STATE OF WISCONSIN
SUPREME COURT

BEATRIZ BANUELOS,

Plaintiff-Appellant,

v. Appeal No. 2020-AP-1582

UNIVERSITY OF WISCONSIN HOSPITALS AND CLINICS AUTHORITY,

Defendant-Respondent-Petitioner.

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

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

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[2] Available at https://docs.legis.wisconsin.gov/2009/related/veto_messages/2009_wisconsin_act_28_details.pdf, last accessed June 13, 2022.

STATEMENT OF AMICI'S INTEREST

The Wisconsin Hospital Association, the Wisconsin Medical Society, the Wisconsin Dental Association, LeadingAge Wisconsin, the Rural Wisconsin Health Cooperative, The Wisconsin Health Care Association/Wisconsin Center for Assisted Living, and the Wisconsin Health Information Management Association (collectively, the "Associations") are not-for-profit member organizations representing the interests of health care providers across Wisconsin. Together, the Associations represent hospitals, health systems, physicians, residents, dentists, dental hygienists, skilled nursing and therapy centers, personal care agencies, community-based providers and facilities that provide long-term care, assisted living, and senior housing. As providers of accessible, high-quality, patient-centered care, the Associations' members are committed to delivering cost-effective care to the patients they serve in full compliance with the state and federal laws governing their practices and their processing of patient health records requests. To do so, however, the Associations' members require clarity on the application of WIS. STAT. § 146.83(3f) to requests for electronic copies of health care records. Clarity is required because for more than a decade these providers believed, as the Circuit Court held below, that the statute does not govern requests for or the delivery of electronic health records. By

contrast, and in complete disregard of the statute's plain language and its place in the context of related federal law, the Court of Appeals issued a decision that prohibits any charge for records delivered in electronic format. In so doing, the appellate court not only has precluded providers from recovering costs associated with the provision of electronic copies of health records but also has placed these providers at risk of significant liability for adhering to the statute's terms. The Associations therefore submit this brief in support of their longstanding, well-founded construction of the statute, and in support of this Court's review, reversal and remand of appellate court's decision.

INTRODUCTION

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

The issue presented for the Court's review is whether a Wisconsin health care provider may charge a fee for providing an electronic copy of a patient's health care record, where neither WIS. STAT. § 146.83(3f) nor any other provision of state or federal law prohibits such a fee. The answer hinges on a determination of the legislature's intent in revising the statute in 2011 to remove the reference to electronic copies of health care records in the medical-record-fee statute and whether that action was intended to prohibit the charging of fees to requestors entirely, as the Court of Appeals held, or was intended to leave the regulation of such fees to the expanding body of federal law expressly addressing the issue, as the Circuit Court held. Strong evidence supports the Circuit Court's conclusion that the legislature's

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

ARGUMENT

I. Wisconsin Law Does Not Prohibit Health Care Providers From Charging Fees to Cover the Cost of Providing Electronic Health Care Records; Therefore, the Court of Appeals' Decision Holding Otherwise Should Be Reversed and Remanded.

The Court of Appeals' decision is defeated by the plain language of the statute, which limits fees for the provision of copies of certain health care records but in no manner prohibits fees for electronic copies of patient health care records. Section 146.83(3f)(b) states that a health care provider can charge "no more than" the listed fees for providing physical copies of health records in the form of paper copies, microfiche or microfilm copies, or printed x-ray film images, plus certification and retrieval fees (depending on the identity of the requester) and shipping costs. It says nothing about electronic or digital copies. Rather, it expressly provides:

> **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.[3]
>
> 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 language italicized in subsections (3f)(a) and (3f)(b), specifies not only the applicable copy fees but also the applicable copy fee limitations imposed on Wisconsin health care providers. In concluding that § 146.83(3f)(b), "defines the total universe of fees that a provider may collect from a requester for the service of fulfilling a request for patient health care records under [§ 146.83(3f)(a)]," the Court of Appeals disregarded this language and, concomitantly, their meaning. ***Banuelos v. Univ. of Wis. Hosps. & Clinics Auth.***, 2021 WI App 70, ¶ 15 399 Wis. 2d 568, 966 N.W.2d 78. That is, paragraph (a) applies to persons who request *copies* of a patient's health care records, provide the patient's informed consent, and pay the applicable fees under paragraph (b). Paragraph (b), enumerating the

[3] Pursuant to WIS. STAT. § 146.83(3f)(c), adjustments to the fees set forth in subsection (3f)(b) are made annually by the Wisconsin Department of Health Services and published in the Wisconsin Administrative Register.

applicable fees, provides that "a health care provide *may charge no more than the total of all of the following [fees]* ***that apply*** *for providing the copies requested under par. (a)."* Hence, paragraph (b) provides the monetary amount for the enumerated copy format, directs that health care providers may charge no more than the total of all of those enumerated fees ***that apply*** for the provision of those copies. And paragraphs (a) and (b), when read together, require the provision of those copies to a requester who has submitted the informed consent and paid the fees. Given the absence of a fee for electronic records in paragraph (b), paragraph (a) has no application to Banuelos's request for electronic copies of her health care records, nor any application to their production. In short, § 146.83(3f)(b) has no bearing on the fees that a health care provider may charge for the provision of electronic or digital records. In so holding otherwise, the appellate court erred.

II. The Plain Language of Section 146.83(3f) Coupled with Its Legislative History Confirms That It Has No Application to Requests for Electronic Copies of Health Care Records.

By simultaneously eliminating both the mandate to provide electronic copies of medical records, *see* 2011 Wis. Act 32, §§ 2659y, 2660, and the corresponding fees provision for electronic medical records, the legislature implicitly recognized: (1) the success of federal and state incentives for providers to adopt electronic health records meant that copies of medical records were increasingly being provided in electronic form; and (2) a

substantial body of federal law regulating electronic copies of medical records and the associated fees was growing to address these developments. In short, the provision of medical record copies is now discussed in terms of portals and licensing fees rather than pages, and by 2011 Wisconsin's legislature could comfortably defer regulation of electronic health records to federal agencies dedicated to these new technological issues.

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

budget bill in 2009 (*see* 2009 Wis. Act 28),[4] the same year that Congress passed the HITECH Act, which was created to motivate the implementation of electronic health records (EHR) and supporting technology across the United States. Two years later, during Governor Walker's administration, Wisconsin repealed those provisions through the 2011 biennial budget bill. (*See* 2011 Wis. Act 32 § 2660). The more reasonable, and quite frankly obvious, inference is that the legislature saw no further need for a separate state mandate and state regulation of associated fees where federal regulations were now solidly in place.

This interpretation of the 2011 statutory changes as getting Wisconsin out of the business of regulating electronic access and copies is further supported by the fact that the Applicability section at WIS. STAT. § 146.836, which is the only statute in Chapter 146 in which a reference to electronic

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[4] Wisconsin Governor Doyle partially vetoed the proposed provisions in 2009 Wis. Act 28 that would allow only a $5 fee for provision of electronic health records and would prohibit any charge for the electronic media on which such records were provided, saying: "I am partially vetoing this provision to eliminate the deadlines and the associated penalties for providing copies of and access to records, with the intent of maintaining current law requirements provided under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). The impact on health care providers of creating state regulations that are significantly more restrictive than federal requirements has not been adequately analyzed. Further, this partial veto will eliminate the $5 fee limit on electronic record copies with the intent that providers may charge a reasonable fee rate for providing copies in an electronic or digital format that is no more than the paper copy rate. The fee limitation is a deterrent to providers adopting electronic health records." 2009 Wis. Act 28, § D.11 at 37 (June 29, 2009) Veto Message Details, *available at* https://docs.legis.wisconsin.gov/document/vetomessages/2009/AB75Details.pdf, last accessed June 13, 2022.

health information remains, states that only "Sections 146.815, 146.82, 146.83(4)[5] 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." *See* WIS. STAT. § 146.836. In its drafting of § 146.836, the legislature expressly stated which provisions would continue to impact electronic health information, and WIS. STAT. § 146.83(3f) is not among them.

In this same regard, the scope of the Court of Appeals' decision is also overbroad and untenable. For example, the decision does not address—or more accurately, patently ignores—issues such as: (1) whether the provider must maintain patient health care records electronically for the fee prohibition to apply; (2) whether providers are responsible for any costs of converting paper records to an electronic form in order to provide the records electronically; or (3) whether the provider bears the cost of the media on which electronic copies are provided (USB, flash drive, CD, etc.). Moreover, it disregards industry practice and ignores federal law, which allows for electronic copy fees, and only prohibits a provider from charging a fee for providing electronic copies where no manual effort is required in producing

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

them for the requestor, for example, because they are transmitted automatically through an Application Programming Interface ("API"). *See* 45 C.F.R. § 171.302(b)(2). Under the Court of Appeals' decision, an obvious question remains: can the provider pass through any fees incurred that were required to license such API if it is not one that is already provided by the provider for such purpose (such as a patient portal)? *See* 45 C.F.R. § 171.302(a). If a Wisconsin health care provider is not permitted to charge any fee for the provision of an electronic copy of medical records under any circumstance, such providers will face numerous costs that will instead be passed through to other patients when assessing the fees for care. Additionally, if there is no limit on the number of times a requestor can obtain a free electronic copy, these costs could increase rapidly. This is particularly true now when federal laws such as HIPAA, the HITECH Act and the 21st Century Cures Act *require* that health care providers provide requestors with electronic copies of their electronic health information unless very narrow exceptions apply, *see* 45 C.F.R. § 164.524(a)(1), but balance that obligation by permitting health care providers to charge reasonable, cost-based fees ***and*** licensing fees if special technologies are required to provide the information in the manner requested, *see id.* at § 164.524(c)(4). The appellate court decision undermines the Wisconsin legislature's intent to obviate these issues

by simply getting out the business of regulating the provision of electronic records.

III. The Statewide Impact of the Court of Appeals' Decision is Not without Consequence and Includes Increased Costs for Providers and the Unintended Cost-Shifting to Patients.

The Court of Appeals' published decision in this case will have an enormous impact on Wisconsin health care providers and their patients as it fundamentally alters the health care industry's understanding of the statute for the last ten years, which has informed providers' and their vendors' processes, policies and procedures for release of information. Since the legislature's 2011 repeal of the language related to copies of electronic records, health care providers and their vendors have understood the statutes to not regulate requests for electronic copies of records or the related charges.[6]

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[6] While Wisconsin's Department of Health Services "does not track information on the total amount of fees charged for medical records by Wisconsin health care providers, or other information on medical records requests," information available from a Wisconsin firm that provides medical record copying services to health care providers indicates that, prior to the rate increase in 2011 Wis. Act 28, "the average request totals 61 pages in length at an average direct processing cost of $62.22, with the total fee that can be charged for this average request equaling $36.35." Legislative Fiscal Bureau, Joint Fin. Cmte., Paper #367 (May 18, 2011) at 6. The Joint Committee on Finance report is available at: https://docs.legis.wisconsin.gov/misc/lfb/budget/2011_13_biennial_budget/102_budget_papers/367_health_services_fees_for_patient_health_care_records.pdf, last accessed June 13, 2022.

The updated statutory fee schedule in § 146.83(3f) still only allows recoupment of approximately $49.25 plus shipping—which is a smaller loss to providers only if one makes the unreasonable assumption that the processing costs are unchanged since 2011.

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

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

Id. at 58 (citations omitted) (emphasis added).

Requiring health care providers to bear the cost of providing such records instead of allowing them to recoup such costs from the requestors will increase the health care providers' operational costs, such as staff time,

vendor contracts, media and other supplies necessary to provide the electronic copies. Needing to account for such costs in their budgets will ultimately increase the cost of health care and shift this burden to other patients, insurers and government payors or require other cutbacks that could impact patient care and services.

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

costs and reasonable actual attorney fees." WIS. STAT. § 146.84(1)(bm). Under the Court of Appeals' reasoning, then, a provider who charges a reasonable cost-based fee for electronic copies (which is often a $6.50 flat rate based on federal HIPAA guidance), could face thousands of dollars in potential liability if, as the appellate court has held, such copies were to have been provided free of charge. Plainly, this liability will result in an extraordinary and unjust windfall to requestors for what amounts to only nominal actual damages, and runs counter to Wisconsin's interests.

CONCLUSION

The Court of Appeals' misconstruction of the legislature's 2011 decision to rely on federal law to regulate fees for the provision of electronic copies of medical records as a decision to prohibit fees for the provision of such records entirely, poses, as outlined above, significant risks to Wisconsin providers. Further, it raises various questions surrounding the scope of its interpretation, which will ultimately lead to continued litigation regarding these issues. Finally, the decision inappropriately transfers the costs of handling such medical records requests away from the requestor to other patients, insurers, and government programs, which exacerbates public policy concerns regarding the cost of health care and will have a statewide impact on Wisconsin health care providers, business affiliates, and vendors.

For each of the foregoing reasons, the decision should be reversed and remanded for reinstatement of the Circuit Court's order dismissing the action in toto.

Dated this 13th day of June, 2022.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19 (8) (b), (bm) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 2,786 words.

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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 parties.

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CERTIFICATE OF DELIVERY AND SERVICE

I hereby certify that on June 13, 2022, twenty-two (22) paper copies of this brief were deposited into the care and custody of UPS, a third-party commercial carrier, for overnight delivery during business hours to:

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I further certify that on June 13, 2022, I sent true and correct email copies as well as three paper copies of this brief, by first-class mail, postage pre-paid, to the following counsel of record:

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