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STATE OF WISCONSIN
SUPREME COURT

BEATRIZ BANUELOS Case No. 2020AP001582

Plaintiff-Appellant

vs.

UNIVERSITY OF WISCONSIN HOSPITAL AND CLINICS AUTHORITY

Defendant-Respondent-Petitioner.

APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY
Honorable Juan B. Colas
Dane County Case No. 2020CV000903

PLAINTIFF-APPELLANT'S RESPONSE BRIEF

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STATEMENT OF THE ISSUE

Wisconsin Statutes §146.83(3f) restricts fees health care providers may charge for "copies of a patient's health care records" to six enumerated items. In 2011, the legislature repealed the permission to charge fees for "copies in digital or electronic format." Can a provider nonetheless charge unlimited fees for electronic copies that are no longer allowed by the statute?

Answered by the circuit court: Yes.

Answered by the Court of Appeals: No.

STATEMENT ON ORAL ARGUMENT

Banuelos favors oral argument, especially to respond to amicus and reply arguments made after this brief is submitted and to respond to questions or concerns of the Court, if any.

STATEMENT OF THE CASE

This case presents a simple issue of statutory construction to decide whether health care providers, like the University of Wisconsin Hospital and Clinics Authority ("UWHCA"), are permitted to charge unlimited, exorbitant fees for transmitting ***electronic copies*** of health care records to patients and other authorized third parties under §146.83(3f).[1]

A. Facts, procedural status, and disposition by the lower courts.

The facts are uncomplicated and not in dispute. Banuelos requested electronic copies of her patient health care records from UWHCA. (R.1:6-7, UW.App.38-39). Banuelos' request directed UWHCA to send the electronic copies to her attorneys. (*Id*.). UWHCA, through its vendor CIOX, complied with that request and sent the requested copies to Banuelos' counsel in electronic format. (*Id*.).

[1] Unless stated otherwise, cited sections refer to the Wisconsin Statutes.

Pursuant the federal HITECH (Health Information Technology for Economic and Clinical Health) Act,[2] UWHCA/CIOX was required to provide the copies electronically. 45 C.F.R. §164.524. While HITECH also restricts fees in certain circumstances, HITECH does not govern the allowable fees where the records are sent directly to the patients' attorney. *See Azar v. CIOX*, 435 F.Supp.3d 30, 58-59, 67 (D.C. Cir. Jan. 20, 2020). Federal law defers to state law in such circumstances. *Id.*[3] In Wisconsin, permissible fees are restricted by §146.83(3f).

After complying with the request for electronic copies, UWHCA charged Banuelos per page fees corresponding to "paper copies." (R.1:6-7, UW.App.38-39). Banuelos filed a complaint alleging that UWHCA violated §146.83(3f) because §146.83(3f) does not allow fees for providing "electronic copies." (R.1, UW.App.35).

The circuit court granted UWHCA's motion to dismiss the complaint, believing that §146.83(3f) was merely "silent" as to fees allowed for electronic copies and UWHCA could charge an unlimited amount. (R.26:4-7, UW.App.30-33).

The Court of Appeals corrected that error, holding that such fees "are unlawful under §146.83(3f)" because "only those fees enumerated in §146.83(3f)" are permitted and "there are no statutorily enumerated fees for electronic copies."[4] *Banuelos v. UWHCA*, 2021 WI App 70, ¶1, 399 Wis.2d 568, 966 N.W.2d 78. This Court then accepted UWHCA's petition for review.

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[2] HITECH was passed in 2009, adding to the well-known HIPAA law. HITECH allows patients and their representatives to obtain electronic copies of medical records under certain conditions but does not replace the more comprehensive HIPAA law. 45 C.F.R. §164.524*; see also* DHHS Guidance, *available at* www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html. HITECH does not change the procedure for third party access to medical records under HIPAA.

[3] While federal law required UWHCA to provide electronic copies, there is no question of federal law, conflict of laws, or preemption for the Court to decide in this case.

[4] Banuelos agrees with the Court of Appeals and UWHCA that whether the Complaint states a claim for relief hinges on the legal question of whether charges for electronic copies are allowed by §146.83(3f) and is subject to *de novo* review by this Court.

INTRODUCTION/ SUMMARY OF THE ARGUMENT

Contrary to UWHCA's argument, this Court is not tasked with adjudicating the fairness of requiring providers (and their for-profit vendors like CIOX) to bear the minimal cost of producing electronic copies of medical records. That is the legislature's exclusive province. This Court's duty is to apply the statute as written.

In doing so, this Court must affirm the Court of Appeals' decision because the unambiguous language of §146.83(3f)(b) does not allow a fee for providing ***electronic copies*** of "patient health care records." Under §146.83(3f)(b), a provider "***may charge no more than the total of***" the applicable items listed, and electronic copies are not among them. §146.83(3f)(b). The statute only allows fees for "paper copies," not electronic copies. §146.83(3f)(b)1. The Court of Appeals properly applied §146.83(3f)(b)'s plain language.

Curiously, UWHCA's claim that the text of §146.83(3f) allows ***unlimited fees*** for electronic copies of "patient health care records" is made without discussion of its actual language – violating the cardinal rule of statutory interpretation. UWHCA never attempts to square its desired construction with the text of the statute. UWHCA's arguments not only conflict with §146.83(3f), but also with the statutory definition of "patient health care records" which includes "***all records related to the health of a patient***…," not just paper records. §146.81(4). Contrary to this unambiguous language, UWHCA claims that §146.83 excludes electronic medical records from its scope, relying on an unrelated section, §146.836, to support this incorrect proposition. Section 146.836 states the opposite – that "patient health care records" include "digital information."

Legislative history further confirms that §146.83 applies to electronic records, and no fee is currently permitted for providing electronic copies.[5] A charge for "copies in digital or electronic format" was ***formerly*** permitted, but the

[5] Except possibly for postage and tax if physical media is used. §146.83(3f)(b)6.

legislature ***repealed*** that permission in 2011. *Compare* §146.83(1f)(2009); §146.83(3f)(b)(2011). The legislature did so without changing the cost restriction or redefining any relevant term. This history verifies that charges for "copies in digital or electronic format" are now prohibited.

UWHCA proposes an extreme interpretation of §146.83***, claiming the statute does not govern electronic records at all.*** Not only would adopting UWHCA's construction require the Court to rewrite §§ 146.81(4)'s and 146.83(3f)'s language and history, but it would also have wide-ranging, absurd consequences almost entirely nullifying any right of access to medical records:

- Patients, other health care providers, and authorized third parties would ***no longer have any right to access, inspect, or copy electronic medical records*** under Wisconsin law, which now constitute virtually all medical records. §146.83(1c), (3f).
- Providers could charge ***unlimited fees*** for supplying copies of medical records created electronically (again – virtually all records), whether the provider sends the copies in paper or electronic format.
- Insurance companies that need access to medical records to evaluate and defend against claims and that request medical records using HIPAA authorizations would no longer have a ***right*** to obtain any electronic medical record under either federal or state law.[6] This would throw the status of virtually all personal injury, workers compensation, life, and disability claims into disarray for applicants, claimants, and insurers.

Such a construction would render any right to inspect or obtain medical records under §146.83(1b)-(3f) almost entirely meaningless.

[6] HIPAA ***permits but does not require*** health care providers to disclose patient health care records to third-parties possessing HIPAA-compliant authorizations. 45 C.F.R. §§164.502(a)(1), 164.502(a)(2), 164.508.

UWHCA's submission is filled with unsupported policy arguments and fearmongering related to the cost of transmitting electronic copies and alleged increases in health care costs. The reality is that supplying electronic copies requires a few mouse clicks at little or no cost to the provider. For-profit vendors like CIOX reap billions of dollars in windfall profits from over-charging patients and third parties for electronic copies of medical records, while ***ensuring that providers have no costs and are indemnified from any losses***. *Azar,* 435 F.Supp.3d at 49-51.[7] Bipartisan administrations in Wisconsin since 1979 have agreed providing copies of medical records, where there is no consumer choice or free market, should not be a profit-generating industry. Claims of significant technological costs are disingenuous as the federal government paid billions of dollars to medical providers to subsidize their electronic medical records systems. The American Medical Association recommends that copies of electronic records should be provided at little or no cost - a recommendation that bipartisan federal administrations (most recently, the Trump administration) and many states have adopted in various circumstances.

While the policy disagreements over this issue may make for interesting discussion, the Court cannot adjudicate them here. The Court has no record to evaluate these complaints of unfairness. Nor does the Court have authority to decide which entities should "bear the cost." That is the legislature's prerogative. This Court must apply the law as written and affirm the Court of Appeals.

ARGUMENT

I. SECTION 146.83(3f) DOES NOT PERMIT FEES FOR ELECTRONIC COPIES OF PATIENT HEALTH CARE RECORDS.

The unambiguous language of §146.83(3f) does not allow fees for providing ***electronic copies*** of "patient health care records," because a health care

[7] Because of the indemnification agreement, CIOX, rather than UWHCA, is likely controlling this litigation.

provider "***may charge no more than the total of***" the applicable items listed, and electronic copies are not among them. §146.83(3f)(b). Fees are allowed only for the listed items:

> (a) . . . if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records.
> (b) . . . ***a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a)***:
> 1. For ***paper copies***: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above.
> 2. For microfiche or microfilm copies, $1.50 per page.
> 3. For a print of an X-ray, $10 per image.
> 4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge.
> 5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested.
> 6. Actual shipping costs and any applicable taxes.

(emphasis added). The statute only allows fees for "paper copies," not electronic copies. §146.83(3f)(b)1.

The structure of §146.83(3f) is plain, unambiguous, and easy to follow. As the Court of Appeals correctly stated, subsection (a) contains "three requirements—making the request for copies, providing the informed consent, and paying 'the applicable fees under par. (b).'" *Banuelos*, 2021 WI App 70, ¶13. Subsection (b) limits what a provider may charge to "six enumerated fees." *Id.*, ¶15. "This language also makes clear that para. (b) ***defines the total universe of fees that a provider may collect from a requester.***" *Id*. (emphasis added). "If a charged fee is not one of the enumerated fees and applicable to the particular request, it is not permitted." *Id*. ¶¶15, 17 (emphasis added). Accordingly, the Court of Appeals correctly held "the fees that UWHCA charged Banuelos are unlawful" because "there are no statutorily enumerated fees for electronic copies." *Id.*, ¶1. The Court of Appeals' decision was not based on "its own perception of generalized legislative intent" as UWHCA argues. It was based on a thorough, plain-language analysis of §146.83(3f).

UWHCA has never made a cogent argument that §146.83(3f)(b) can be read differently:

> [UWHCA]'s reliance on the statute's silence on this topic is not accompanied by a discussion of the text of the statute. This does not constitute a viable argument in opposition to a plain language analysis of the meaning of the statute. In sum, [UWHCA] does not offer any developed plain language interpretation of the statute.

Banuelos, 2021 WI App 70, ¶33.

When the statute is plain and unambiguous, as it is here, the Court's "inquiry stops there." *Moya v. Aurora Health Care*, 2017 WI 45, ¶¶17-19, 375 Wis.2d 38, 894 N.W.2d 405. "…[T]he court is not at liberty to disregard the plain, clear words of the statute." *Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶46, 271 Wis.2d 633, 681 N.W.2d 110.

The circuit court's error, which the Court of Appeals corrected, was overlooking the critical language of §146.83(3f)(b) that providers "***may charge no more than the total of***" the listed items. The circuit court incorrectly believed that the statute was "silent" as to items not listed and providers ***are permitted*** to charge for those. (R.26:4-7; UW.App.30-33). While UWHCA touts the circuit court's decision, it abandons the circuit's court's reasoning, which does not align with §146.83(3f)'s language.

The circuit court's reasoning would have nullified the statute. The circuit court's decision permits fees that are included in §146.83(3f)(b)'s list ***and fees that are not included***. This Court recognized in *Townsend v. ChartSwap, LLC*, 2021 WI 86, ¶¶1-2, 399 Wis. 2d 599, 967 N.W.2d 21, that §146.83(3f) creates fee "restrictions" for providers. If the circuit court's reasoning controlled - there would be no "restrictions." All fees would be allowed. For example, a provider could charge a "basic fee" or "labor fee" in any amount, because those are not within the statute's enumerated items. Even if the fee for a particular item is limited by §146.83(3f)(b), the provider could simply ***rename*** it something else to avoid any restriction. For example, a "certification fee," could be renamed a "legal

compliance fee" and be unrestricted. The Court of Appeals corrected this basic error.

The circuit court's decision was also contrary to this Court's precedent. In *Moya*, this Court agreed that fees not specifically itemized in §146.83(3f) are ***disallowed*** by the statute's plain language. 2017 WI 45, ¶31. This Court confirmed that "[a]ccess to patient health care records is governed by Wis. Stat. § 146.83," and the statute allows health care providers to "impose ***certain costs*** on the person requesting health care records...." *Id*. ¶¶4-5 (emphasis added). More specifically, this Court held that providers are not permitted to charge certification and retrieval fees to a person authorized by the patient. *Id*. ¶25. Since those fees were ***not included*** in §146.83(3f)'s permissible list, ***they were disallowed***. *Id*. Had the circuit court's reasoning prevailed, the charges in *Moya* would have been allowed because §146.83(3f)(b)4-5 does not specifically address them.

This Court applied the same analysis to the similar public records fee restriction. *See Milwaukee J. Sentinel v. City of Milwaukee*, 2012 WI 65, ¶¶35-36, 341 Wis. 2d 607, 815 N.W.2d 367 (where the statute authorized fees for four specific tasks, the list demonstrated "that the legislature considered the imposition of fees and knew how to authorize particular types of fees" and statutory text did not "allow the imposition of a broad array of fees"; "the legislature knew how to draft that language and could have done so had it wished."); *Id*., ¶83 (Roggensack, J., concurring and noting that addressing concerns about costs not enumerated by statute "is a legislative function, not a function properly undertaken by the courts."). The Court of Appeals correctly applied this Court's decisions in *Moya* and *Journal Sentinel*. *Banuelos*, 2021 WI App 70, ¶¶27-28.

Instead of relying on the circuit court's reasoning, UWHCA wrongly argues that "patient health care records" do not include electronic records, and "copies" do not include electronic copies.[8] Section 146.83(3f)'s text and history

[8] Section 146.83(3f)'s other two requirements that UWHCA is a "health care provider" and that Banuelos provided "informed consent," have never been in dispute.

are inapposite. Neither the circuit court nor the Court of Appeals adopted UWHCA's misconstruction of the statute.

A. "Patient health care records" includes electronic records, and "copies" includes electronic copies.

As used in §146.83, "patient health care records" broadly includes "***all records related to the health of a patient prepared by or under the supervision of a health care provider***;…" §146.81(4) (definitions apply to §§146.81-146.84) (emphasis added). "***All records***," by its plain and inclusive language, includes electronic records. The word "all" chosen by the legislature must be given full effect. *DeHart v. Wisconsin Mut. Ins. Co.*, 2007 WI 91, ¶61, 302 Wis.2d 564, 734 N.W.2d 394 (the Court must give "full effect and meaning to all of the words of the statute"). "In the absence of statutory definitions, this court construes all words according to their common and approved usage, which may be established by dictionary definitions." *Swatek v. County of Dane,* 192 Wis.2d 47, 61, 531 N.W.2d 45 (1995). According to Miriam-Webster's dictionary, "all" is defined as: "the whole amount, quantity, or extent of; as much as possible; every member or individual component of."[9] If electronic records were excluded from the definition of "patient health care records," it is axiomatic that the definition would no longer include "all records" – especially since ***almost all records are electronic***.

UWHCA asks the Court to rewrite the definition of "patient health care records" and hold that "all records" really means "only those few remaining paper records." However, "[a] court is not empowered to rewrite… statutes under the guise of construing them." *Sinclair v. Dep't of Health & Soc. Servs., Div. of Fam. Servs.*, 77 Wis.2d 322, 332, 253 N.W.2d 245 (1977). Likewise, the Court cannot apply differing definitions of "patient health care records" in different sections as UWHCA argues. Section 146.81's definitions apply to "ss. 146.81 to 146.84." The

[9] *Available at* www.merriam-webster.com/dictionary/all.

legislature mandated that "patient health care records" have the same definition throughout.

UWHCA argues without support that "all records" is not meant to encompass the "format" of the records. That argument is contrary to the statutory definition, which does not limit the "record" by format. §146.81(4). The only criteria are whether the record "is related to the health of the patient" and "prepared by or under the supervision of a health care provider." *Id.*; *see also Wall v. Pahl*, 2016 WI App 71, ¶28, 371 Wis.2d 716, 886 N.W.2d 373. Electronic medical records meet these two criteria. Common sense dictates that an electronic record is still a "record," and "all" means all. The legislature's chosen language is broad and unambiguous.

Further, as will be discussed in greater detail below, §146.836 confirms that "patient health care records" "includ[es]. . . ***electromagnetic or digital information***... recorded or preserved, regardless of physical form or characteristics." (emphasis added).

Likewise, the term "copies" is undefined, and not limited to "paper copies" in §146.83(3f)(b). The plain meaning of the word "copy" is not limited to a particular format. A "copy" is a "an imitation, transcript, or reproduction of an original work."[10] Section 146.83(3f) distinguishes between "copies" and "paper copies:"

> (a) . . . if a person requests ***copies*** of a patient's health care records,… the health care provider shall provide the person making the request ***copies*** of the requested records.
> (b) . . . a health care provider may charge no more than the total of all of the following that apply for providing the ***copies*** requested under par. (a):
> 1. For ***paper copies***: …

§146.83(3f)(b) (emphasis added). The chosen language shows that the legislature understood that "copies" were not limited to "paper copies." If the legislature intended for "copies" to mean the same thing as "paper copies," it would not have

[10] *Available at* www.merriam-webster.com/dictionary/copies?msclkid=23c36c3ac58411ec973f06316ab0c597.

used different terms in subsections (a)/(b) and (b)1. *See Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2019 WI 24, ¶29, 385 Wis.2d 748, 924 N.W.2d 153 ("When the legislature uses different terms in a statute—particularly in the same section—we presume it intended the terms to have distinct meanings.") (internal citation omitted); *Armes v. Kenosha Cty.*, 81 Wis.2d 309, 318, 260 N.W.2d 515 (1977) ("Where the legislature uses two different phrases,... in two paragraphs in the same section, it is presumed to have intended the two phrases to have different meanings."). The legislature intended "paper copies" to be a subset of "copies." Section 146.83(3f) broadly governs "copies," but only allows fees for "paper copies."

B. Legislative history confirms that §146.83(3f) applies to electronic records and no longer permits fees for electronic copies.

Any ambiguity as to whether electronic records qualify as "patient health care records" or whether §146.83(3f) prohibits charges for electronic copies is resolved based on the statute's history. This Court in *Moya* held that the "past iterations" of §146.83(3f) are important to understanding its meaning. 2017 WI 45, ¶28. Even without ambiguity, courts "may consult extrinsic sources to confirm our understanding of the plain language of a statute." *Id*.

Section 146.83(3f)'s history unquestionably shows that it governs electronic records because the statute formerly permitted a charge for providing "copies in digital or electronic format" and later repealed that permission –without changing the definition of "patient health care records." *Compare* §146.83(1f)(2009) *with* §146.83(3f)(b)(2011). In 2009, the legislature allowed "a charge" for **"**providing copies in digital or electronic format." §146.83(1f)(2009). Then, in 2011, the legislature repealed that permissible charge. §146.83(3f)(2011). This legislative history confirms that in 2011, when the statute was last amended, the legislature intended not to allow fees for "***providing copies in digital or electronic format"*** under §146.83. *See Cardinal v. Leader National Ins. Co.*, 166

Wis.2d 375, 388, 480 N.W.2d 1 (1992) (omission of a word when amending a statute "indicates an intent to alter its meaning").

The change from allowing "a charge" for "***copies in digital or electronic format***" in 2009 to disallowing such charges in 2011 is shown as follows:

§ 146.83(1f)(2009)	**§ 146.83(3f)(2011)**
(a) . . . if a patient or a person authorized by the patient requests copies of the patient's health care records, . . . the health care provider shall, . . . provide the patient or person authorized by the patient copies of the requested records after receiving the request. **. . .** (c) . . . 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): **1.** For paper copies, 35 cents per page. **2.** For microfiche or microfilm copies, $1.25 per page. **3.** For a print of an X-ray, $10 per image. **3m.** ***For providing copies in digital or electronic format, a charge for all copies requested.*** **4.** Actual shipping costs. **5.** If the patient or person authorized by the patient requests delivery of the copies within 7 or fewer days after making a request for copies, and the health care provider delivers the copies within that time, a fee equal to 10 percent of the total fees that may be charged under subds. 1. to 4.	**(a)** . . . if a person requests copies of a patient's health care records, provides informed consent, and pays the applicable fees under par. (b), the health care provider shall provide the person making the request copies of the requested records. **(b)** . . . a health care provider may charge no more than the total of all of the following that apply for providing the copies requested under par. (a): 1. For paper copies: $1 per page for the first 25 pages; 75 cents per page for pages 26 to 50; 50 cents per page for pages 51 to 100; and 30 cents per page for pages 101 and above. 2. For microfiche or microfilm copies, $1.50 per page. 3. For a print of an X-ray, $10 per image. 4. If the requester is not the patient or a person authorized by the patient, for certification of copies, a single $8 charge. 5. If the requester is not the patient or a person authorized by the patient, a single retrieval fee of $20 for all copies requested. 6. Actual shipping costs and any applicable taxes.

(emphasis added).

Another subsection added in 2009, §146.83(1k)(2009), further confirms that the word "copies" is meant to include electronic copies and "patient health care records" includes "records in digital or electronic format." Under section 146.83(1k)(2009), upon request, the provider was required to supply copies of "patient health care 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." *Id.* Section 146.83(1k)(2009) shows "copies" encompasses "copies in a digital or electronic format," and "patient

health care records" includes those created or transmitted in "digital or electronic format" within §146.83. Otherwise, the 2009 additions would have been meaningless and contradictory to the existing statutory language.

In 2011, when the legislature repealed the permissible fee for electronic copies and removed (1k)'s requirement that providers supply electronic copies, it did so without altering the definition of "patient health care records," the term "copies," the right of patient access, or the requirement that the provider charge "no more than" the enumerated fees. *Compare* §146.81(4)(2009) and §146.81(4)(2011), §146.83 (2009), and §146.83(2011) *with current versions*.

Banuelos agrees with UWHCA that §146.83(3f) no longer requires providers to supply electronic copies following the deletion of §146.83(1k)(2009). Section 146.83(3f) no longer requires "copies" to be produced in any particular format. However, when providers either choose or are required by federal law to supply electronic copies, no fee is permitted. *Id*.

UWHCA exaggerates the import of §146.83(1k)(2009)'s deletion, claiming that §146.83(1b)-(3f) only encompassed electronic records from 2009-11. (UW Brief, p.44). UWHCA's argument is entirely premised on unsupported speculation that the legislature wanted to "exit the business" of regulating electronic records. (UW Brief, p.32). Statutory interpretation cannot be based on speculation and unsupported "inferences." Moreover, the logic of the argument that because the legislature no longer required providers to supply electronic copies, it also wanted to abandon any cost restriction does not follow. At best, the deletion of §146.83(1k)(2009) shows that the legislature wanted to be flexible in allowing providers to ***choose*** what type of copies to provide. There is no logical connection between that policy choice and allowing providers to charge outrageous amounts for electronic copies.

UWHCA's over-reading finds no support in the legislative history or language of the statute. As discussed, if the legislature wanted to stop regulating the cost of electronic records, it would have changed the definition of "patient

health care records" and §146.83(3f)'s mandatory cost restriction, which it did not. The opposite "inference" seems much more logical: while providers are not ***required*** to supply electronic copies, those who do, and have spent little or no cost doing so, are not permitted to profit from excessive fees.

UWHCA misstates how §146.83(3f) has operated over time, arriving at a construction that renders both the 2009 and 2011 revisions superfluous. Based on its language, ***there was never a time in the last 20 years when the legislature excluded electronic records from the scope of §146.83***:

- Prior to 2009, §146.83 set fees by administrative rule based on an "approximation of actual costs." §146.83(3m)(2008). Contrary to UWHCA's uncited assertions, the pre-2009 statute contemplated records in all formats including emerging technology like electronic records: "In determining the approximation of actual costs… the department may consider … The varying cost of retrieval of records, ***based on the different media on which the records are maintained***…, the impact on costs of advances in technology." *Id* (emphasis added). The pre-2009 DHS rule allowed for $.31 for copies of "each record page" ***regardless of the format***. Wis. Admin Code DHS §117.05(3)(a)(2009).[11]
- In 2009, the legislature changed from setting fees by administrative rule to the statutory fee restriction, which then allowed per page fees for "paper copies" and reasonable fees for "copies in digital or electronic format." §146.83(1f)(2009).

[11] *Available at* docs.legis.wisconsin.gov/code/register/2009/637b/insert/dhs117. UWHCA's argument that before 2009 electronic records were not prevalent or contemplated by the legislature is also belied by the ***1999*** passage of §146.836 recognizing that "patient health care records," includes "digital information." Regardless, the pre-2009 statute still governed "all records" and allowed charges set by administrative rule that encompassed "different media on which the records are maintained" and "advances in technology." §§146.81(4), 146.83(3m)(2008). DHS allowed per page charges for "each record page" before 2009, whether paper or electronic. The statutory distinction between the fees allowed for paper versus electronic copies was first passed in 2009.

- In 2011, the legislature kept the statutory fee restrictions, but repealed the allowable fee for electronic copies. §146.83(3f).

UWHCA's argument that the legislature wanted to return to a pre-2009 "*status quo ante*," where electronic records were not within the statute's scope is wrong on all counts. As discussed, the pre-2009 "*status quo ante*" was to allow fees set by DHS for all formats on "different media" and considering "advances in technology." §146.83(3m)(2008). There was never a pre-2009 "*status quo ante*" where electronic records were excluded from §146.83. Further, although the drafting file indicates that Governor Walker initially proposed returning to the pre-2009 administrative fee-setting scheme (UW.App.146-147), both he and the legislature ultimately settled on keeping the 2009 statutory fee restrictions, that would serve as the "maximum allowable fees." (UW.App.149). The 2011 legislature repealed the permissible fee for "copies in digital or electronic format," knowing that such fees would no longer be allowed. §146.83(1f)(2009); §146.83(3f).

UWHCA's interpretation requires this Court to hold that both the 2009 and 2011 revisions were meaningless. "Statutory interpretations that render provisions meaningless should be avoided." *Belding v. Demoulin*, 2014 WI 8, ¶17, 352 Wis.2d 359, 843 N.W.2d 373; *see also Landis v. Physicians Ins. Co. of Wisconsin*, 2001 WI 86, ¶16, 245 Wis. 2d 1, 628 N.W.2d 893 ("in interpreting a statute, courts must attempt to give effect to every word of a statute, so as not to render any portion of the statute superfluous").

UWHCA's incorrect argument that §146.83 has ***always*** allowed providers to charge discretionary fees for electronic copies, is not only factually incorrect, if accepted, it would moot the 2009 changes to the statute. If providers could already charge a discretionary amount for electronic copies, then §146.83(1f)(c)3m(2009), which first ***allowed a "reasonable charge"*** for electronic copies, was superfluous and had no effect. UWHCA misconstrues the "legislative compromise" resulting from Governor Doyle's partial veto in 2009, where the

governor vetoed the legislature's $5 fee limitation for electronic copies in favor of allowing a "reasonable charge." (UW.App.130). Contrary to UWHCA's argument, in 2009, both the governor and the legislature wanted providers to be able to charge for electronic copies – they simply differed on what the allowable charge should have been. If §146.83 already allowed fees for electronic copies regardless of (1f)(c)3m(2009), ***there would have been no need for that provision at all*** and Governor Doyle would have simply stricken it.

More importantly, UWHCA's construction moots the 2011 change, when the legislature repealed the permission to assess "a charge," for electronic copies. UWHCA asks this Court to hold that the 2011 change again had no impact on the provider's ability to charge fees. According to UWHCA, even though the permissible fees were repealed in 2011, providers could still assess discretionary charges for supplying electronic copies. Had the legislature wanted providers to continue charging discretionary fees for copies of electronic records, it would have left §146.83(1f)(c)3m(2009)'s permission to charge for electronic copies in place. Once again, UWHCA's construction requires this Court to hold that the 2011 change did nothing at all. These legislative changes were meaningful, and this Court must respect the legislature's judgment.

Moreover, the drafting file demonstrates that the legislature understood the effect of repealing the permission to "charge" for electronic copies in 2011. The legislature knew that §146.83(3f) would continue to limit the "maximum allowable fees" to those items listed:

- "fees that health care providers may charge for copies of patient health care records are established in state statute." (UW.App.145).
- ". . .a health care provider may charge no more than the total of all of the following fees for providing copies to a patient or a person authorized by the patient:(then lists the charges allowed)…" (UW.App.145).

- "These fees, plus any applicable tax, would be the maximum amount a health care provider could charge for duplicate health care records…" (UW.App.147).
- "In general, the statutes establish the following maximum allowable fees…" (UW.App.149).

Nothing in the 2011 drafting file suggests that the legislature believed that §146.83(3f) would no longer apply to electronic records or that the statutory revisions were intended to change the meaning of "patient health care records" or "copies." Rather, the legislature knew that the statutory list constituted the "maximum" providers could charge when it chose to repeal the permission for electronic copy fees.

UWHCA does not dispute that the ***only*** way the Court could accept its construction is to hold that "patient health care records" do not include electronic records or "copies" do not include "electronic copies" in §146.83(3f). However, UWHCA cannot dispute that from 2009-11, "patient health care records" included electronic records and "copies" included "electronic copies." There is no basis to claim that the legislature intended those terms to mean something different after 2011, when it ***chose not to alter or redefine them***. *See Trojan v. Bd. of Regents of Univ. of Wisconsin Sys.*, 104 Wis.2d 277, 285, 311 N.W.2d 586 (1981) (undisturbed provisions remaining after statutory revisions are deemed not to have changed); *Columbus Park Hous. Corp. v. City of Kenosha*, 2003 WI 143, ¶ 37, 267 Wis.2d 59, 671 N.W.2d 633.

This Court cannot draw "inferences" contrary to the statutory definitions chosen by the legislature, because UWHCA perceives the statute's application to be unfair. What constitutes "fairness" resides in the eye of the beholder and is the subject of great debate here. However, that debate is irrelevant because this Court cannot rewrite statutes to alleviate perceived unfairness to a party. *Bank of Com. v. Waukesha Cty.*, 89 Wis.2d 715, 724, 279 N.W.2d 237 (1979).

UWHCA posits "[i]t may be that the legislature did not fully consider the implications of the definition of 'patient health care records.'" (UW Brief, p.46, n.8). Even if that were true, the legislature must fashion its own remedy:

> The statute as now written is not ambiguous and the court cannot, under guise of judicial statutory construction, rewrite the statute to reflect the intention the legislature might have had.

Harris v. Kelley, 70 Wis.2d 242, 250, 234 N.W.2d 628 (1975); *La Crosse Lutheran Hosp. v. La Crosse County*, 133 Wis.2d 335, 338, 395 N.W.2d 612 (Ct.App.1986) ("If a statute fails to cover a particular situation, and the omission should be cured, the remedy lies with the legislature, not the courts."); *see also Buffham v. Racine*, 26 Wis. 449, 456 (1870) (holding that the legislature can correct its own mistakes, and "it would be very dangerous to put.. a construction... that the legislature did not mean what it has expressed"). This Court's duty is to apply the legislature's directive as written.

C. Section 146.836 supports the Court of Appeals' decision.

Contrary to the UWHCA's arguments, §146.836 confirms the definition of "patient health care records" "includ[es]. . . ***electromagnetic or digital information*** . . . recorded or preserved, regardless of physical form or characteristics:"

> 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.

§146.836 (emphasis added). UWHCA's claim that §146.836 "indicates that 'patient health care records' does not include electronic records" (UW Brief, p.30) is the opposite of §146.836's actual language. The Court of Appeals correctly stated §146.836 includes "no language limiting 'copies' to any particular format" and UWHCA's "argument disregards the legislature's directive that the definition of patient health care records as including 'all records' applies '[i]n ss. 146.81 to 146.84.'" *Banuelos*, 2021 WI App 70, ¶38.

Section 146.836 does not "single out" provisions that deal with electronic records while omitting others that deal with only paper records. It contains is no such language, and UWHCA fails to elaborate on how its text could ever be read in that fashion. Section 146.836 does not change the definition of "patient health care record" as applied to §146.83(3f), nor does it exclude any type of record from the scope of any other section within the Chapter. Section 146.836 does not distinguish between sections applying to paper as opposed to those applying to electronic records; it ensures the confidentiality of written, drawn, printed, spoken, visual and electronic information. If the section was intended to exempt records in certain formats from other sections, it would be totally unclear which of the various formats would be excluded – would it be written, drawn, spoken, visual, printed, and/or digital? Had the legislature wanted §146.836 to serve as the dividing line between sections applicable to paper versus electronic records, it would have read something like the following:

> When used in sections 146.815, 146.82, 146.83 (4) and 146.835 "patient heath care records" includes ***those*** on which written, drawn, printed, spoken, visual, ***electromagnetic or digital information*** is recorded or preserved, regardless of physical form or characteristics, but when used in sections 146.81, 146.816, 146.817, 146.819, 146.83(1)-(3), 146.837, 146.84, and 146.87 "patient health care records" does not apply to digital information.

When the legislature uses "applicability" sections to apply differing definitions or distinguish between the requirements in statutory sections, it spells out the distinction and/or excluded sections with clarity. *See, e.g.*, §§115.997(3), 182.0175(3)(bc), 244.03, 895.61(2). Neither the language or purpose of §146.836 excludes electronic records from the scope of §146.83(1b)-(3f).

The purpose of § 146.836 is to ensure that all electronic records, paper records, diagnostic films, spoken recordings, audio recordings, visual recordings, handwritten notes, and drawings are subject to confidentiality, as the legislature stated when creating it in 1999:

> AN ACT to create 51.30 (4) (b) 25., 51.30 (4) (g), 51.30 (5) (f), 146.82 (2) (a) 20. and 146.836 of the statutes; relating to: ***the form of patient health care records and mental health treatment records subject to confidentiality and other restrictions*** and release ***without informed consent*** of patient health care records and mental health treatment records that do not identify the patient.

1999 Wis Act 78 (Emphasis added).[12]

The sections referenced in §146.836 all relate to the content and confidentiality of records: §146.815 (content of hospital records); §146.82 (confidentiality of records and informed consent to access); §146.83(4) (prohibition on falsifying and concealing records); §146.835 (maintaining confidentiality from parents that are denied physical placement of a child). UWHCA's construction changes the language and purpose of §146.836 to something the legislature never intended. UWHCA's claim that the Court of Appeals' construction renders §146.836 "meaningless" or "redundant" is baseless. The Court of Appeals properly applied §146.83 and §146.836 consistent with each statute's text and distinct purpose.

Once again, the legislative history of Chapter 146 confirms that §146.836 cannot be read as UWHCA argues. Section 146.836 has not changed substantively since 1999, when it was enacted. As discussed, in 2009, the legislature changed §146.83 to require providers to supply electronic copies of records, including records created electronically, to the patient at reasonable cost. §146.83(1k), (1f)(2009). If §146.836 was meant to ***exclude*** electronic records from §146.83's scope, then the 2009 changes to §146.83 would have been either ineffectual or in conflict with §146.836. The statutes cannot be read this way. *State v. Szulczewski*, 216 Wis.2d 495, 503, 574 N.W.2d 660 (1998) ("statutes should be reasonably construed to avoid conflict.… When two statutes conflict, a court is

[12]Section 146.836 governs the confidentiality of "all patient health care records," while §146.83(3f) restricts fees for copies of the "requested records," which patients can request in a limited fashion such as a certain date range. In that respect, it would make no sense for the language of §146.836 to "apply" to §146.83(3f). Section 146.836 has nothing to do with whether patients can access or copy electronic records, as UWHCA contends.

to harmonize them,... scrutinizing both statutes and construing each in a manner that serves its purpose").

UWHCA's argument is based entirely on a contextual relationship it ***infers*** between these two statutes that is not reflected in the language or purpose of either. This is not how the Court interprets independent statutes. *Kopke v. A. Hartrodt S.R.L.*, 2001 WI 99, ¶18, 245 Wis.2d 396, 629 N.W.2d 662 ("there are limits as to how much and what kind of statutory context is relevant" because "[e]very statute is an independent communication.").

Here, the consequences of adopting UWHCA's construction would be absurd and contrary to the purpose of the statutes. Courts must apply a construction that adheres to the stated purpose of the act over a construction that would defeat its manifest object. *Milwaukee County v. DILHR*, 80 Wis.2d 445, 453, 259 N.W. 2d 118 (1977). The Court cannot interpret a statute in a way that leads to an "absurd or unreasonable results." *Kalal*, 2004 WI 58, ¶46.

UWHCA asks this Court to adopt a radical construction where, §§146.81, 146.816, 146.817, 146.819, 146.83(1b)-(3f), 146.837, and 146.84 (sections not listed in §146.836) do not apply to electronic records at all. That construction would have wide-ranging, absurd consequences contrary to these statutes' text and purpose:

- §146.83(1b)-(3f) govern patients', other health care providers', and authorized third parties' the right to access, inspect, and obtain copies of "patient health care records." Since electronic medical records constitute all or virtually all medical records, holding that §146.83(1b)-(3f) does not apply to electronic records would leave patients, health care providers, and authorized third parties (like insurance companies) with no right to access, inspect, or obtain almost all medical records. ***So long as the records were created electronically, health care providers would not have to provide any access to them under UWHCA's construction.***

- Under UWHCA's construction, §146.83(3f) does not govern permissible copy fees for records created electronically at all. As a result, any time a provider is faced with a request for copies of electronic records (again – virtually all medical records) by a patient (even disability claimants and indigent Medicaid recipients), insurance company, or other authorized third party, the provider can charge ***unlimited fees*** for doing so, whether the provider chooses to send copies in paper or electronic format.
- Insurance companies require medical records to evaluate and defend against claims request medical records using HIPAA authorizations signed by the claimant. Insurers would now have no right to obtain any electronic medical record under either federal or state law.[13] UWHCA's interpretation would throw the status of virtually all personal injury, workers compensation, life, and disability claims into disarray for applicants, claimants, and insurers.
- UWHCA's construction, where "electronic copies" are simply not regulated by §146.83(1b)-(3f), would obligate providers to send paper copies ***contrary to federal law*** in some circumstances (42 U.S.C. §17935(e)(1)), and likely contrary to the wishes of most providers and patients in the modern era. Section 146.83(3f)(a) states that the "provider ***shall*** provide the person making the request copies of the requested records." If only paper copies were governed by this section, providers would be ***required*** to produce paper copies in response to every request.

[13] Contrary to UWHCA's argument, federal law is of no help here as providers are ***permitted, but not required,*** to supply records to third parties pursuant to HIPAA authorizations. 45 C.F.R. §§164.502(a)(1), 164.502(a)(2), 164.508.

- Requirements for preservation and destruction of medical records under §146.817 and §146.819 would no longer apply to electronic medical records.

Excluding electronic records from §146.83(1b)-(3f) would render any right of access to medical records or cost restriction meaningless under Wisconsin law.

Once again, the drafting file from the 2011 changes undermines UWHCA's argument that the legislature intended to stop regulating electronic records altogether. While it confirms that the legislature wanted to relieve providers of the requirement to "provide the copies in a digital or electronic format," the legislature still wanted patients to access and copy those records with the fee restrictions in place: "***Instead***, permit any patient or person authorized by the patient… to… (a) inspect records of a health care provider pertaining to that patient at any time during regular business hours, upon reasonable notice; (b) receive a copy of the records upon payment of fees established by the department." (UW.App.147). The legislature in 2011 (when electronic records were prevalent and discussed in the drafting file) never intended to exclude electronic records from the scope of §146.83(1b)-(3f). UWHCA's interpretation of §146.836 was properly rejected by the Court of Appeals.

II. THERE IS NO ISSUE OF FEDERAL LAW FOR THIS COURT TO ADDRESS.

UWHCA has never raised any issue of federal law or federal preemption at any stage of this litigation.[14] UWHCA agrees that "medical records are regulated both by federal laws… and… state law," which is common in many areas. (UW. Ct. App. Resp. Brief, p.5). When revising §146.83 in 2011, the legislature understood that "all requests for patient health care records, regardless of the state,

[14] HITECH preempts less stringent state laws governing patient access to electronic records, but more stringent state regulations, including those controlling the cost of providing copies of the records are not preempted. 45 C.F.R. §160.203(b); *see also* DHHS Guidance, *available* www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html *("*HIPAA does not override those State laws that …prohibit fees… [or] allow only lesser fees.") So there is no potential for a preemption issue. Section 146.83(3f) controls the permissible fees.

are subject to HIPAA regulations." (UW.App.153). The legislature understood that state and federal regulations co-exist. (*Id*.). Under HITECH, UWHCA was required to supply Banuelos with electronic copies of her medical records. 42 U.S.C. §17935(e)(1); 45 C.F.R. §164.524. HITECH also allowed Banuelos to have the records sent to her lawyer. *Id.*[15] However, in such circumstances, federal law defers to state law as to the allowable fees. *Azar,* 435 F.Supp.3d at 58-59, 67; 45 C.F.R. §160.203(b). There is no question that UWHCA complied with federal law in this respect. UWHCA has never disputed this analysis and raises no issue with it here.

One of the *amici* supporting UWHCA's petition incorrectly claimed that Banuelos ***chose*** to request records under federal law, and therefore cannot avail herself of state law. Banuelos cannot choose when and how the law applies. No such legal doctrine exists. That would be akin to people claiming they do not have to pay state income taxes because they paid federal income tax. Both state and federal law govern access to patient health care records. Here, federal law defers to state law as to the allowable cost. *Azar,* 435 F.Supp.3d at 58-59, 67; 45 C.F.R. §160.203(b). Because Banuelos requested copies of "patient health care records," from a "health care provider," §146.83(3f) and its cost restrictions apply.

UWHCA suggests without citation to any authority that the history of §146.83 reflects an "inference" that the legislature wanted to entirely defer to federal law when it comes to electronic records, although that inference is not reflected in the statute's text or drafting file. The primary federal regulation of medical records, HIPAA, was enacted in 1996. Section 146.83 has been amended six times since passage of HIPAA, and neither the statute nor drafting files have ever indicated an intent to defer to federal law. The most recent 2011 drafting file acknowledges the existence of federal regulations and makes no mention of deferring in any respect. (UW.App.153).

[15] *See also* DHHS Guidance, *available* *www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html*.

Moreover, federal law is not comprehensive like §146.83(3f) in providing access to "all" patient health care records:

- Under HIPAA, and subsequent HITECH/CURES Act regulations, patients are not entitled to receive copies of ***all*** patient health care records or protected information; for example, psychotherapy notes are not required to be released under federal law, while they are under Wisconsin law. *Compare* 45 C.F.R. §164.524(a)(1)(i) with §§51.30, 146.81(1)(d), 146.81(1)(h), 146.81(4), 146.83(1c), 146.83(3f).
- Under federal law, the provider is ***permitted, but not required***, to release medical records to a third-party with a HIPAA authorization. 45 C.F.R. §§164.502(a)(1), 164.502(a)(2), 164.508. In contrast, §146.83(1b) and (3f) ***require*** access. Using a signed HIPAA authorization is the method by which insurers and other third parties request medical records.[16] If §146.83 no longer governed electronic records, there would be no requirement that providers allow authorized third parties to access or obtain copies of electronic patient health care records, throwing the insurance industry and claim process into chaos.
- Under HITECH/HIPAA, there is no mandatory enforcement mechanism for patients. *See, e.g.*, *Payne v. Taslimi,* 998 F.3d 648, 660 (4th Cir. 2021). If patients are overcharged or not provided access to requested records, they cannot file a lawsuit. They must make a complaint before a federal agency and even if the agency decides to respond, there is no guarantee of enforcement. Our legislature provides enforcement mechanisms to ensure compliance. §146.84.

[16] Patients and their representatives can rely on HITECH to access electronic records, but this procedure is not available to third parties with HIPAA authorizations like insurers.

- Again, under HIPAA, providers are permitted, but not required, to share medical records with other providers.[17] Wisconsin law requires sharing of all such medical records between providers. §146.84(1m).
- UWHCA mentions "MyChart" systems as a potential solution, but those are not comprehensive either. The federal government paid providers to establish "My Chart," systems, but they remain voluntary, not mandatory.[18] The system is only required to include certain limited patient health information, not "all records." 45 C.F.R. §§170.315(e)(1)(i)(A)). Third parties have no right to access a MyChart account.

Holding that the legislature "deferred" to federal law regulating electronic records is contrary to text and history of Chapter 146 and would undermine patient and third-party access to "patient health care records."

III. THE LEGISLATURE MUST MAKE THE POLICY CHOICE OF WHAT FEES ARE PERMITTED.

UWHCA's argument is largely premised on a supposed unwritten "inference" that the legislature wanted to allow providers to charge unlimited fees for electronic copies. That is the opposite of what the statutory text says, is not supported by anything in the record, and is contrary to §146.83(3f)'s stated purpose. UWHCA's argument in favor of these "inferences" derives exclusively from alleged unfairness. However, courts "cannot rewrite statutes" to avoid perceived unfairness. *Bank of Com.*, 89 Wis.2d at 724. UWHCA asks the Court to rewrite the statute to meet its desired result, which this Court cannot do. *State v.*

[17] 45 C.F.R. §§164.502(a)(1), 164.502(a)(2), 164.508. There were limited modifications to this rule in the 2016 Cures Act (regulations published in 2021), where "information blocking" between providers possessing optional federally-certified Health IT technology was prohibited, but it only applies to certain electronically stored information, is not comprehensive, and is subject to numerous exceptions. 42 U.S.C. §300jj–52; 45 C.F.R. §170.401; 45 C.F.R. §§171.201-305.

[18] See 45 C.F.R. Ch 170 (providers not required to implement "Health IT" technology or MyChart, but the Chapter regulates those that do and other Health IT concerns).

Steffes, 2013 WI 53, ¶21, 347 Wis.2d 683, 832 N.W.2d 101 (cannot "rewrite or ignore the plain language of the statute" to "reach the result desired by" a party).

The policy debate as to whether it is "fair" to require providers to supply electronic records at no cost is one for the legislature. UWHCA makes numerous unsupported arguments that doing so would raise the cost of healthcare. However, the Court has no record to evaluate those assertions, which are highly suspect. Nor is the Court imbued with constitutional authority to adjudicate them. That is the legislature's prerogative.

When it comes to "fairness" of disallowing fees for electronic copies, the opposing arguments are far more persuasive:

- There is little or no actual cost involved in providing electronic copies. The records are sent in one or more "pdf" files to the patient via a website or email. To the extent the requests are not fulfilled by an automated process, it takes a few mouse clicks to retrieve and send them. Further, the federal government paid $36 billion dollars to providers to compensate for adoption of electronic medical records systems.[19] National vendors like CIOX, used by UWHCA and numerous other Wisconsin providers, fulfill records requests at no cost to the provider and indemnify the provider from any losses or liabilities. *Azar*, 435 F.Supp.3d at 49-51.

- Virtually all records today are created electronically and can be immediately accessed by the provider or vendor. Since 2011, when the federal government paid for providers' technology infrastructure, 96% of all major providers, including UWHCA and all Wisconsin hospital systems, have adopted

[19] "FDA Chief Calls For Stricter Scrutiny Of Electronic Health Records," KHN news, 3/21/19, *available at* khn.org/news/fda-chief-calls-for-stricter-scrutiny-of-electronic-health-records/#:~:text=The%20investigation%20found%20that%20the%20federal%20government%20has,including%20at%20least%20one%20run%20by%20the%20FDA.?msclkid=34ca0d8fc7d911ec9ea94f9c1ac407e4.

electronic medical records systems.[20] By and large, paper records have either been destroyed or scanned into the electronic system. Transmitting electronic records to patients is done without significant cost.

- When passing HITECH's regulations and guidance, the federal government analyzed the cost to provide electronic records and concluded that such records should either be sent for free or at little cost, almost always less than $6.50.[21] From 2016 to 2020 (before *Azar* was decided), providers adhered to the "*$6.50 or less"* rule for electronic copies, even for requests where the patient directed the provider to send the records to a lawyer.

- Permitting no fee for electronic copies fits within §146.83(3f)'s other restrictions. The enumerated permissible costs generally allow the provider to recoup actual material cost – paper copies, film, prints, postage, and taxes, but not labor cost to retrieve and certify the records. §146.83(3f)(b)1-6. With electronic records, there is no such material cost. The only arguable cost is a minimal labor cost to retrieve the records on a computer, which the legislature already prohibits. §146.83(3f)(b)5. Not allowing a fee for doing so is perfectly reasonable.[22]

- The legislature's choice that providers cannot charge outrageous per page fees totaling hundreds or thousands of dollars for sending a "pdf" file to the patient is a rational one. This is an area where there is no consumer choice or free market and the legislature has long avoided records copying as a for-profit exercise. *See* §146.83(1979). The legislature has established rates that offset some

[20] (R.20:4 *citing* Rodriguez, "HITECH Act Resulted in Significant Gains in EHR Adoption in Hospitals," AMJC, 2017, *available at* https://www.ajmc.com/newsroom/hitech-act-resulted-in-significant-gains-in-ehr-adoption-in-hospitals).
[21] *See* DHHS guidance, *available at* https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/access/index.html.
[22] Allowing "per page" fees for electronic records is particularly unreasonable as electronic records systems duplicate pages of redundant information in the notes corresponding to each visit, exponentially increasing the page count.

of providers' actual cost, but in 2011, rejected a proposal to allow a state agency to set the rates based on providers' infrastructure cost. (UW.App.146-49).

- Claiming that the legislature wanted higher rates for law firms and insurers because these entities profit from medical records is an attempt to gaslight the Court. Neither the statute nor its history reflects that intent. The only entities profiting from the sale of electronic medical records are out-of-state data vendors like CIOX. CIOX, a Georgia Company, fulfills the requests at no cost to medical providers and then reaps billions of dollars in windfall profits from selling the electronic data back to the patient and others. *Azar,* 435 F.Supp.3d at 49-51. CIOX has done so well in the electronic medical record era that it was recently sold for $7 billion.[23] When law firms and insurance companies collect medical records, it is not a for-profit exercise. It is a necessary ***cost*** of evaluating, pursuing, and defending claims. As for insurers, it is highly unlikely that the legislature would have wanted to raise their costs, potentially resulting in increased insurance premiums (especially when the legislature at the same time substantially changed insurance regulations to lower premiums[24]). It is particularly unlikely that the legislature favored the profits of out-of-state data vendors like CIOX. In the case of patients who request records through personal injury law firms, those expenses are ultimately borne by the client/patient, not the law firm.

- Bi-partisan federal administrations passed, supported, and defended regulations requiring free copies of electronic medical records. Through the last three administrations, the federal government has recommended that providers supply electronic medical records "free of charge" and has considered the cost of providing copies paid for with the cost of treatment.[25] Alex Azar, Trump

[23] "Datavant Closes Merger with Ciox," Press Release of Datavant Corp., July 28, 2021, *available at* https://datavant.com/about/news-press/datavant-closes-ciox-merger-announces-launch-of-datavant-switchboard/

[24] *See e.g.* 2011 changes to §632.32 and §344.33.

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

Administration DHHS Secretary, was quoted as saying "[p]atients should be able to access their electronic medical record, at no cost, period," and railing against the practices of data vendors like CIOX: "[t]he reality is that patient data belongs to patients. It doesn't belong to EHR companies." [26]

- The American Medical Association advocates for little or no fees, agreeing that electronic medical records requests can be fulfilled "easily, at very low cost, and with virtually no delay" [27] and that "the hard copy medical record is increasingly a dinosaur in health care delivery contexts."[28]

- Many states, like Wisconsin, do not permit providers to charge for providing electronic copies of medical records under various circumstances. *See e.g.*, KRS §422.317 (Kentucky law allows one free copy of patient health care records); Neb. Rev. Stat §71-8405 (no charge for records for social security and disability claims); Ohio Revised Code 3701.741, 3701.742 (no charge for records for social security and disability claims); Texas Code, Health & Safety §161.201 - 161.204 (no charge for records for social security and disability claims).

Contrary to UWHCA's argument, it is not "self-evident" that the legislature wanted to allow profiteering data vendors to charge unlimited fees selling patients' medical records. There are many valid policy reasons to sustain the legislature's choice not to allow fees for electronic copies. The policy debate as to whether that choice is "fair" is one for the legislature, not this Court.

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[26] "New Federal Rules Will Let Patients Put Medical Records on Smartphones," KHN News, 3/9/2020, *available at* khn.org/news/new-federal-rules-will-let-patients-put-medical-records-on-smartphones/

[27] Fioriglio, G, "Copy fees and patients' rights to obtain a copy of their medical records: from law to reality," (2005), *available at* https://pubmed.ncbi.nlm.nih.gov/16779040/

[28] *Id.*

CONCLUSION

For the foregoing reasons, Banuelos respectfully requests that the Court affirm the Court of Appeals' decision, reversing the circuit court's dismissal of Banuelos' complaint, and remand to the circuit court for the claim to proceed.

Respectfully submitted this 10th day of May, 2022.

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CERTIFICATE OF FORM, LENGTH, ELECTRONIC FILING, AND SERVICE

I hereby certify that:

This brief conforms to the rules contained in Wis. Stat. §§ 809.19 (8)(b), (bm), and (c). The length of this brief is 9,401 words.

I have submitted an electronic copy of this brief. The text of the electronic brief is identical 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 parties.

Dated this 10th day of May, 2022.

By: *Electronically signed by Jesse B. Blocher*

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CERTIFICATION OF HAND-DELIVERY

I certify that on May 10, 2022, this brief was hand-delivered to the Clerk of the Wisconsin Supreme Court. I further certify that the brief was correctly addressed.

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