of Banuelos's post-*Azar* request, federal law permitted providers to charge per-page rates when delivering electronic copies in response to requests like Banuelos's that direct the copies to personal injury attorneys, while—as is evident from the face of Banuelos's request—Wisconsin law simply did not address electronic delivery. Banuelos received an invoice consistent with these regulations, which "reflect[ed] the per page rate for *paper* copies permitted by Wisconsin Statutes § 146.83." R. l-7; App. 37, R. 1-15; App. 45 (invoice).

The circuit court also reasoned that when the Wisconsin legislature in 2011 repealed the reference in the statutes to electronic records, it left the statute without a specification of permissible—or impermissible—fees for electronic records. R. 26-6 to 7; App. 32-33. The circuit court held that it was not its role to intervene in such circumstances when the statute does not prohibit the charge. R. 26-7; App. 33. Subsequently, another circuit court judge in Milwaukee County reached the same conclusion in an action filed by the same attorneys who represent Banuelos in this case. *See* App. 48-57 (Mot. Hr'g. Tr., Feb. 8, 2021, *Meyer v. Aurora Health Care*, No. 20-CV-5760 (Wis. Cir. Ct., Milwaukee Cty., filed Sept. 30, 2020)).

D. The Court of Appeals Reverses in a Published Decision, Requiring That Electronic Copies of Medical Records Be Provided for Free.

On September 30, 2021, the court of appeals reversed the circuit court's order. It held that § 146.83(3f) "unambiguously" provides a mandate to produce copies of patient health care records—including electronic records—provided that the three requirements set out in that section are met (i.e., making the request for copies, providing the informed consent, and paying the applicable fees under paragraph (b)). *Banuelos v. Univ. of Wisc. Hosp. and Clinics Auth.,* 2021 WI App 70, ¶ 13, 399 Wis. 2d 568, 966 N.W.2d 78; App. 8. It then held that if, as is the case with electronic records, there are no "applicable fees" under paragraph (b), the copies must be provided at no cost. *Id.*

The court of appeals reached this conclusion ostensibly based on the "plain meaning statutory interpretation" of § 146.83(3f). *Id*. ¶ 6; App. 5. The court noted on multiple occasions that there was "no reference in subds(b)1.-6. to electronic copies, which is the format requested and

provided here." *Id.* ¶¶ 14, 18; App. 9, 11. It also held that paragraph (b) of § 146.83(3f) "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)." *Id.* ¶ 15. This is because, it reasoned, the section "limits what a provider may charge 'for providing the copies [of patient health care records] requested under par. (a)' to '*no more than the total of the following that apply*' of six enumerated fees." *Id.*

But the court of appeals then erroneously held that "[b]ecause para[graph] (b) does not enumerate any fees that apply to the provision of electronic copies of patient health care records, under para[graph] (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; App. 11. It reached this conclusion based on a number of inferences. One inference was the "legislature's public policy of promoting access to patient records." *Id.* ¶ 21. The court also considered the legislative history of the statute as part of its plain meaning analysis. Comparing § 146.83(3f) before and after the 2011 amendment, the court of appeals determined that the legislature's changes supported the court of appeals' conclusion that the statute was an enumeration of all permitted fees, including for electronic copies (for which the court thus held that no fees were permitted). *Id.* ¶ 24. This conclusion depended on the court of appeals' further inference that if the statute were not such a comprehensive enumeration of permissible fees, "there would have been no reason in the previous version of the statute for the legislature separately to provide that health care providers may impose an unspecified and unlimited 'charge' for providing copies in digital or electronic format." *Banuelos,* 2021 WI App 70, ¶ 24; App. 14. The court held that "[s]uch an interpretation would render

that part of the previous version of the statute superfluous and meaningless, a result that we avoid." *Id.*

The court of appeals also declined to accept any guidance from the statute's applicability section in § 146.836, based on its conclusion that applying § 146.836 by its terms would result in some seemingly arbitrary—in the courts' words, "absurd"—distinctions between which provisions of chapter 146 applied to electronic copies and which did not. *Id.* ¶ 39; App. 21-22. But the court of appeals' analysis did not propose any reading of that section in which it was not entirely redundant. *Id.* The decision was published in the official reports.

II. Legal Background

Access to protected health information is governed by federal and state law. This case turns on the interpretation of § 146.83(3f)—which, in addition to federal law, is one of the state-law provisions that governs individuals' and their designees' access to copies of protected health information. That provision does not mention electronic records. Thus, as both the circuit court and court of appeals recognized, *Banuelos,* 2021 WI App 72, ¶¶ 10, 22-27; App. 7, 11-13, the legislative history of this section is crucial to this appeal. *Accord State v. Stenklyft*, 2005 WI 71, ¶ 40, 281 Wis. 2d 484, 697 N.W.2d 769 (explaining that when a provision "itself is silent as to" a given issue, "it is appropriate to examine legislative history to determine the legislative intent in enacting the provision").

Before 2009, Wisconsin's statutes did not address electronic copies of medical records at all, merely providing patients with the right to receive "a copy" of their health care records, upon payment of fees prescribed by the Department of Health Services ("DHS") by rule. Wis. Stat. § 146.83(3m)

(2007-2008); App. 64. Such fees were to be "based on an approximation of actual costs," and listed factors that DHS 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; App. 66-67. The first 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, at 490; App. 67 (creating § 146.83(1k)). In the second provision, the legislature sought to impose a $5 cap on the amount of fees that could be charged for providing electronic copies and to disallow fees for discs or other media upon which electronic copies are provided. *Id.*, §§ 2433d, 2433f, at 489; App. 66 (creating § 146.83(1f)(c)3m and § 146.83(1h)(b)3m).

However, in signing the bill into law, Governor Doyle used his line-item veto authority to strike the $5 cap from that provision, as well as the prohibition of disc fees, finding these were "a deterrent to providers adopting electronic health records." Veto Message, § D.11, at 37 (June 29, 2009); App. 130. Governor Doyle struck the following words from the provision:

> **3m.** For providing copies in digital or electronic format, a ~~single~~ charge ~~of $5~~ for all copies requested. ~~A health care provider may not charge a fee for the disc or other storage medium on which copies are provided in a digital or electronic format.~~

Id., §§ 2433d, 2433f, at 489; App. 66 (creating § 146.83(1f)(c)3m and § 146.83(1h)(b)3m). As he explained in his Veto Message, the overarching purpose of Governor Doyle's "partial[] veto [of] this provision" was the "intent of maintaining current law requirements provided under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)." Veto Message, § D.11, at 37 (June 29, 2009); App. 130. In other words, by barring the legislature's efforts to erect new state-law requirements with respect to electronic copies, Governor Doyle ensured that Wisconsin's medical records laws would remain at the *status quo ante*, which—as he made explicit—was simply the "requirements provided under the federal" law. *Id.* He thus made clear that the statute's silence regarding an electronic records fee limit did not reflect the exertion of regulatory authority, but rather its relinquishment.

After Governor Doyle's veto, §§ 146.83(1f)(c) and 146.83(1h)(b) read: ". . . [A] health care provider may charge no more than the total of all of the following that apply for providing copies requested under par. (a) [or (b)]: . . . For providing copies in a digital or electronic format, a charge for all copies requested." The legislature had plainly attempted to provide a mandate for the provision of, and to recognize (but set a fee cap on) charges for, electronic copies. But in respect of the fee cap, the legislature was foiled by Governor Doyle, whose line-item veto left the statute with a curious provision permitting "no more than . . . a charge for all copies requested." 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) (2009-2010); App. 62. But, as amended by the partial-sentence line-item veto, it expressly allowed providers to collect "a charge for all [electronic] copies requested," without imposing any cap on such charges. Wis. Stat. §§ 146.83(1f), (1h) (2009-2010); App. 62.

This compromise evidently did not satisfy either the governor or the legislature. Governor Walker's 2011 budget submission requested repeal of the electronic-delivery mandate,[3] and the legislature ultimately scrapped both the mandate *and* the corresponding fee provision in the 2011 biennial budget. From the first drafts of the 2011 budget—consistent with Governor Walker's request—the legislature proposed to repeal the § 146.83(1k) mandate that required providers to make copies available in electronic format. *See* 2011 Assembly Bill 40, § 2660, at 1020; App. 143.

As initially proposed, the revised statute would have restored DHS's pre-2009 authority to determine what fees could be charged for copies of health care records. *See* 2011 Assemb. Bill 40, § 2663, at 1021; App. 144. The Joint Committee on Finance's substitute amendment retained the mandate-repeal language, ASA 1, § 2660, at 1114; App. 156, but instead of restoring DHS's pre-2009 authority to regulate fees, it continued the legislature's post-2009 approach of regulating certain categories of fees by statute. *Id.*, § 2663m, at 1114-15; App. 156-57 (creating § 146.83(3f)). Given that there was

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[3] Specifically, Governor Walker requested "[r]epeal [of] 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." *See* Joint Committee on Finance Paper # 367, Fees for Patient Health Care Records (DHS - SSI and Public Health) (May 18, 2011), at 3; App. 147.

no longer to be a requirement under the state statute to provide electronic copies, however, the compromise provision governing what could be charged for complying with that electronic-record mandate—which had been enacted alongside the mandate in 2009—was also removed from the statute. *See id.;* 2011 Wis. Act. 32, §§ 2655, 2660, 2663m, at 405-06; App. 160-61 (repealing §§ 146.83(1f)(c) and (1k)). Upon repealing these provisions in 2011, the legislature enacted in their place § 146.83(3f), which contains no reference to electronic records. Thus, since 2011, the Wisconsin Statutes—by design—have not regulated the provision of electronic copies of records. Just as when Governor Doyle excised provisions of the same statute in 2009, the effect of the 2011 statute was to return Wisconsin law to the *status quo ante*, which, in the case of medical records regulations, means the dictates of federal law.

ARGUMENT

The court of appeals' interpretation of § 146.83(3f) is reconcilable neither with the text nor the statutory history. The 2011 amendment's elimination of the mandate to provide electronic copies of medical records at the same time as the corresponding fee provision was deleted, together with the negative implication from the applicability section—§ 146.836—compels the conclusion that the statute leaves fee regulation for electronic copies to federal law. But the court of appeals concluded to the contrary that the statute creates an unspoken state law requirement to produce electronic copies without charge, reversing a decade-long understanding that the law deferred to the federal law applicable to delivery of electronic copies of medical records. The court of appeals' conclusion was incorrect.

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

"[S]tatutory interpretation focus[es] primarily on the language of the statute." *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 44, 271 Wis. 2d 633, 681 N.W.2d 110 ("Judicial deference to the policy choices enacted into law by the legislature requires that statutory interpretation focus primarily on the language of the statute. We assume that the legislature's intent is expressed in the statutory language."). In construing a statutory provision, "[s]tatutory 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. "If this process of analysis yields a plain, clear statutory meaning, then there is no ambiguity, and the statute is

applied according to this ascertainment of its meaning." *Id*. ¶ 46 (quoting *Bruno v. Milwaukee County*, 2003 WI 28, ¶ 20, 260 Wis. 2d 633, 660 N.W.2d 656). And this Court has held—in interpreting this very statute—that a 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 when a statute is unambiguous, courts "may consult extrinsic sources to confirm [their] understanding of the plain language of a statute." *Id*. ¶ 18.

A. The Text of Wisconsin's Medical Records Fee Statute Demonstrates That It Does Not Apply to Electronic Records.

The court of appeals opined that "UW Health does not offer any developed plain language interpretation of the statute." *Banuelos,* 2021 WI App 70, ¶ 33; App. 16. But the court of appeals misconstrued UW Health's arguments below, missing UW Health's clear plain language argument that the Wisconsin medical statutes, on their face, do not include electronic copies in the definition of "patient health care records" to which the statute's fee limits apply.

The court of appeals reasoned that the fee provision in § 146.83(3f)(b)—which the court reiterated makes "no reference . . . to electronic copies"—sets out the exclusive charges for medical record "copies . . . requested under par[agraph] (a)" of the statute. *Banuelos,* 2021 WI App 70, ¶¶ 14-15; App. 7-8 ("[P]ara[graph] (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[graph] (a)."). So whether the fee provision in paragraph (b) even applies depends on whether the records request qualifies as a request "under" paragraph (a). Paragraph (a),

for its part, is triggered upon a request for "copies of a patient's health care records." But like in paragraph (b), nothing in § 146.83(3f)(a) indicates that "a patient's health care records" includes electronic records.

This is no mere omission. As explained further below, *see infra* Argument Section II, just two statutory sections after § 146.83(3f), under the heading "Applicability," the legislature expressly singled out those select few provisions in which the term "patient health care records" would include records stored in the form of "digital information," and § 146.83(3f) is not among them. Wis. Stat. § 146.836. This exclusion is all the more notable because two of the provisions to which this more expansive definition of "patient health care records" applies—§§ 146.82 and 146.83(4)—immediately bookend § 146.83(3f), indicating that the legislature intentionally carved out the fee limits in subsection (3f) from application to electronic records. As a result, requests "under" § 146.83(3f)(a) are limited to requests for non-electronic medical records. And, as highlighted by its omission of any fees applicable to electronic copies, the fee limits in paragraph (b) accordingly apply only to such non-electronic record requests that could fall under paragraph (a). By contrast, when a person requests *electronic* copies of medical records, Wisconsin law neither mandates their delivery (as would be required if electronic records could fall within paragraph (a))[4] nor limits the fees that may be charged when electronic records are delivered.

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[4] This makes sense because, as noted, the very purpose of the 2011 statutory revision was to repeal the electronic delivery mandate, and it would defy reason and elementary norms of statutory interpretation to conclude that, notwithstanding the existence or nonexistence of the mandate, § 146.83(3f)(a) obligates the delivery of health records in electronic form.

In rejecting this plain-text reading of § 146.83(3f), the court of appeals relied on the definition in § 146.81(4) that "'[p]atient health care records' means *all records* related to the health of a patient prepared by or under the supervision of a health care provider," determining that "all records" must include electronic records. *Banuelos,* 2021 WI App 70, ¶ 39; App. 21-22. But this surface-level analysis fails to consider the plain context of this definition—which addresses the substance of the records (i.e., that they must "relate to the health of the patient" and be "prepared by or under the supervision of the health care provider"), not their format (*i.e.*, paper or electronic)—and, as explained further below, *see infra* Argument Section II, cannot be squared with the terms of § 146.836. If, as the court of appeals appears to hold, every provision of Wisconsin's medical records laws—even provisions like § 146.83(3f) that expressly enumerate mediums like "paper," "microfilm," "microfiche," and "print[s] of an X-ray," but omit references to electronic records—*already* cover medical records in electronic format, then § 146.836 would "have no consequence," which longstanding principles of statutory interpretation counsel against. *Matter of D.K.*, 2020 WI 8, ¶ 40, 390 Wis. 2d 50, 937 N.W.2d 901.

Rather, the plain language of § 146.83(3f)—which does not mention electronic records and which is notably omitted from the scope of the electronic records applicability provision in § 146.836—indicates that "patient health care records" does not include electronic records, so the provision's fee limits likewise do not apply to electronic records. And, as explained below, this conclusion is cemented by the applicable legislative history.

B. The Legislative History of Wisconsin's Medical Records Fee Statute Demonstrates That It Does Not Apply to Electronic Records.

The plain language and legislative history of the Wisconsin medical records statute, in particular, § 146.83(3f), show that § 146.83(3f) was not intended to—and still does not—cover electronic records. The court of appeals reached the contrary conclusion largely because it erred in its review of the legislative history. The court of appeals considered the legislative history to support its view that § 146.83(3f) was "an enumeration of all permitted fees that health care providers may charge for the service of providing copies of patient health care records" (including for electronic records) because "[i]f not, there would have been no reason in the previous version of the statute for the legislature separately to provide that health care providers may impose an unspecified and unlimited 'charge' for providing copies in digital or electronic format." *Banuelos,* 2021 WI App 70, ¶ 24; App. 14. The court reasoned that "[s]uch an interpretation would render that part of the previous version of the statute superfluous and meaningless, a result that we avoid." *Id.* (citing *Belding v. Demoulin*, 2014 WI 8, ¶ 17, 352 Wis. 2d 359, 843 N.W.2d 373 ("Statutory interpretations that render provisions meaningless should be avoided."); *State v. Popenhagen*, 2008 WI 55, ¶ 35, 309 Wis. 2d 601, 749 N.W.2d 611 ("Statutes are interpreted to give effect to each word [and] to avoid surplusage. . . .")). But the court of appeals' reasoning is demonstrably flawed, for three reasons. *First*, it flips on its head the legislature's documented intent to repeal in 2011 the mandate to provide electronic copies, instead finding that by repealing that mandate, the legislature simultaneously created an even broader one, requiring not only that Wisconsin health care providers deliver electronic medical records on demand but that they do so for free. *Second*, the court of

appeals' inference of legislative intent to preclude charges for electronic records depended on a fundamental mistake of fact regarding the terms of the statute that the legislature was trying to pass in 2009. *Third*, the court of appeals improperly conjured an inference of a generalized legislative intent to make copies of medical health records more available to support its interpretation of § 146.83(3f). As this Court recently cautioned, however, courts should not rely on their own "perception of [a generalized] legislative intent when construing a statute." *Townsend v. ChartSwap, LLC*, 2021 WI 86, ¶ 24, 399 Wis. 2d 599, 967 N.W.2d 21.

1. The Legislature Intended to Exit the Business of Regulating Electronic Copies of Medical Records, and the Court of Appeals' Decision Flips the 2011 Repeal on Its Head.

Banuelos does not contest that the purpose of the 2011 amendment to the medical records statute was to repeal both the 2009 state-law requirement to provide electronic copies and the partially vetoed provision allowing for an unspecified "charge" for such records. In recognition that Wisconsin law is not what governs the delivery of electronic medical records, Banuelos's own request did not cite Wis. Stat. § 146.83 *at all*, but instead cited federal law. R. 1-14; App. 46. In her complaint, Banuelos explicitly states that since 2009, it is the HITECH Act—not Wisconsin law—that has required medical providers to provide electronic copies of medical records to patients and their designees. R. 1-4 to 5; App. 36-37. And Banuelos pleaded that "HITECH pre-empts conflicting and less stringent state laws, which *do not require . . . that patient requests for electronic medical records be provided to the patient in electronic format*." R. 1-5; App. 37 (emphasis added).

The key question for this Court is what the legislature intended to do by repealing the previous mandate to provide electronic copies and the corresponding fee provision, and enacting in its place the current provision in § 146.83(3f), which is silent as to fees for electronic copies. Did the legislature intend to exit the business of regulating electronic copies, again leaving the field to federal law as had been the legislature's approach prior to 2009? Or did the legislature intend to create a state-law requirement that—in conjunction with the prevailing federal rule obligating the delivery of electronic copies upon request—mandates the production of such electronic copies for free?

The court of appeals chose the latter, thereby interpreting a statute whose stated purpose was to repeal a mandate—and whose consequence was to revert the legal regime to its pre-regulatory status of deferring to federal law (which by then reflected the strictures of the newly enacted HITECH Act)—as having simultaneously created an even broader one. Under the court of appeals' ruling, not only must Wisconsin health care providers provide electronic medical records on demand but they now must do so for free. Since "[w]e are to avoid interpretations that render parts of statutes meaningless," that reading is directly contrary to the established principles of statutory interpretation. *Norda, Inc. v. Wisconsin Educ. Approval Bd.*, 2006 WI App 125, ¶ 12, 294 Wis. 2d 686, 718 N.W.2d 236. Further, if the legislature had intended to make electronic medical records available for free, it would have said so more clearly. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

2. The Court of Appeals' Decision Was the Result of an Erroneous Inference Sprung from a Fundamental Mistake of Fact.

The court of appeals held that the legislative history:

> [S]hows 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.

Banuelos, 2021 WI App 70, ¶ 41; App. 23; *see also* 42 U.S.C. § 17935(e)(1); 45 C.F.R. § 164.524(c)(2)(ii). But the court of appeals' conclusion is contradicted by its own reasoning earlier in that same paragraph. There, the court of appeals made clear that in 2009, rather than permitting fees "of any amount," what the legislature actually sought to accomplish was to impose *a $5 cap* on the amount health care providers could charge for electronic copies of medical records. It was only due to Governor Doyle's line-item veto that the enacted statute authorized an uncapped "charge."[5] So while the legislature clearly believed that *some* charge for electronic records was appropriate, it is equally evident that it did *not* intend in 2009 to enact a

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[5] The court of appeals' conclusion inverts the legislative history. As Governor Doyle's veto message made clear, he was concerned that the legislature's $5 cap on fees would be "a deterrent to providers adopting electronic health records." Veto Message, § D.11, at 37 (June 29, 2009); App.130. Because he was concerned that the Legislature's fee cap would deter that development, Governor Doyle excised the fee-cap language for the purpose of hastening that development. The court of appeals, however, attributed to the 2009 legislature that sought to impose such fee limits—with the potential deterrent effect the fee caps carried—the simultaneous intent to "encourag[e] the adoption of electronic health care records," via *unlimited* fees. *Banuelos*, 2021 WI App 70, ¶ 41; App. 23. This defies logic. The legislature can either intend to cap or to uncap fees, not both; and it can intend to realize the consequences of capped or uncapped fees, not both.

provision that permitted "any amount" to be charged for electronic copies. Nor, given that the legislature did not at that time intend to bless *uncapped* fees, is there any basis to infer that the legislature intended to use that unintended uncapped fee provision as an incentive to hasten providers' adoption of electronic records. Because "[s]tatutes are interpreted to give effect to each word, [and] to avoid surplusage," *State v. Popenhagen*, 2008 WI 55, ¶ 35, 309 Wis. 2d 601, 749 N.W.2d 611, it follows that, absent the fee cap the legislature sought to impose in 2009, the statute did not govern the amount that could be charged for electronic copies.

This inference is further underscored by another provision of the statutes passed by the legislature in 2009, which Governor Doyle also struck by exercising his line-item veto: the provision that "[a] health care provider may not charge a fee for the disc or other storage medium on which copies are provided in a digital or electronic format." 2009 Wis. Act. 28, §§ 2433d, 2433f, at 489; App.66 (creating § 146.83(1f)(c)3m and § 146.83(1h)(b)3m). If, as the court of appeals concluded, the plain text of the statute operates to preclude charging for anything not expressly provided for in § 146.83(3f), *Banuelos,* 2021 WI App 70, ¶¶ 6, 17; App. 5-6, 10, the legislature's insertion of a proviso precluding providers from imposing charges on otherwise unlisted services that, per the court of appeals' logic, are already forbidden, would be gratuitous. *See Popenhagen*, 2008 WI 55, ¶ 35; *see also Norda,* 2006 WI App ¶ 12. Instead, the legislature's effort expressly to delineate certain impermissible charges implies that other, non-enumerated charges are permitted without limitation unless a cap or prohibition is provided for. *State v. Dorsey*, 2018 WI 10, ¶ 29, 379 Wis. 2d 386, 906 N.W.2d 158.

Viewing the current § 146.83(3f) in the context of its statutory history, as this Court has counseled that § 146.83 should be interpreted, *Moya*, 2017

WI 45, ¶ 18, helps bring the provision's terms into sharper focus. The legislature's effort in 2009 to impose a fee cap on electronic copies and to disallow charges for discs and other storage media was frustrated by Governor Doyle's line-item veto, which left the statute with a nonsensical provision permitting "no more than . . . a charge" for "providing copies in a digital or electronic format."[6] The enacted legislation was the result of political compromise, as was the legislature's decision, two years later, to return to a clean slate—leaving federal law as the governing standard—rather than attempt to salvage the hodgepodge statute. As this Court has recognized, "Legislation is, after all, the art of compromise, [and] the limitations expressed in statutory terms [are] often the price of passage." *ChartSwap*, 2021 WI 86, ¶ 20. This being so, "courts need to pay close attention to compromises needed to win passage of bills," *Schutte v. Ciox Health, LLC*, 28 F.4th 850, 859 (7th Cir. 2022) (citing Victoria Nourse, *Misreading Law, Misreading Democracy* 79–83 (2016)), and to avoid reading into those compromise efforts greater purpose than the "unprincipled lines" that lawmakers must sometimes strike to reach agreement, *id.* Here, to the contrary, the court of appeals *disregarded* the fact that the statute as enacted in 2009 was a creature of compromise and instead scrutinized the enacted text of the short-lived 2009 statute in a vacuum. The result was a fundamental misunderstanding of the legislature's stated purpose in 2009,

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[6] Wisconsin courts have considered veto messages when examining the meaning of a statute. *See, e.g., State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 69, 271 Wis. 2d 633, 681 N.W.2d 110; *Juneau v. Courthouse Employees, Local 1312*, 221 Wis. 2d at 630, 646, 585 N.W.2d 587 (1998); *Wisconsin Patients Comp. Fund v. St. Paul Fire & Marine Ins. Co.*, 116 Wis. 2d 537, 546, 342 N.W.2d 693 (1984); *In re Paternity of C.A.S.*, 156 Wis. 2d 446, 460, 456 N.W.2d 899 (Ct. App. 1990); *aff'd*, 161 Wis. 2d 1015, 468 N.W.2d 719 (1991).

which is essential to understand its conduct in repealing that compromise act just two years later in 2011.

When in 2011 the legislature repealed the 2009 mandate to provide electronic copies and the corresponding fee provision, in their place enacting the current provision in § 146.83(3f), the *only* inference supported by the legislative history is that the legislature wished to exit the business of regulating electronic copies of medical records entirely. Given that the legislature had in 2009 tried and failed to insert a fee cap on electronic copies, and further given the 2009 passage of the federal HITECH Act—which regulated electronic copies of medical records and imposed its own electronic delivery mandate—the legislature in 2011 took the opportunity again to withdraw state regulation from this area entirely, rather than leave in place the 2009 statute that reflected neither the legislature's nor the Governor's full intent. In doing so, the legislature returned the law to its *status quo ante* governed by only federal law, which, as it stands today, does not restrict the fees that may be charged when electronic records are delivered to personal injury lawyers. Importantly, however, federal law continues to impose strict limits on the charges for electronic records delivered to the individual patient requesters themselves. *See, e.g.*, 45 C.F.R. § 164.524(c); HHS, *Individuals' Right under HIPAA to Access Their Health Information 45 CFR § 164.524,* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html.

The legislature's resolution was elegant in its simplicity. From the legislative history, it is clear that the legislature intended that providers should both be required to produce records in electronic format if available and be permitted to charge for providing such electronic medical records, but also that those charges should be capped. Further, it is clear that from

2009 to 2011 the legislature at least tolerated a regime that required electronic delivery while permitting unlimited fees. Interpreting the 2011 repeal to revert the law to be coterminous and complementary with federal law is thus consistent with the historical evidence of the legislature's intent, as federal law requires electronic delivery; permits fees but in many cases caps them at $6.50 (remarkably close to the $5 cap proposed by the legislature in 2009); and applies no fee caps in certain other cases, such as requests—like those at issue here—that are directed to for-profit personal injury attorneys. *See, e.g.*, *id.* As it relates to the permissible fees for delivering electronic copies of medical records, then, the only interpretation that lacks any basis in the statutory history or record is the proposition that such electronic copies should be entirely free. No Wisconsin legislature has ever suggested that would be an appropriate resolution, yet this is the resolution that the court of appeals adopted below. The text of the statute alone is enough to reject the court of appeals' conclusion, and the legislative history amplifies the court of appeals' improper reading of the statute.

3. The Court of Appeals Erred in Relying upon an Inference of a Generalized Legislative Intent.

On top of its erroneous inference from the statutory history, the court of appeals erred by relying on its perception of a generalized legislative intent to "promot[e] access to patient records." *Banuelos,* 2021 WI App 70, ¶ 21; App. 10. The court of appeals pointed to two other sections of Wis. Stat. chapter 146 that it said highlighted the "strong interest of the legislature in permitting patients to obtain and share with others their own health care records": § 146.83(4)(b), which provides that no one may "conceal or withhold a patient health care records with intent to . . . prevent its release to the patient" or their designee, and § 146.84(2)(a)3, which

prescribes a $25,000 fine or nine months' imprisonment for violations of § 146.83(4). *Id.* Based on these provisions, the court concluded that the legislature had a "public policy of promoting access to patient records," and then used that inference to broaden the scope of § 146.83(3f) so as not to "contravene that public policy." *Id.* Notably, the court of appeals made the very same argument in *ChartSwap*, there reasoning that the "intent of the legislature was to ensure that patients have access to medical records in the custody and control of health care providers without being charged more than the reasonable costs of copying and mailing them." 2021 WI 86, ¶ 24. In overturning that decision, this Court held that "[t]he court of appeals' reliance on its perception of legislative intent when construing a statute is misplaced." This same principle compels reversal here, where the court of appeals once again conjured its own inferences of a generalized "legislative intent" that would override the legislature's prerogative to make nuanced policy decisions, including to defer to federal law on the regulation of electronic medical records.

In any event, to the extent the legislature did, in fact, favor the broad public policy of ensuring *patients'* access to copies of their medical records, the court of appeals' remedy of mandating health care providers to deliver *all* electronic records to *all* recipients at no cost is untethered from—and at odds with—such a policy. In fact, robust and easy access for patients to copies of their own records would remain undisturbed if this Court overturned the court of appeals' decision. This is because—as the Wisconsin legislature understood in 2011—federal law already requires delivery of electronic records upon request and imposes strict limits on the charges that health care providers (or their agents) may impose for delivering those records to individual patient requesters themselves. *See* 45 C.F.R. § 64.524(c).

The impact of the court of appeals' decision is instead to allow commercial for-profit entities like personal injury lawyers or insurance companies the right to demand that health care providers deliver copies of *someone else's records* to them for free, thereby imposing costs on the health care system—and ultimately on Wisconsin patients themselves—for the benefit of those for-profit entities' bottom lines. To the extent that it is appropriate to pontificate about the legislature's general or overarching policy desires regarding patient access, there is simply no basis to believe that the court of appeals' position was the outcome the legislature wanted.

The question here is *not* about providing equitable patient access to medical records, but rather it relates to 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, who choose, for their own business reasons, to obtain records directly from health care providers rather than from the patients who are their customers. The legislature's decision to defer to federal law, which ensures low-cost patient access to electronic medical records, subsidized by permitting higher charges to for-profit entities who request or receive such records directly from health care providers, *see Azar*, 435 F. Supp. 3d at 58, is a reasonable allocation, which the courts should not second-guess. *See Est. of Genrich v. OHIC Ins. Co.*, 2009 WI 67, ¶ 47, 318 Wis. 2d 553, 769 N.W.2d 481 ("[I]t is not our place to question the policy decisions of the legislature."); *see also Hoida, Inc. v. M & I Midstate Bank*, 2006 WI 69, ¶ 24, 291 Wis. 2d 283, 717 N.W.2d 17 ("[The judiciary] is limited to applying the policy the legislature has chosen to enact, and may not impose [its own] policy choices.").

II. The Medical Records Statute's Applicability Section Is Inconsistent with the Court of Appeals' Interpretation.

The court of appeals also erred in failing to draw the appropriate negative implication from the statute's applicability section. As explained above, *see supra* Argument Section I.A., the applicability section in § 146.836 further underscores the legislature's intent that § 146.83(3f) not govern electronic medical records. Just two statutory sections after § 146.83(3f), the legislature provided 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). 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 § 146.83(3f), even while including the very next subsection. § 146.836 shows that the legislature knows how to make it clear that a statutory provision pertaining to medical records covers electronic records, but it chose not to extend that coverage to § 146.83(3f). Where the legislature makes a distinction, as it did in § 146.836, "it is the task of this court to give effect and meaning to that distinction." *Est. of Miller v. Storey*, 2017 WI 99, 42, 378 Wis. 2d 358, 903 N.W.2d 759. 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 § 146.836's expansion to include electronic records. *Dorsey*, 2018 WI 10, ¶ 29.

The court of appeals' interpretation of the applicability section makes it redundant. 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 "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). If every provision of Wisconsin's medical records laws—even provisions like § 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 § 146.836 would merely direct that a term that *already* included electronic copies, included electronic copies. Long-standing precedent stands against interpreting § 146.836 to mean and do precisely nothing. *See, e.g.*, *In re Washington,* 2007 WI 104, ¶ 30 n. 10, 304 Wis. 2d 98, 735 N.W.2d 111; *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. The far more compelling interpretation of the applicability section is that § 146.836 states the provisions for which "patient health care records" includes electronic records—unsurprisingly, largely confidentiality-based provisions. By contrast, provisions not listed—often provisions where federal law addresses the same topic—are not included, in deference to the federal regulatory scheme.

It is worth noting that the applicability section identifying specific provisions for which "patient health records" includes electronic records has remained the same since it was enacted in 1999. This supports UW

Health's argument that the statute was, from its inception, largely not intended to cover electronic records, which in 1999 would not have been commonplace. The fact that, in 2009, the legislature enacted both a mandate to provide electronic medical record copies and a corresponding fee provision demonstrates that the *status quo ante* was that electronic copies were not covered by those statutes. Otherwise, no new mandates or provisions would have been needed. With the 2009 insertion and 2011 deletion of the electronic copies mandate and fee provision, the applicability section remained unchanged. This is unsurprising; given the express language of the 2009 provisions, which inserted an electronic copy mandate and corresponding fee provision, there was no doubt that those provisions, too, governed electronic copies, irrespective of their omission from § 146.836. When, in 2011, the legislature repealed both the electronic copies mandate and the corresponding fee provision, the legislature again did not amend the applicability section, thereby returning the statutory regime to the *status quo ante* of electronic copies no longer being covered by those statutes, save for where expressly identified by § 146.836. In short, neither the insertion nor the deletion of the self-standing electronic copies mandate and corresponding fee provision undercuts the meaning or purpose of the applicability section.

The court of appeals also held that UW Health's argument below did not "address the significance of the distinction between the reference to 'electronic records' in § 146.836 and the reference to 'copies of a patient's health care records' in Wis. Stat. § 146.83(3f)." *Banuelos*, 2021 WI App 70, ¶ 39; App. 22. The court said the problem was that "UW Health points to no language limiting 'copies' to any particular format." *Id.* But, as explained above, the word "copies" does not exist in a vacuum. The phrase is "copies

of a patient's health care records," and the plain text of the statute confirms that § 146.83(3f)'s reference to a "patient's health care records" does not encompass electronic records. Perhaps the court of appeals meant that, pursuant to § 146.83(3f), a person might request a copy of a record that is ordinarily stored in paper format be provided in an electronic format. But even that cannot be the case. If the phrase "copies of a patient's health care records" as used in § 146.83(3f) and its predecessors meant any type of copy, including electronic copies, then it would have been entirely redundant for the legislature to insert in 2009 a provision requiring 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, at 490; App. 67 (creating § 146.83(1k)).[7]

Finally, the court of appeals dismissed UW Health's argument as to § 146.836 as "absurd," stating that "[o]ther provisions in this chapter not listed in § 146.836 cannot plausibly be read to exclude records in electronic format." *Banuelos*, 2021 WI App 70, ¶ 39; App. 21-22. But the court of appeals' rationale—which conflates absurdity with its view of what is and is

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[7] Nor, as a practical matter, would it make sense for the legislature to prohibit any charges for electronic copies in this scenario where the records themselves are stored in paper copy. In such a case, the costs associated with scanning and preparing for electronic delivery are essentially identical to the costs of copying and preparing for physical delivery. To the extent any rationale exists for imposing lower costs for electronic delivery of electronically stored records, those justifications would not apply in this context.

not "plausible"—misconstrues the absurdity canon and this Court's teaching. "It is the court's role, in the context of statutory interpretation, to give effect to legislation unless [the court finds] that the legislature *could not have intended* the absurd or unreasonable results a statute appears to require." *Johnson v. Masters*, 2013 WI 43, ¶ 20 n.12, 347 Wis. 2d 238, 830 N.W.2d 647 (emphasis added); *see also, e.g.*, Antonin Scalia & Bryan Garner, Reading Law 239 (2012) ("The doctrine of absurdity is meant to correct obviously *unintended* dispositions, not to revise purposeful dispositions that, in light of other provisions of the applicable code, make little if any sense."). "[I]t is not within [the court's] province to artificially limit the obvious reach of a statute without adequate reason." *State v. Iverson*, 2015 WI 101, ¶ 35, 365 Wis. 2d 302, 871 N.W.2d 661. As this Court recently held in *ChartSwap*, "it is not absurd for the legislature to make policy decisions regarding the applicability of statutes to different constituents. At some point, there will be a cutoff. This is a policy choice that legislatures frequently make, and policy choices are left to legislative discretion." 2021 WI 86, ¶¶ 19-20. It is far from an "obviously unintended" disposition that the legislature would only intend to regulate electronic records in limited ways. Indeed, it is a perfectly rational line to draw, and one that is supported by the legislative history and the applicability section, whereby the regulation of electronic record

delivery and fees was plugged into the state statute in 2009 and unplugged in 2011.[8]

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In conclusion, the court of appeals' decision negates the decision the 2011 legislature to defer to federal regulation of electronic copies of medical records and results in exactly the policy that the 2011 legislature rejected.

CONCLUSION

For the reasons stated above, UW Health requests that this Court reverse the published opinion of the court of appeals and reinstate the circuit court's dismissal of the action.

[8] It may be that the legislature did not fully consider the implications of the definition of "patient health care records" not including electronic records, or it may be that the resulting regulation was the result of compromise or extrinsic constraints not readily discernable by the courts, *see ChartSwap*, 2021 WI 86, ¶ 20. In either case, it is not for the courts to step into the domain of the legislature to make their own policy decisions. *See Est. of Genrich*, 2009 WI 67, ¶ 47 ("[I]t is not our place to question the policy decisions of the legislature."); *Hoida, Inc.,* 2006 WI 69, ¶ 24 (("[The judiciary] is limited to applying the policy the legislature has chosen to enact, and may not impose [its own] policy choices.").

Respectfully submitted this 20th day of April 2022.

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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.

**APPEAL OF A PUBLISHED DECISION BY
COURT OF APPEALS, DISTRICT IV, ON APPEAL FROM THE
CIRCUIT COURT OF DANE COUNTY, CASE NO. 20-CV-903,
THE HONORABLE JUAN B. COLÁS PRESIDING**

COMBINED CERTIFICATION BY ATTORNEY PURSUANT TO WIS. STAT. § 809.19(8g)(c)

I hereby certify that this brief conforms to the rules contained in Wis. Stat. §§ 809.19 (8) (b), (bm), and (c) for a brief. The length of this brief is 10,408 words.

I hereby certify that filed with this brief is an appendix that complies with Wis. Stat. § 809.19 (2) (a) and that it contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: April 20, 2022

Daniel A. Manna, SBN 1071827

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.

**APPEAL OF A PUBLISHED DECISION BY
COURT OF APPEALS, DISTRICT IV, ON APPEAL FROM THE
CIRCUIT COURT OF DANE COUNTY, CASE NO. 20-CV-903,
THE HONORABLE JUAN B. COLÁS PRESIDING**

CERTIFICATE OF COMPLIANCE WITH FORMER RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of former Wis. Stat. § 809.19(12) (as required by Appendix A to Supreme Court Interim Rules Nos. 19-02A and 20-07A). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: April 20, 2022

Daniel A. Manna, SBN 1071827

STATE OF WISCONSIN
SUPREME COURT

BEATRIZ BANUELOS,

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AUTHORITY,

Defendant-Respondent-
Petitioner.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 20, 2022, I filed with the Court by hand delivery and served copies of the Brief and Appendix of Defendant-Respondent-Petitioner upon counsel for Plaintiff-Appellant by first class mail:

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