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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**

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

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INTRODUCTION

Despite Banuelos's suggestion that UW Health's construction of Wis. Stat. § 146.83(3f) would impinge on a patient's ability to obtain their electronic records at a low cost, that is not the issue before the Court. As explained in UW Health's opening brief, the federal HIPAA and HITECH regimes ensure low-cost patient access to their health records, providing patients with a right to access copies of those records—in whatever format they choose, electronic or not—for a maximum price of $6.50. Br. 8, 40. Accordingly, the dispute in this case over the scope of § 146.83(3f) impacts only how the cost of providing copies of electronic records *to entities other than the patient* should be apportioned as between the health care provider and those third parties—in this case a for-profit personal injury law firm. Banuelos's arguments, which hypothesize a parade of horribles based on this fundamental mistaken premise that patient access to electronic copies is in any way diminished under UW Health's reasonable and historically accurate explication of the meaning of § 146.83(3f), are simply beside the point. Banuelos's "plain text" reading of "patient health care records" cannot be correct as it reads the applicability section, Wis. Stat. § 146.836, entirely out of the statute. Even if that proposed reading were correct, Banuelos's claim fails because her demand for electronic copies was not made "under"—or recognized by—§ 146.83(3f)(a), but instead was made under a distinct federal law mandate. Finally, Banuelos's alternative telling of the legislative history is unsupported.

ARGUMENT

I. Banuelos's reading of "patient health care records" reads the applicability section entirely out of the statute.

Banuelos argues that the definition of "patient health care records" includes "all records" in all formats—including electronic—citing the "broad" definition in Wis. Stat. § 146.81(4) that "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." Opp. 15–16. As Banuelos's own brief demonstrates, this goes too far and reads the applicability section in § 146.836 entirely out of the statute. Under Banuelos's construction, the applicability section merely "confirms" that "'patient health care records' includ[es] electromagnetic or digital information…recorded or preserved, regardless of physical form or characteristics." Opp. 16. But a provision that merely "confirms" what another section already supposedly makes clear "by its plain and inclusive language," *id.* at 15, is by definition surplusage, and long-standing principles of statutory interpretation counsel against such a duplicative reading, *e.g.*, *In re Washington*, 2007 WI 104, ¶ 30 n.10, 304 Wis. 2d 98, 735 N.W.2d 111. As explained in our opening brief, *see* Br. 42, the only non-duplicative interpretation of the applicability section is that, in enacting that provision, the legislature meant to do something specific: to identify the provisions—to the exclusion of all others—in which "patient health care records" includes electronic records. Where the legislature "acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

Taking into account the applicability section and the plain text of § 146.81(4), the far more compelling interpretation of the general definition of "patient health care records" is that it relates only to 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). This is confirmed by the detailed list of record types that are explicitly included and excluded from the definition, all of which relate to the subject-matter or content of the records, not their format. *See* Wis. Stat. § 146.81(4). Put otherwise, § 146.81(4) is agnostic as to form; by its plain terms it neither permits nor forbids the application of electronic records to its definition. This, of course, is exactly why the legislature needed to enact § 146.836 to articulate when electronic records are, and are not, applicable to the term "patient health care records." Indeed, when the legislature enacted the applicability section in 1999, it described the purpose of the provision as relating to "***the form*** of patient health care records and mental health treatment records subject to confidentiality ***and other restrictions*** . . . ." 1999 Wis. Act 78 (emphasis added). Of course, the legislature would not need to identify "the form of patient health care records" that are subject to "other restrictions" if, as Banuelos insists, § 146.81(4) made clear that *all* such records were covered by *all* the act's restrictions. Only UW Health's construction heeds this court's recent directive that "the context of a statutory scheme is important to the plain meaning of the text. Statutes are to be construed and harmonized with one another when possible." *Townsend v. ChartSwap, LLC*, 2021 WI 86, ¶ 16, 399 Wis. 2d 599, 967 N.W.2d 21.

The enactment of the applicability section in § 146.836 was a deliberate legislative choice to extend *specific* provisions regarding health care records to *all record formats*. This amendment was necessary because the definition of "patient health care records" does not specify the format. In

enacting § 146.836, the legislature made plain that it did not wish to include electronic records under the provisions governing an individual or their designee's access to patient health care records. The legislature's intention with respect to § 146.836's applicability section is reflected in other contemporaneously enacted "applicability" provisions, which modify the definition of "treatment records" to specify the formats applicable to the paragraphs identified therein—as § 146.836 does for "patient health care records." *See* Wis. Stat. § 51.30(4)(g), (5)(f). For each of the three applicability sections, the legislature strikingly chose to exclude provisions governing an individual or their designee's record access, *compare* § 146.83(1b)–(3f) *with* §§ 51.30(4)(cm), (5)(b), while including provisions governing such topics as concealing or falsifying records, *see* §§ 146.83(4) and 51.30(4)(dm). The consistency of these "applicability" sections in carving-out the provisions governing access for individuals or their designees from applying to electronic records confirms that the legislature intentionally excluded electronic records from the definition of "patient health care records" as it relates to such access and the accompanying fee provisions in § 146.83(3f).

The fact that the legislature did not update the applicability section when it added and removed the mandate and fee provision for electronic records in 2009 and 2011 is not—as Banuelos argues—an indication that "patient health care records" always included electronic records. Opp. 17-18. 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. *See ChartSwap*, 2021 WI 86, ¶ 26 ("[W]hen the wording of a general statute swallows the application of a specific statute,

the terms of the specific authorization must be complied with.") (citation omitted). But when the legislature repealed those provisions in 2011 in light of HITECH and HIPAA covering the field for access by a patient (or their designee) to electronic health records, the definition reverted back to the *status quo ante* as it existed since the enactment of § 146.836 in 1999, which excluded electronic records from the definition of patient health care records. This left federal law as governing access to electronic copies in Wisconsin.[1]

Banuelos also argues that because § 146.83 references "written, drawn, printed, spoken, visual and electronic information," it is "unclear which of the various formats would be excluded" from the provisions to which § 146.836 does not apply. Opp. 25. Again, this stunted reading of § 146.836 ignores the obligation to read statutes as a whole. *State ex. rel. Parker v. Sullivan*, 184 Wis. 2d 668, 700, n.36, 517 N.W.2d 449, 461 (1994). For those sections to which § 146.836 does not apply, the covered formats are clear from the text of those excluded sections. For example, in § 146.83(3f) "patient's health care records" covers paper records, microfiche or microfilm records and X-ray records, as these are specifically listed in § 146.83(3f)(b). Banuelos similarly argues that the term "copy" in § 146.83(3f) "is not limited to a particular format" and so can encompass electronic copies, not just paper copies. Opp. 16–17. But UW Health never

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[1] Such a decision to defer to the comprehensive federal scheme is far from unusual. Alaska, Kansas, Wyoming, and the District of Columbia do not have independent fee regulations for medical record copies, while Arizona, Hawaii, and Idaho impose only "reasonableness" limits. *See* Ariz. Rev. Stat. § 12-2295(A), Haw. Rev. Stat. § 622-57(g), Idaho Code § 9-420. And Delaware limits by regulation what physicians can charge *patients*, but otherwise applies only a reasonableness limit, too. *See* Bd. of Med. Licensure & Discipline, Reg. 16.0; Del. Code Ann. tit. 10, § 3926(a).

claimed that "copies" were limited to paper copies, and the plain text renders such a reading impossible: "copies" in § 146.83(3f)(a) encompasses the forms of copies expressly listed as falling within that definition in subsection (3f)(b): "paper copies," "microfiche or microfilm copies," and "print[s] of an X-ray." Electronic copies, however, are not included.

Having failed to articulate any reading of § 146.836 that gives the provision independent meaning, Banuelos falls back on unsupported policy arguments that fail under their own weight. She asserts that—notwithstanding that every time the legislature addressed electronic copies, it provided for fees for those copies—electronic copies should be provided for free because "supplying electronic copies requires a few mouse clicks at little or no cost to the provider," and entails no "material cost". Opp. 11, 33-34. But Banuelos's construction of § 146.83 makes no distinction between the source of these "free" electronic copies (*i.e.*, if they are retrieved from archives and converted from hard copies) or the medium on which they are produced (*i.e.*, on CDs rather than online). In fact, Banuelos specifically provided that CD delivery was an acceptable way to deliver her records. *See* R.1-14. CDs cost money, as does the time to compile digital files from hard copies. And the legislature has never indicated an intent inexplicably to burden health care providers with these material and compilation costs *solely* with respect to electronic copies.

The better reading, which takes account of both the applicability section and the plain text of § 146.81(4), is that the general definition of "patient health care records" relates only to the substance of the records, and § 146.836 addresses their format. Under that cohesive reading, electronic copies are not regulated by the fee provision in § 146.83(3f)(b).

II. Banuelos's request was not a request "under" § 146.83(3f)(a).

Even if Banuelos's reading of "patient health care records" were correct, her claim still fails. Section 146.83(3f)(b)'s fee caps only apply to requests made "under par. (a)," which Banuelos's request was not. Banuelos's request relied on the HITECH Act, which entitled her to request copies in an electronic format, and to direct those copies to a third-party recipient. Br. 32; HITECH Act, 42 U.S.C. §§ 17921(5), 17935(e)(1). But as Banuelos recognizes, Opp. 19, 30, it is clear from the repeal of the electronic-records mandate in 2011 and the plain text of § 146.83(3f) that the Wisconsin legislature did not intend for a requester to be able to demand under Wisconsin's § 146.83(3f)(a) that a provider produce electronic copies, let alone to have such a statutorily unrecognized demand satisfied *for free* under par. (b). *See* Br. 32; Opp. 19 (arguing that the legislative purpose of the 2011 repeal was "to be flexible in allowing providers to ***choose*** what type of copies to provide"). Nor does § 146.83(3f)(a) permit requesters to direct copies—electronic or not—to third parties. To the contrary, the section unequivocally states that the copies "shall" be provided to "the person making the request."

Exercising her federal rights, Banuelos "specifically requested that . . . copies in PDF format on CD or via electronic delivery, per the requirements of HITECH Act" be sent "to [her] attorneys." R.1-14. Banuelos thus made her request "under" a distinct federal law mandate which conferred different rights than the Wisconsin statutes. Despite this, Banuelos now seeks to back-door into § 146.83(3f)(b)'s fee provisions. But those fee provisions cannot apply here, as Banuelos's request was not a request "under par. (a)": it simply did not fit into the Wisconsin statutes' framework

and was premised on obtaining services not recognized or provided for by § 146.83(3f).

III. Banuelos's view of the legislative history is baseless.

The plain language of ch. 146 leaves no doubt that § 146.83(3f) does not apply to requests for electronic copies. But even if the statute were not so clear, the legislative history makes clear that § 146.83(3f) was not intended to—and still does not—cover electronic records. This is evident from both (i) the legislature's effort in 2009 to impose a fee cap on electronic copies and to disallow charges for discs and other storage media; and (ii) the 2011 repeal of the electronic records mandate and corresponding fee provision.

Banuelos's view of the legislative history is riddled with errors and is colored by an irrelevant and constitutionally dubious implication that the legislature was trying to burden out-of-state vendors who are not even part of this case. *First*, Banuelos's mud-slinging in relation to Ciox cannot have any bearing on this case. This court recently held that the fee restrictions in § 146.83(3f)(b) apply only to health care providers, not their vendors. *See ChartSwap*, 2021 WI 86, ¶¶ 16–17. Accordingly, the statute is, and always has been, directed at Wisconsin health care providers, and whether or not a health care provider may choose to outsource its records collection processes is irrelevant. *Second*, Banuelos's suggestion that the Wisconsin legislature would be "particularly unlikely" to "favor[] the profits of out-of-state data vendors like CIOX" over in-state personal injury firms, Opp. 35, depends on ascribing to the legislature an animus towards out-of-state entities (that are not even regulated by the statute) that contravenes bedrock constitutional prohibitions against such citizenship-based discrimination.

See Wis. Const. Art. 1, § 1; U.S. Const. Amend. XIV. The correct formulation of the question here is as it was posed in UW Health's opening brief: whether the legislature intended to burden health care providers for the benefit of for-profit enterprises like plaintiffs' attorneys and insurance companies. Br. 40. The answer is clearly no.

A. Banuelos's interpretation of the "*status quo ante*" is baseless.

Banuelos argues that UW Health's position regarding the pre-2009 "*status quo ante*" is "wrong on all counts," but her counter position is unsupportable. Opp. 21. Banuelos argues that pre-2009, the "*status quo ante*" was to "allow fees set by DHS for all formats 'on different media' and considering 'advances in technology.'" *Id.* But, contrary to Banuelos's assertion, the pre-2009 fee provision does not indicate that "patient health care records" includes or excludes electronic records, merely stating that DHS may make rules about fees for certain formats. Crucially, at no point prior to 2009 did DHS ever exert such rulemaking authority over electronic records; they remained unregulated, as Governor Doyle recognized at the time. Veto Message, § D.11, at 37 (June 29, 2009); App. 130. Before the June 2009 Wisconsin statute, the only regulation of electronic records in Wisconsin was that set by HITECH that had been enacted earlier that same year in February 2009. Br. 22. And even with the enactment of the June 2009 Wisconsin statute, the driving idea behind Governor Doyle's partial veto was that the Wisconsin statutes would merely "maintain" those pre-existing federal law requirements. Veto Message, § D.11, at 37; App. 130. Despite the legislature's attempt to regulate electronic records in 2009, the enacted legislation never reflected the exertion of state regulatory authority over electronic record *pricing*. Instead, Governor Doyle made clear the

overarching purpose of his partial veto of the provision was the "intent of maintaining current law requirements provided under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA)." *Id.* This is important because it contextualizes what the legislature intended to do in 2011 when it repealed the 2009 provisions, which was to return to the *status quo ante*, *i.e.*, before the 2009 Act's half-hearted and confusingly-worded attempt to reflect in the state statutes the requirements of the federal legislation.

B. There is no evidence that the legislature intended to make electronic copies available for free.

Banuelos's interpretation of the statute also makes no sense in the real world. If it were the legislature's intention to make access to electronic copies free, it would have said so clearly in 2011 when legislating on the topic. *See Eau Claire Cty. v. Gen. Teamsters Union Local No. 662*, 2000 WI 57, ¶ 17, 235 Wis. 2d 385, 611 N.W.2d 744 ("Such a dramatic change in public policy should not have to be made by inference."). As Banuelos notes, "[f]rom 2016 to 2020 (before *Azar* was decided), providers adhered to the '*$6.50 or less*' rule for electronic copies." Opp. 34 (emphasis in original). This charge was never raised as an issue before the ruling in *Ciox Health, LLC v. Azar*, 435 F.Supp.3d 30 (D.D.C. 2020) because there was no indication—either in § 146.83 or from the legislature's statements—that electronic copies were to be provided for free. It is inexplicable that, as Banuelos alleges, "the legislature understood the effect of repealing the permission to 'charge' for electronic copies in 2011" to be that electronic copies would be free, Opp. 22, and yet not a single legislator ever said that was what they were doing. The simplest explanation is usually the best one: why didn't the legislature say

that it was granting access to electronic copies for free? Because it never intended to—and did not, in fact—do so.

CONCLUSION

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

Respectfully submitted this 24th day of May 2022.

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Dated: May 24, 2022

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I hereby certify that on May 24, 2022, I filed with the Court by hand delivery and served copies of the Reply Brief of Defendant-Respondent-Petitioner upon counsel for Plaintiff-Appellant by first class mail:

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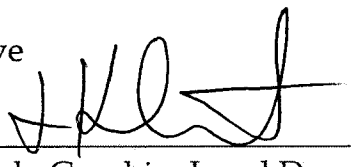

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