Nos. 2020AP2081-AC & 2020AP2103-AC

In the Wisconsin Court of Appeals
District IV

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU,
PLAINTIFFS-RESPONDENTS,

V.

TONY EVERS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF WISCONSIN, KAREN TIMBERLAKE, IN HER OFFICIAL CAPACITY AS INTERIM SECRETARY OF THE WISCONSIN DEPARTMENT OF HEALTH SERVICES AND JOEL BRENNAN, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF ADMINISTRATION
DEFENDANTS-APPELLANTS,

AND

MILWAUKEE JOURNAL SENTINEL,
INTERVENOR- APPELLANT.

On Appeal from the Waukesha County Circuit Court,
the Honorable Lloyd V. Carter, Presiding

BRIEF OF PLAINTIFFS-RESPONDENTS WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU

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INTRODUCTION

What began as emergency litigation to preserve the confidentiality of thousands (or perhaps even tens or hundreds of thousands) of private health records has since turned into something more: a fight over access to the courts. In the opinion of the State, not only is it free to categorically release patient-identifiable information derived from Wisconsinites' private medical records at once—information whose publication would be *presumptively unlawful* under HIPAA—but it cannot be made to answer in court about the legality of its plan, since, in its view, no one has a right to challenge it. While the State concedes that individual patients could potentially challenge the release of *their own* records only, the suggestion that thousands of Wisconsinites would need to rise up and flood our State's 72 county courts with a tsunami of coordinated single-plaintiff complaints *just to have a chance* of stopping the State from proceeding with a bulk records release, in violation of the confidentiality statutes, does not pass the straight-face test. Yet it is apparently the State's considered position that, whenever it seeks to dump a large bucket of health-care records at once—whether it be the names of all employers with two or more workers who have had COVID-19, as here, or the names of all patients at UW Health System who have been diagnosed with

meningitis—its decision is practically unreviewable and therefore unstoppable.

Thankfully, that is not the law. Rather, under Wisconsin's Declaratory Judgments Act, any group or individual with standing can seek a declaration of rights before a threatened harm, including an illegal records release, is done. All that the would-be plaintiff needs is a justiciable claim, meaning (here) merely a legally protectible interest, even if only as a matter of judicial policy. Plaintiffs—business groups with scores of members whose companies and employees would be harmed by the release—have *several* legally protectible interests, any one of which would justify moving forward in the trial court. To name just two: (1) Plaintiffs have an interest in their tax money not being spent on activities that violate Wisconsin statutes, and (2) Plaintiffs are at least arguably within the zone of interests of the medical-record-confidentiality laws, which allow Plaintiffs to sue after the fact for an unlawful release of records that caused them damage. And while Defendants' position is that Wis. Stat. § 19.356 prohibits declaratory-judgment actions regarding the legality of public-records releases, they ignore that that statute explicitly preserves the right to sue under the DJA and that, even if it did not,

Section 19.356 does not confer upon Plaintiffs an adequate and effective means of stopping the release sufficient to preclude a DJA action.

This Court should affirm.

ISSUE PRESENTED

Whether Plaintiffs, who have sued to stop the release of at least thousands of private health-care records, have raised a justiciable claim against the State under Wisconsin's Declaratory Judgments Act.

The circuit court answered yes.

This Court should answer yes.

ORAL ARGUMENT AND PUBLICATION

This Court has scheduled oral argument in this case for March 24, 2021. Plaintiffs do not request publication.

STATEMENT OF THE CASE

On July 1, 2020, media reported that Governor Evers and then-Secretary-Designee Palm planned to publish the names of all Wisconsin business that had recorded at least two COVID-19 cases. M.D. Kittle, *Breaking*: *Evers' DHS outing businesses with COVID cases*, Empower

Wisconsin (July 1, 2020).[1] Plaintiff WMC and other businesses sent a letter to the State, explaining that releasing such information, even in a response to a public-records request, would violate several statutory and constitutional provisions. R.8:11–16.[2] The State quickly reversed course, announcing that it had decided not to publish the information, Molly Beck, *Wisconsin's health agency shelves plans to name businesses tied to coronavirus cases after pushback from industry lobbyists, GOP*, Milwaukee Journal Sentinel (July 7, 2020),[3] with Governor Evers admitting on September 9 that the information was "not public" and that posting it would raise "privacy issues." *See* Molly Beck, *Tony Evers says he would take a coronavirus vaccine and blames Trump for sowing distrust in the process*, Milwaukee Journal Sentinel (Sept. 9, 2020).[4]

On September 30, however, the State changed its position yet again, informing Plaintiff WMC that it would be releasing the names of over 1,000 employers across Wisconsin who had at least two employees

[1] https://empowerwisconsin.org/breaking-evers-dhs-outing-businesses-with-covid-cases/.

[2] All record citations are to No. 2020AP2103-AC.

[3] R.8:5–10.

[4] https://www.jsonline.com/story/news/politics/2020/09/09/tony-evers-blames-trump-for-sowing-distrust-in-covid-vaccine-process/5760488002/.

test positive for COVID-19 or close case contacts being investigated by contract tracers, purportedly in response to public-records requests. R.7.

The next day, Plaintiffs filed their initial complaint in this case and a motion for an *ex parte* temporary restraining order and temporary injunction. R.4; 5. Plaintiffs alleged that the information the State planned to release derives from diagnostic test results and records of contact tracers investigating COVID-19 that constitute "[p]atient health care records," which must be kept confidential under Wis. Stat. §§ 146.81 and 146.82. R.4. Plaintiffs also explained that releasing employer names would violate the privacy of numerous Wisconsin citizens and further damage its business community. R.4.

On October 1, the circuit court entered an *ex parte* temporary restraining order prohibiting the State from releasing the requested records and set a motion hearing for October 7. R.13; 20. At the hearing, with no party objecting, the circuit court granted the Journal Sentinel's motion to intervene, set a briefing schedule and hearing for November 30, and extended the temporary restraining order to the hearing date. R.22; 24; 26. Both the State and the Journal Sentinel moved to dismiss the Complaint. R.21; 30; 31; 69. On October 23, Plaintiffs filed a First

Amended Complaint and a combined brief opposing the requests to dismiss and in support of a temporary injunction. R.36; 37, App.101–16.[5]

In their Amended Complaint, Plaintiffs alleged that "[t]he information that Defendants plan to release is derived from diagnostic test results and the records of contact tracers investigating COVID-19." App.103. In particular, Plaintiffs alleged, "[i]nformation about whether an employee of a facility has tested positive for COVID-19 can come only from the individual's medical records" and that "Defendants seek to release the results of medical diagnostic tests conducted on numerous individuals." App.109. Plaintiffs further alleged that "releasing a patient's employer's name would permit identification of the patient." "Given the relatively small number of employees at any given facility, it would not be difficult for co-workers or community members to discern the identity of the employee or employees who have tested positive for COVID-19." App.110. Plaintiffs also alleged that "the State originally obtained the medical records for the purpose of communicable disease surveillance" and that "[r]esponding to an open-records request is not communicable-disease surveillance." App.111.

[5] All appendix cites refer to the State's Appendix.

As to each association, Plaintiffs alleged that "[t]he release of confidential medical information of the employees of [the association's] members will violate those employees' right to privacy and unfairly harm the reputation of [the association's] members." App.103–05. Plaintiffs alleged that "Defendants' planned disclosure will irreparably harm Plaintiffs' members by effectively blacklisting them and permanently harming their reputations." App.112. In particular, Plaintiffs alleged, [i]f any of Plaintiffs' members are listed in Defendants' release (as some most assuredly will be, given the breadth of Plaintiffs' memberships and of Defendants' planned release), such information will imply that the businesses are somehow at fault for COVID-19." App.112. As Plaintiffs alleged, "[m]any consumers report paying increased attention to the COVID safety precautions being taken at businesses and the steps businesses are taking to protect their employees" and that "an apparent deficiency in this area would cause them to take their business elsewhere." App.113. And Plaintiffs alleged that, "[g]iven this well documented fear and response by consumers, it is highly likely that consumers will avoid businesses on the State's blacklist, regardless of whether the business was in any way at fault for the positive cases or was ever actually exposed to COVID-19." App.113.

Additionally, Plaintiffs alleged that either they or their members are Wisconsin taxpayers. App.103–05, 111. Plaintiffs further alleged that "[i]mplementing Defendants' unlawful plan to collect, review, and release the confidential medical information at issue in this case necessarily involves, and will continue to involve, the unlawful expenditure of public funds. Government employees must spend time and resources to carry out this unlawful course of action, which resources the government will not fully recoup. As a result, Defendants will have less money to spend on legitimate government interests." App.112. Plaintiffs also alleged that "[a]s Wisconsin taxpayers, WMC, WMC's members, MACC's members, and NBCC's members, have a substantial interest in public funds and will incur direct pecuniary losses as a result of Defendants' unlawful action." App.112; *see also* App.103–05.

After a hearing, the circuit court denied the State and Journal Sentinel's motions to dismiss and granted Plaintiffs' motion for temporary injunction. *See* R.73; 101; App.117–43. The court held that Plaintiffs had standing to bring the case under the zone-of-interests theory and that the action was justiciable under the Uniform Declaratory Judgments Act (DJA). App.121–43. The court further held that Plaintiffs

had satisfied the criteria for a temporary injunction. App.121–43. The court entered written orders on December 4. R.73; App.117–20.[6]

STANDARD OF REVIEW

When reviewing a circuit court's decision on a motion to dismiss, this Court reviews de novo "[w]hether a complaint states a claim upon which relief can be granted." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 17, 356 Wis. 2d 665, 849 N.W.2d 693. This Court "accept[s] as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* ¶ 19. "Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law." *Id.* ¶ 21. Likewise, when reviewing "a challenge … to standing as alleged in the complaint, [this Court] take[s] the allegations in the complaint as true and liberally construe[s] them in the plaintiff's favor." *Chenequa Land Conservancy,*

[6] On December 12, Plaintiffs filed a motion for leave to file a Second Amended Complaint, accompanied by a proposed Second Amended Complaint. R.77; 78. The proposed Second Amended Complaint adds claims on behalf of two anonymous individuals who tested positive for COVID-19 at the relevant time and who are and have been employees of a public-facing Wisconsin business with over 25 employees, which business has had at least two individuals test positive for COVD-19. R.78. These plaintiffs seek an injunction pursuant to Wis. Stat. 146.84(1)(c), which authorizes an individual to bring an action to enjoin any violation of Wis. Stat §§ 146.82 or 146.83. R.78.

Inc. v. Vill. of Hartland, 2004 WI App 144, ¶ 18, 275 Wis. 2d 533, 685 N.W.2d 573.[7]

ARGUMENT

I. Plaintiffs Have Sufficiently Alleged a Justiciable Claim Under the Declaratory Judgments Act

A. Wisconsin's Declaratory Judgments Act is "to be liberally construed and administered to achieve a remedial purpose." *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42, 309 Wis. 2d 365, 749 N.W.2d 211. The Act's "underlying philosophy … is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed." *Id.* ¶ 28. Hence granting relief is "appropriate" under the Act whenever doing so "will serve a useful purpose." *Id.* ¶ 42 (citation omitted). And "appropriate" relief under the Act includes injunctions. *See* Wis. Stat. § 806.04(8); *Town of Booming Grove v. City of Madison*, 275

[7] This Court "review[s] [a] circuit court's decision to issue a temporary injunction for an erroneous exercise of discretion," *Serv. Employees Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35, but neither Defendant raises any arguments relating to the circuit court's decision to issue a temporary injunction (other than the argument that Plaintiffs have no justiciable claim). Instead, both Defendants focus on the court's decision to deny the motions to dismiss, and both seek dismissal of the case. *See generally* State's Br. 11–34; MJS Br. 11–50. Therefore, the standard of review for motions to dismiss is the appropriate standard here.

Wis. 328, 336, 81 N.W.2d 713 (1957) ("Injunctive relief may be granted in aid of a declaratory judgment, where necessary or proper to make the judgment effective.").

Importantly, whether a plaintiff might have instead pursued a remedy under a *different* statute has little bearing on the propriety of giving useful relief under the Act. It is instead merely "one factor to consider in determining whether to entertain the action." *Lister v. Bd. of Regents of Univ. Wisconsin Sys.*, 72 Wis. 2d 282, 307–08, 240 N.W.2d 610 (1976). And even then, "[t]o preclude declaratory relief, the alternative remedy should be speedy, effective and adequate, or at least as well-suited to the plaintiff's needs as declaratory relief." *Id.*

A claim under the Act may proceed if justiciable, ensuring "that a bona fide controversy exists and that the court, in resolving the questions raised, will not be acting in a merely advisory capacity." *Lister*, 72 Wis. 2d at 306. "[T]he concepts of standing and justiciability … have been viewed as overlapping concepts in declaratory judgment cases." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.,* 2011 WI 36, ¶ 47, 333 Wis. 2d 402, 797 N.W.2d 789 (lead op.). A claimant establishes standing (or justiciability) by alleging "a personal stake in the outcome," such as having been "threatened with[] an injury to an interest that is legally

protectable." *Munger v. Seehafer*, 2016 WI App 89, ¶¶ 48–49, 372 Wis. 2d 749, 890 N.W.2d 22. Put differently, a "party seeking declaratory relief must have … a legally protectible interest." *Olson*, 309 Wis. 2d 365, ¶ 29 (citation omitted). So, if a party establishes standing, the party also satisfies the third factor for justiciability of a declaratory-judgment action, which is the only factor at issue here.[8] *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶¶ 47–49.

Standing is not a high hurdle. "Unlike in federal courts, … standing in Wisconsin is not a matter of jurisdiction, but of sound judicial policy." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. The doctrine's purpose is to "ensur[e] that the issues and arguments presented will be carefully developed and zealously argued, as well as [to] inform[] the court of the consequences of its decision." *Id.* ¶ 16. Hence Wisconsin courts construe standing "liberally," requiring no more than "an injury to a trifling interest." *Id.* ¶ 15; *accord Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 38, 327 Wis. 2d 572, 786 N.W.2d 177 (lead op.). So

[8] Courts apply a four-factor test to determine whether a controversy is "justiciable" under the Act. *See Olson*, 309 Wis. 2d 365, ¶¶ 28–29. While the Journal Sentinel briefly alludes to the ripeness factor, MJS Br. 43–45, the only factor truly at issue in this case is the legally-protectable-interest prong. *See* State's Br. 11–26; MJS Br. 36–50.

judges in Wisconsin must "*construe standing in declaratory-judgment actions liberally, in favor of the complaining party*, as it affords relief from an uncertain infringement of a party's rights." *State ex rel. Vill. of Newburg v. Town of Trenton,* 2009 WI App 139, ¶ 10, 321 Wis. 2d 424, 773 N.W.2d 500 (emphasis added); *see also Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶ 38 n.7, 244 Wis. 2d 333, 627 N.W.2d 866.

This is not to say, however, that the DJA confers a cause of action upon any conceivable legal theory that one might wish to test in the courts. There are real limits. For example, in *Planned Parenthood of Wisconsin, Inc. v. Schimel*, 2016 WI App 19, 367 Wis. 2d 712, 877 N.W.2d 604, the plaintiffs sued under the Act for a declaration of the meaning of certain newly enacted statutes, arguing that, depending upon the statutes' construction, plaintiffs could face penalties for violating them. *Id.* ¶¶ 1, 11. But this Court held that plaintiffs had "failed to demonstrate that their undisputed protocol … could place them in potential jeopardy" under the any of the proposed interpretations of the disputed statutes. *Id.* ¶ 13. Because there was no danger that plaintiffs could be harmed by the statutes, plaintiffs lacked standing to pursue a declaratory-judgment action as to the meaning of those statutes. *Id.*

B. A plaintiff can raise a justiciable claim under the DJA in at least three, independent ways.

First, a plaintiff establishes standing under the Act so long as she points to an interest that is at least "*arguably* within the zone of interests that [another law] seeks to protect." *Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶ 16 (emphasis added). If a constitutional or statutory provision underlies the claim, the court "decides standing by examining the facts and interpreting [the] statute, rule, or constitutional provision at issue." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 55 (lead op.). When "[n]o statute or constitutional provision expressly relates to or protects the interest," courts examine "the interests involved, applicable statutes, constitutional provisions, rules, and relevant common law principles" to determine "whether the asserted interest … is to be recognized by the court." *Id.* ¶¶ 56–57. The question is whether the "interests deserve legal protection [because] they are sufficiently significant and whether good policy calls for protecting them or for denying them protection." *Id.* ¶ 41 (citation omitted).[9]

[9] Additionally, an organization asserting a claim on behalf of its members must allege "facts sufficient to show that a member of the organization would have had standing to bring the action in his own name." *Wis. Env'l Decade, Inc.*

Second, and separately, a plaintiff may allege in a DJA action that it, as a "taxpayer," or that "taxpayers as a class," "have sustained, or will sustain, some pecuniary loss" because of the sued-upon violation. *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 16, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds* 2018 WI 63 (citation omitted) (DJA action). Under this doctrine of "taxpayer standing," "*[a]ny* illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.* (citation omitted, emphasis added). And, critically, the loss occurs *any time* the government expends resources to undertake an unlawful act. *See Coyne v. Walker*, 2015 WI App 21, ¶¶ 12–13, 361 Wis. 2d 225, 862 N.W.2d 606, *aff'd* 2016 WI 38. "As a result of the illegal expenditure, the governmental unit has less money to spend for legitimate government objectives, or it must levy additional taxes to increase its revenue." *Voters with Facts*, 376 Wis. 2d 479, ¶ 16. "Even an 'infinitesimally small' pecuniary loss is sufficient to confer [taxpayer] standing." *Id.* (citation omitted). The key is "*whether [the government's]*

v. Pub. Serv. Comm'n, 69 Wis. 2d 1, 20, 230 N.W.2d 243 (1975). Organizations must also show that "the interests at stake in the litigation are germane to the organization's purpose … and … neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit." *Munger*, 372 Wis. 2d 749, ¶ 54 (citation omitted).

actions were unlawful, thereby conferring taxpayer standing." *Id.* ¶ 18 (emphasis added).

Third, even if a plaintiff does not pass muster under either the zone-of-interests or taxpayer-standing doctrines, she still presents a justiciable claim under the DJA so long as her case satisfies the judicial-policy purposes of standing—which are, after all, what the more specific standing doctrines are designed to promote. *See McConkey*, 326 Wis. 2d 1, ¶¶ 17–18 (DJA case). Thus, a court should reach the merits so long as it is satisfied that the parties will "competently frame[] the issues and zealously argue[] [t]his case," and "a different plaintiff would not enhance [the court's] understanding of the issues in this case." *Id.* ¶ 18. Judicial economy especially favors adjudicating the merits when "it is likely that if [this case] were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit." *Id.*

C. Plaintiffs here pass all three tests for standing, any one of which would be grounds for affirming.

First, Plaintiffs' interests are at least "arguably within" a legally protected "zone of interests" in two independent ways. To begin, their interests are protected by the medical-records laws—specifically Wis.

Stat. §§ 146.82 and 146.84—even though those statutes do not directly grant them a pre-enforcement right of action for injunctive relief. *See Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶ 16. Section 146.84 provides that "[a]ny person, including the state or any political subdivision of the state, who violates s. 146.82 or 146.83 … shall be liable to *any person injured as a result of the violation*." Wis. Stat. § 146.84(1)(b), (bm) (emphasis added). Importantly, the term "person" here describes not only human beings but also non-individual entities—*including Plaintiffs and their corporate members*. After all, "the state or any political subdivision" are enumerated "person[s]," *id.*, and Section 146.84 uses the term "individual" in another subsection, indicating that "person" bears a different meaning than "individual." *See Pawlowski v. Am. Fam. Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67; *see also Townsend v. ChartSwap, LLC*, 2020 WI App 79, ¶ 15, 395 Wis. 2d 229, 952 N.W.2d 831 (LLC was included in "any person" under Section 146.84(1)(b)).[10] Because Plaintiffs and their members are "person[s]" within the meaning of Section 146.84, that statute protects Plaintiffs and their members'

[10] For the same reasons, the Legislature did not intend to restrict relief to "patients." *See Cook v. Public Storage, Inc.*, 2008 WI App 155, ¶ 32, 314 Wis. 2d 426, 761 N.W.2d 645.

"interest" in medical-record confidentiality by imposing "liabil[ity]" on actors whose violation of Section 146.82 causes Plaintiffs or their members harm. This is so even though the statutes do not themselves give Plaintiffs a cause of action for this pre-violation fact pattern. If they did, there would be no need to sue under the DJA. Indeed, if the test were, "Does the statute protecting your interest *itself* give you a cause of action for the suit you've filed?", then the zone-of-interests test would play no role, since there would be no need to file under the DJA in the first place.

Separately, even if Sections 146.82 and 146.84 did not explicitly impose "liabil[ity]" for violations against Plaintiffs as "persons," Plaintiffs' interests would nonetheless merit "recogni[tion]" as a matter of "judicial policy," which can independently confer standing. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶¶ 40, 56–57 (lead op.) That is because the design of these laws is plainly to protect anyone who might be harmed by the unlawful release of private medical information, and Plaintiffs obviously have a stake in preventing an unlawful release of information that will cause them harm. Indeed, "the unlawful disclosure of legally protected information constitute[s] a clear *de facto* injury." *In re Horizon Healthcare Servs. Inc. Data Breach Litigation*, 846 F.3d 625, 636 (3d Cir. 2017). And even the First Amendment does not protect press from tort liability when

press obtained the information unlawfully. *See Cohen v. Cowles Media Co.,* 501 U.S. 663, 671 (1991). Thus, the law recognizes an interest in preventing harm from the unlawful release of information. These interests "are sufficiently significant and [] good policy calls for protecting them." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 41 (lead op.) (citation omitted). For this separate reason also, Plaintiffs satisfy the arguably-within-the-zone-of-interests test.

Second, Plaintiffs have taxpayer standing. Plaintiffs have alleged that either they or their members are Wisconsin taxpayers, that the State has expended and will continue to expend "time and resources" to "collect, review, and release" these records, which would involve the "expenditure of public funds" that "the government will not fully recoup," and that, as a result, Plaintiffs or their members would "incur direct pecuniary losses" "[a]s Wisconsin taxpayers." App.111–12.[11] These allegations must be taken as true and "liberally construe[d]" in favor of Plaintiffs. *Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶ 18.

[11] Plaintiffs also alleged that "Defendants' unlawful actions will expose the State to liability for damages, which are paid out of the public fisc. And defending against claims for damages arising out of this unlawful action will again require government employees to expend time and resources, which resources cannot be recovered." App.112.

Plaintiffs also have "sufficiently allege[d]" that the State's actions are "unlawful," which is all that taxpayer standing demands. *See Voters with Facts*, 376 Wis. 2d 479, ¶¶ 16, 18. Again, because this case is on appeal from the denial of motions to dismiss and Defendants seek dismissal, all that is required for Plaintiffs' claims to proceed is that "the alleged facts related to th[e] substantive law [] plausibly suggest the plaintiff is entitled to relief." *Id.* ¶ 14 (citation omitted). The medical records of patients who have tested positive for COVID-19 must be kept confidential under Wis. Stat. § 146.82. If the State releases confidential information from these records in a way that "would permit" identification of the patients, it violates Section 146.82. *See* Wis. Stat. §§ 146.82, .84. To "permit" means "to make possible." *Permit*, Merriam-Webster;[12] *Permit*, Lexico by Oxford;[13] *State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 53, 271 Wis. 2d 633, 681 N.W.2d 110. More, if the State rediscloses medical records that it has received, it may do so only for the same purpose as that for which the records were received.

[12] https://www.merriam-webster.com/dictionary/permit.
[13] https://www.lexico.com/en/definition/permit.

Wis. Stat. § 146.82(5)(c). If the State releases the records for some other purpose, that violates Section 146.82. *Id.*

Plaintiffs alleged that the State obtained this information from the "medical records" of individuals who have tested positive for COVID-19 (*i.e.*, "the results of medical diagnostic tests" and "the records of contact tracers") and that the planned release would at least make possible "the identification of patients," since "co-workers or community members" conceivably could uncover "the identity of the employee or employees who have tested positive for COVID-19" with the information in the State's planned release. App.109–110. Indeed, that is why such a release would be presumptively unlawful under HIPAA, unless an expert showed that identification was very unlikely. *See* 45 C.F.R. §§ 160.103, 164.502, 164.514(b). Plaintiffs also alleged that "the State originally obtained the medical records for the purpose of communicable-disease surveillance" and that "[r]esponding to an open-records request is not communicable-disease surveillance." Again, these factual allegations must be taken as true. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19. These facts "plausibly suggest a violation" of both the redisclosure limitations of Section 146.82(5)(c) and the general-disclosure prohibition of Section 146.82(1). *Id.* ¶ 21. Thus, Plaintiffs have sufficiently alleged that the State's planned

release would be unlawful, which is enough to support taxpayer standing. *See Voters with Facts*, 376 Wis. 2d 479, ¶¶ 16, 18.[14]

Third, Plaintiffs satisfy the judicial-policy considerations underlying standing doctrine. *See McConkey*, 326 Wis. 2d 1, ¶¶ 17–18. Here, no one contends that Plaintiffs have failed to "competently frame[] the issues and zealously argue[] [t]his case," and "a different plaintiff would not enhance [the court's] understanding of the issues in this case." *Id.* ¶ 18. Judicial economy favors adjudicating the merits here, as "it is likely that if [this case] were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit." *Id. Indeed, two individuals whose medical records are at issue are seeking even now to join this case as plaintiffs*. R.77; 78.

C. Defendants make several arguments challenging Plaintiffs' standing, but none is convincing.

[14] The purpose of all three Plaintiff organizations is to represent the interests of their member businesses and (by extension) their employees, to support area businesses generally, and to create a community and environment hospitable to businesses. App.104–06. Preventing pecuniary losses to their members as taxpayers and protecting their members from unlawful reputational harm are central to these purposes. And Plaintiffs' claim will not require any evidence or testimony from any of Plaintiffs' members. Nor does the relief requested require participation of any member. *See Munger*, 372 Wis. 2d 749, ¶ 54.

To begin, the State sows confusion by incorrectly framing the question presented as whether the Plaintiffs may seek an injunction *by suing directly under* Section 146.84(1)(c). *See* State's Br. 2, 11. Of course they cannot. Nor have they tried. Instead, from day one, Plaintiffs have sought declaratory and injunctive relief under the Declaratory Judgments Act. *See* App.101, 107, 113–15; R.4:4, 8, 11–13; 36. Unsurprisingly, the circuit court's decision addressed only this issue, not whether Plaintiffs could obtain relief directly under Section 146.84(1)(c). *See* App.124–25.

Even if the State's arguments are meant to contest the circuit court's zone-of-interests analysis under the DJA, they still miss the mark. The State repeatedly argues that Sections 146.82 and 146.84, the medical-records statutes, "do[] not apply to the plaintiffs." State's Br. 13–19. Not true. The statutes clearly *do* apply to Plaintiffs. As explained above, *supra* pp.16–19, and repeatedly argued by the Plaintiffs throughout this case, *see* R.36:12–13; 101:44–45,[15] if the State were to release the records at issue here, Plaintiffs and their members could bring claims under Section 146.84(1)(b) or (bm) for the damages caused to them

[15] Contrary to the State's assertion, State's Br. 15, Plaintiffs have always argued that they are covered by Section 146.84.

by the State's violation of Section 146.82. Because Section 146.84 protects Plaintiffs' and their members' interests by providing them with a cause of action for damages resulting from a violation of Section 146.82, they are at least *arguably* within the zone of interests protected by those statutes and may therefore bring a declaratory-judgment action relating to those statutes. *See Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶ 16.

Instead of addressing Plaintiffs' argument that Section 146.84's damages provisions place Plaintiffs' within the statute's zone of interests, the State focuses on the language in Section 146.84(1)(c), State's Br. 11, 14–17, which provides that "[a]n individual may bring an action to enjoin any violation of s. 146.82 or 146.83 or to compel compliance with s. 146.82 or 146.83 and may, in the same action, seek damages as provided in this subsection." Wis. Stat. § 146.84(1)(c). The State appears to be arguing that, if a statute provides that one class of litigants may seek injunctive relief, any litigant *outside* that class may not seek a declaratory judgment relating to that statute, regardless of whether the statute provides that litigant with another form of relief. The State does not actually develop this argument or provide any citation of legal authorities to support it, and in any event, the State is incorrect. The DJA states that courts "have the power to declare rights, status, and other legal relations *whether or*

not further relief is or could be claimed." Wis. Stat. § 806.04(1) (emphasis added). Thus, "declaratory relief is appropriate wherever it will serve a useful purpose, and the fact that another remedy exists is only one factor to consider in determining whether to entertain the action." *Lister*, 72 Wis. 2d at 307. Not only that—alternative remedies under different statutes *normally do not preclude* DJA relief, except when the alternative remedy is "speedy, effective and adequate, or at least as well-suited to the plaintiff's needs as declaratory relief." *Id.* at 307–08. Here it is not. Plaintiffs have *no* pre-release remedy under Section 146.84(1)(c), much less a "speedy, effective and adequate" one. *See infra* pp.35–36, 41. Section 146.84(1)(c) therefore does not preclude Plaintiffs from pursuing relief under the DJA.

Nor does allowing Plaintiffs to pursue relief under the DJA render Section 146.84(1)(c) surplusage. MJS Br. 29–30. Despite there being some "overlap[]" between the statutes, Section 146.84(1)(c) "encompass[es] claims" that could not be brought under the DJA. *See AVL Powertrain Eng'g, Inc. v. Fairbanks Morse Engine,* 178 F. Supp. 3d 765, 783 (W.D. Wis. 2016). Section 146.84(1)(c) permits a request for injunctive relief to be coupled with a claim for damages, including against the State. The DJA cannot be used for such a purpose. *See Lister,* 72 Wis. 2d at 307–08.

Both Defendants point to *Milwaukee Deputy Sheriff's Association v. City of Wauwatosa*, 2010 WI App 95, 327 Wis. 2d 206, 787 N.W.2d 438. State's Br. 16–17; MJS Br. 39–42. But Defendants' reliance is misplaced. There, the Association did not argue associational or taxpayer standing. Instead, the plaintiff argued that the Association was "within the 'zone of interest' protected by Wis. Stat. § 51.30" based on the Association's "interest 'in representing its members, knowing the law to represent its members, and preventing negative employment actions from being taken against its members.'" *Milwaukee Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 30. Additionally, the appellant made no argument that the Association or its members could have sought damages under Section 51.30. *Id.* ¶ 32. Here, the Plaintiffs raise associational standing and argue that they or their members would be injured as a result of the unlawful release of confidential information and could therefore seek damages under the applicable statute. *See* App.103–05; 112–13; *supra* pp.16–18. *Milwaukee Deputy Sheriff's Association* is simply "inapplicable as precedent" on those issues. *See Zarder v. Humana Ins. Co.*, 2010 WI 35, ¶¶ 44, 57–59, 324 Wis. 2d 325, 782 N.W.2d 682. In any event, *Milwaukee Deputy Sheriff's Association* has nothing to say about taxpayer standing or judicial-policy

standing, *see* 327 Wis. 2d 606, ¶ 30, which are independent reasons to proceed to the merits.

More to it, the language of Section 51.30, at issue in *Milwaukee Deputy Sheriff's Association*, is significantly different than the language in Section 146.82, at issue here. As this Court explained, Section 51.30 provides that "all treatment records shall remain confidential and are privileged *to the subject individual*." 327 Wis. 2d 206, ¶ 32 (citing Wis. Stat. § 51.30(4)). By contrast, Section 146.82 does not contain the emphasized language "and are privileged *to the subject individual*." *See* Wis. Stat. § 146.82. So Section 146.82 does not foreclose the possibility that patient health-care records may be privileged to persons other than the patient. Indeed, that the Legislature chose not to include this language in the otherwise identical and later-enacted Section 146.82 indicates that the Legislature intended that patient health-care records *not* be privileged only to the subject individual. *See* Laws of 1977, ch. 428, § 67 (creating Wis. Stat. § 51.30(4)); Laws of 1979, ch. 221, § 649t (creating Wis. Stat. § 146.82(1)). "[T]he legislature knew how" to privilege treatment records to the subject individual, "yet chose different language" and thereby "deliberately chose not to do so." *See State v. Hall*, 207 Wis. 2d 54, 88–89, 557 N.W.2d 778 (1997).

Last but not least, the Wisconsin Supreme Court has held that its "method of analysis of Wis. Stat. § 51.30 … is not applicable to Wis. Stat. § 146.82." *Crawford ex rel. Goodyear v. Care Concepts, Inc.*, 2001 WI 45, ¶ 33, 243 Wis. 2d 119, 625 N.W.2d 876. The Court explained that "Section 51.30 is a specific statute relating to access to registration and treatment records for individuals committed pursuant to the provisions of Wis. Stat. ch. 51, while § 146.82 is a general statute governing patient health care records." *Id.* Because of the "stigma associated to mental illness and commitment to a mental institution[,] individuals are entitled to privacy about these matters." *Id.* And because Section 146.82 does not involve these same concerns, the Court held that it "need not apply the same analysis to 146.82" and that its prior case interpreting identical language in Section 51.30 was "inapplicable in our analysis of 146.82." *Id.*[16]

Thus, Plaintiffs fall within the zone of interests protected by the medical-records laws because Plaintiffs can seek damages for violations of those laws after the fact. The harm to Plaintiffs and their members will "result" directly from "the violation" of Section 146.82. *See* App.112–13. This places them squarely within the ambit of Section 146.84's damages

[16] For the same reasons, *Olson v. Red Cedar Clinic*, 2004 WI App 102, 273 Wis. 2d 728, 681 N.W.2d 306, is not on point.

provisions. And because Section 146.84 provides protection to Plaintiffs and their members, Plaintiffs and their members are at least "arguably within the zone of interests" protected by these statutes. *See Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶ 16.

Finally, Defendants attempt to raise several *factual* issues to support their argument that Plaintiffs are not within the zone of interests protected by Section 146.82 and .84. State's Br. 17–19; MJS Br. 43–45. In particular, the State argues, without evidentiary support, that the records at issue are not "patient health care records" under Section 146.82 because the records "are data summaries" that "do not replicate the information contained in … reports of local health officials." State's Br. 17–18. But whether the information contained in the records that the State plans to release draws upon "information contained in … reports of local health officials" is an issue of fact, and Defendants' alleged "facts" are irrelevant at the motion-to-dismiss stage. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19. Plaintiffs alleged that the information in the State's planned records release comes from "the results of medical diagnostic tests conducted on numerous individuals," which "can come only from the individual's medical records." App.109. Plaintiffs will prove this in

discovery and at trial. If the State wishes to contest these allegations, it must do so before the circuit court.

The same is true of the State's assertion that "[p]atients cannot be identified from the face of the disputed records or based upon their contents." State's Br. 18–19. Plaintiffs have alleged that Defendants' planned release "would permit identification of the patient," as it "would not be difficult for co-workers or community members to discern the identity of the employee or employees who have tested positive for COVID-19." App.110. Again, these factual allegations must be taken as true. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19.

Finally, the Journal Sentinel argues that Plaintiffs' harms are "too speculative" to support standing under the DJA. MJS Br. 43–45. These arguments go to ripeness, not standing. *See Putnam v. Time Warner Cable of Se. Wisconsin, Ltd.*, 2002 WI 108, ¶ 44, 255 Wis. 2d 447, 649 N.W.2d 626. On the issue of ripeness, courts will entertain a declaratory-judgment action where injury has not yet occurred so long as "the facts [are] sufficiently developed to allow a conclusive adjudication" such that the courts "avoid entangling themselves in abstract disagreements." *Id.* "Thus, courts generally view cases where resolution of the disputed issues rest on 'hypothetical or future facts' as not ripe for adjudication in order

to avoid rendering advisory opinions." *Carlin Lake Ass'n, Inc. v. Carlin Club Properties, LLC*, 2019 WI App 24, ¶ 35, 387 Wis. 2d 640, 929 N.W.2d 228 (citation omitted). "For declaratory judgment and injunctive relief, however, the standard for ripeness is lower: harm may be anticipatory, if imminence and practical certainty of act or event exist." *Id.* Here, there can be no serious question that the claims were ripe for adjudication. Plaintiffs filed their initial complaint a mere 24 hours before the State's planned release. *See* R.4. *Indeed, so imminent was the State's action that the circuit court issued an* ex parte *temporary restraining order the very day it was requested*. *See* R.13; *see also* R.6:2–3. The State's release of the records was thus "an imminent and practical certainty," and therefore no ripeness issue exists, even if the harm is anticipatory. *See Putnam*, 255 Wis. 2d 447, ¶ 46; *Carlin Lake Ass'n*, 387 Wis. 2d 640, ¶ 35.

Defendants move on to attack Plaintiffs' taxpayer standing, but those arguments are likewise meritless.

The State argues that Plaintiffs have not met the requirements of taxpayer standing—specifically, the requirements of an expenditure and a direct pecuniary loss. State's Br. 23. The Journal Sentinel makes a similar argument. MJS Br. 46–47. But Defendants either ignore or misread the allegations contained in the Amended Complaint. Plaintiffs

clearly and explicitly alleged that either they or their members are Wisconsin taxpayers, that the State expended and would continue to expend "time and resources" to "collect, review, and release" these records, which actions would be unlawful and would involve the "expenditure of public funds" that "the government will not fully recoup,"[17] that "[a]s a result, Defendants will have less money to spend on legitimate government interests," and that, therefore, Plaintiffs or their members would "incur direct pecuniary losses" "[a]s Wisconsin taxpayers." App.109–12. Again, these allegations must be taken as true and are enough to satisfy taxpayer standing. *See supra* pp.19–22. As this Court explained in *Coyne*, the time and resources expended by government employees carrying out allegedly unlawful commands are

[17] Given this allegation, the Journal Sentinel's argument that DHS will recoup these expenses likewise fails. MJS Br. 48–49; *see Data Key Partners*, 356 Wis. 2d 665, ¶ 19. Moreover, the Journal Sentinel admits that the State cannot recoup the expense of releasing partial records or records that require redaction. MJS Br. 49. But the records at issue here *are* partial records and *were* redacted by state employees utilizing state funds. *See* R.38:2–3. Thus, according to the Journal Sentinel's own arguments, Plaintiffs' allegation that the State will not fully recoup its expenses is correct.

enough to inflict a pecuniary loss sufficient to confer taxpayer standing. 361 Wis. 2d 225, ¶¶ 12–13.[18]

The State suggests that Plaintiffs' loss as taxpayers is not "different than [that of] the general public," State's Br. 23 (citing *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988)), but that would not matter. *City of Appleton* does not require that the plaintiff taxpayers suffer some injury "different in character" than the injury suffered by similarly situated *taxpayers*. Quite the opposite: that case requires that the injury to the plaintiff taxpayers *also* represent the injury to "similarly situated taxpayers." 142 Wis. 2d at 877. It is this injury to *taxpayers*—a pecuniary loss—that must be "different in character from the damage sustained by the general public" as *non-taxpayers*. *Id.* That is precisely what Plaintiffs alleged here.

[18] The Journal Sentinel also takes issue with Plaintiffs' claim of risk of pecuniary loss as taxpayers because the State's action will expose it to liability for damages that will be paid out of the public fisc. MJS Br. 49–50. But damages against the State are indeed paid out of the public fisc. *See Serv. Employees Intn'l Union*, 393 Wis. 2d 38, ¶ 69. And Section 146.84 allows for damages against the State when the State releases information in violation of Section 146.82. Wis. Stat. § 146.84(1)(b), (bm). Given the breadth of the State's planned release, *see* App.109, these violations of Section 146.82 create a risk of substantial losses to the public fisc, including because the State's release will, at the very least, harm businesses throughout the State, *see* App.112–13. This liability for damages presents a substantial likelihood of pecuniary loss to Plaintiffs and their members, as taxpayers, from the State's unlawful release.

Finally, the State argues that Plaintiffs should not be permitted to proceed despite satisfying the judicial-policy purposes of standing. State's Br. 24. The State argues that, "[i]f the plaintiffs were correct, any person could sue to enjoin the release of patient health care records." State's Br. 24. Not so. If a person sought to enjoin the release of patient health-care records, she would need to satisfy the public-policy purposes underlying standing: to "ensur[e] that the issues and arguments presented will be carefully developed and zealously argued, as well as [to] inform[] the court of the consequences of its decision" *McConkey*, 326 Wis. 2d 1, ¶ 16. Because Plaintiffs satisfy those purposes here, the circuit court should reach the merits of Plaintiffs' claims. *See id.* ¶¶ 16–18.

II. Section 19.356 Does Not Preclude This Lawsuit

To determine whether a remedy is exclusive, courts apply two principles. First, they consult the text. If the statute disclaims exclusivity, the analysis ends. If it does not, courts ask whether the remedy is a "speedy, effective, and adequate" alternative to a suit under the DJA. If it is, then a court might hold that relief under the DJA is foreclosed. *Lister*, 72 Wis. 2d at 307–08.

Section 19.356's remedies and procedures are clearly not exclusive. Section 19.356 *explicitly forswears exclusivity*, stating in its first clause:

"*except … as otherwise provided by statute*." Wis. Stat. § 19.356. Yet, even without that disclaimer, the same conclusion follows, given that the remedies it supplies are decidedly *not* speedy, effective, and adequate alternatives to a pre-release DJA action.

A. A remedy supplied by a substantive statute is exclusive—and therefore blocks relief under the DJA—only if (1) the text of the statute does not foreclose an exclusivity construction and (2) the procedure and remedy it provides are "adequate." *See State ex rel. First Nat. Bank of Wisconsin Rapids v. M & I Peoples Bank of Coloma*, 82 Wis. 2d 529, 541–43, 263 N.W.2d 196 (1978); *Joint Dist. No. 1, Villages of Waterford & Rochester, Towns of Waterford, Dover, Norway & Rochester, Racine Cty. v. Joint Dist. No. 1, Towns of Dover, Norway & Raymond, Racine Cty.*, 89 Wis. 2d 598, 608, 278 N.W.2d 876 (1979); *e.g.*, *Aiello v. Litscher*, 104 F. Supp. 2d 1068, 1073–74 (W.D. Wis. 2000) (explaining that because "plaintiffs could not have used [the other statute] to challenge the [agency's] dismissal of their complaint," the plaintiffs were not "required to utilize the procedures under [the other statute]" to raise such a challenge). Courts have found statutory procedures to be inadequate when they fail "to afford *any* relief to the party filing the court action."

See Lamar Cent. Outdoor, LLC v. Wis. Dept. of Transp., 2008 WI App 187, ¶ 32, 315 Wis. 2d 190, 762 N.W.2d 745 (collecting cases).

The Legislature created Section 19.356 to serve the limited purpose of codifying and narrowing the cause of action created by the Wisconsin Supreme Court in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). In *Woznicki*, the records custodian "notified Woznicki that there had been two requests for his file" and that he "intended to release the records to the two requesters." *Id.* at 182. "Consequently, Woznicki moved the circuit court for a temporary injunction prohibiting the District Attorney from releasing his personnel and telephone records." *Id.* The Supreme Court granted review, and, after determining that the records at issue were not subject to a blanket exemption from disclosure, the Court went on to determine "whether the District Attorney's decision to release [the records] is subject to judicial review." *Id.* at 184. The Court held that it was. After acknowledging that "the open records law does not explicitly provide a remedy," the Court nevertheless held that "de novo review by the circuit court[] is implicit in our law." *Id.* at 185. The Court explained that "[t]he statutes and case law have consistently recognized the legitimacy of the interests of citizens to privacy and the protection of their reputations" and that such interests "would be meaningless unless

the [records custodian's] decision to release the records is reviewable by a circuit court." *Id.*

The Court therefore created a new cause of action. It explained that the duty of all records custodians, before the release of records, is "to consider all the relevant factors in balancing the public interest and the private interests." *Woznicki*, 202 Wis. 2d at 191. The Court then held that, "[s]hould the District Attorney choose to release the records after the balancing has been done, that decision may be appealed to the circuit court, who in turn must decide whether permitting inspection would result in harm to the public interest which outweighs the public interest in allowing inspection." *Id.* at 192. The Court further held that "an individual whose privacy or reputational interests are implicated by the [records custodian's] potential release of his or her records" is entitled to notice "allowing a reasonable amount of time for the individual to appeal the decision." *Id.* at 193.

Three years later, in *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), the Court expanded the cause of action it had created in *Woznicki*. In *Milwaukee Teachers'*, the Court held that "the *de novo* judicial review we recognized in *Woznicki* applies in all cases in which a record custodian

decides to disclose information implicating the privacy and/or reputational interests of an individual public employee, regardless of the identity of the record custodian." 227 Wis. 2d at 782.

In response, the Legislature enacted Wis. Stat. § 19.356. In 2002, the Joint Legislative Council established a Special Committee on Review of the Open Records Law and instructed the committee "to review the Supreme Court decisions in *Woznicki* … and *Milwaukee Teachers'* … and recommend legislation implementing the procedures anticipated in the opinions, amending the holdings of the opinions, or overturning the opinions." Wisconsin Legislative Council, *Special Committee on Review of the Open Records Law Report to the Legislature*, RL 2003-01, at 5 (March 25, 2003). The Committee then drafted legislation that "partially codifies *Woznicki* and *Milwaukee Teachers*" and "applies the rights afforded by [those cases] only to a defined set of records in the possession of governmental entities." *Id.* at 9; *see also* 2003 Wis. Act 47, Joint Legislative Council Prefatory Note. The Legislature then passed 2003 Wis. Act 47, codifying the Committee's recommendation at Wis. Stat. § 19.356.

Section 19.356 provides that "[e]xcept as authorized in this section or as otherwise provided by statute, no authority is required to notify a

record subject prior to providing to a requester access to a record containing information pertaining to that record subject, and no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." Wis. Stat. § 19.356 (1). Section 19.356 then provides for notice and judicial review for three limited categories of records: employee-discipline records, records obtained by subpoena or search warrant, or records prepared by an employer other than "an authority." Wis. Stat. § 19.356(2)(a). The effect of Section 19.356 was merely "to narrow and codify the notice and judicial review rights" created by *Woznicki* and *Milwaukee Teachers'*. *See Schill*, 327 Wis. 2d 572, ¶ 42 (lead op.); 2003 Wis. Act 47, Joint Legislative Council Prefatory Note. Section 19.356 limits this right to de novo review to three discrete categories of records.

Yet Section 19.356 does not provide the exclusive method for reviewing the legality of the decision of a records custodian to release a record. Section 19.356 explicitly *allows* for a person to obtain judicial review of a public-records release if such review is "otherwise provided by statute." Wis. Stat. § 19.356(1). Among the statutes that provide for judicial review of the legality of a public-records release is the DJA. The Act has long permitted judicial review of governmental action to ensure

that such action does not violate statutory or constitutional provisions. *See, e.g.*, *Papa v. Wis. Dept. of Health Servs.*, 2020 WI 66, ¶¶ 1–3, 393 Wis. 2d 1, 946 N.W.2d 17; *State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2020 WI App 17, ¶ 17, 391 Wis. 2d 441, 941 N.W.2d 284; *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, ¶ 10, 387 Wis. 2d 511, 929 N.W.2d 209; *Lawson v. Hous. Auth. of City of Milwaukee*, 270 Wis. 269, 270, 70 N.W.2d 605 (1955). In fact, the Act "is singularly suited to test the validity of [governmental] action" before it is carried out. *Weber v. Town of Lincoln*, 159 Wis. 2d 144, 148, 463 N.W.2d 869 (Ct. App. 1990).

Section 19.356 does not effect an implied, partial repeal of the DJA. "[I]mplied repeal of statutes is disfavored," as "a strong public policy exists which favors the continuing validity of a statute except where the legislature has acted explicitly to repeal it." *State v. Gonnelly*, 173 Wis. 2d 503, 512, 496 N.W.2d 671 (Ct. App. 1992). Thus, "this court will only conclude that a statutory provision has been repealed by implication when the conflicting provisions are 'so contrary to or irreconcilable with' one another that only one of the provisions may remain in force." *In re Commitment of Matthew A.B.*, 231 Wis. 2d 688, 706, 605 N.W.2d 598 (Ct. App. 1999) (citation omitted). And "this court will not 'lightly or quickly' conclude that statutory provisions are irreconcilable." *Id.* (citation

omitted). Courts "must reasonably construe statutes to avoid conflicts, and when statutes do conflict, [courts] must attempt to harmonize them." *Id*. As explained above, Section 19.356 and the DJA are not only not "irreconcilable," they are not even in conflict.

Finally, Section 19.356 does not provide Plaintiffs an adequate procedure or remedy. Indeed, Section 19.356 fails "to afford *any* relief" to the Plaintiffs here. *See Lamar Cent. Outdoor*, 315 Wis. 2d 190, ¶ 32. Nor does Section 19.356 provide any procedure for "resolution of the issue[] raised," let alone an "adequate" one. *See First Nat. Bank of Wisconsin Rapids*, 82 Wis. 2d at 541–43. The records at issue in this case do not fall within the three narrow categories of records covered by Section 19.356, and therefore Section 19.356 provides no method of review of the lawfulness of this release and no remedy for injured plaintiffs. Section 19.356 is therefore inadequate and cannot preclude declaratory relief. *See Joint Dist. No. 1*, 89 Wis. 2d at 608.

It should not be controversial that a plaintiff whose legally protectable interests are harmed or threatened by a public-records release is able to seek judicial review of the categorical legality of (as opposed to the interest balancing underlying) that release under the DJA. In other contexts, few would doubt this. For example, if the State were to

facially discriminate based on race by releasing the records of only its Black employees, all would agree that those workers could challenge the release's propriety under the State Constitution by bringing a claim under the DJA. Section 19.356 would not bar the courthouse doors, even though Section 19.356 does not give that Plaintiff a cause of action. Likewise, if affected workers here sought to challenge the State's planned release as a violation of their constitutional right to privacy, *see* R.8:15–16; 53:9–10, all would agree that they could sue under the DJA. Section 19.356 would not stand in their way.

B. Defendants' own arguments underscore that Section 19.356 is inadequate. Both Defendants argue that the records at issue here are not covered by Section 19.356 and so review is unavailable. State's Br. 26–28; MJS BR.16–18. So it is undisputed that Section 19.356 is simply incapable of resolving the issue presented here. It follows that the statute fails "to afford *any* relief" to any person harmed by the release of these records and is therefore inadequate. *See Joint Dist. No. 1*, 89 Wis. 2d at 608; *Lamar Cent. Outdoor*, 315 Wis. 2d 190, ¶ 32. Therefore, *Sewerage Commission of Milwaukee v. Department of Natural Resources*, 102 Wis. 2d 613, 307 N.W.2d 189 (1981), and *City of Superior v. Commission on*

Water Pollution of State, 263 Wis. 23, 25, 27, 56 N.W.2d 501 (1953) are inapposite. State's Br. 32.

Both Defendants invoke the "specific governs the general" canon, but the conclusion they draw from it does not follow. State's Br. 31–33; MJS Br. 20–22. The canon that "specific statutes take precedence over general statutes," like implied repeal, applies only "[w]here conflict between statutes is unavoidable." *State v. Reyes Fuerte*, 2017 WI 104, ¶ 29, 378 Wis. 2d 504, 522, 904 N.W.2d 773. Courts must "seek to harmonize [the statutes] through a reasonable construction that gives effect to all provisions." *Id.* Only where "the two provisions are in irreconcilable conflict" will the court resort to "the rule that the more specific governs the more general." *In Interest of I.V.*, 109 Wis. 2d 407, 414, 326 N.W.2d 127 (Ct. App. 1982). There is no conflict here.

The lack of conflict distinguishes the other cases cited by Defendants. *See, e.g.*, *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukana*, 2013 WI App 113, 350 Wis. 2d 435, 838 N.W.2d 103 (statute providing: "No action on any grounds … to contest the validity of an annexation under sub. (2), may be brought by any town").

Rudolph v. Indian Hills Estates, Inc., 68 Wis. 2d 768, 229 N.W.2d 671 (1975) is likewise irrelevant. That case involved a request for judicial

dissolution of a corporation, which is not an available remedy under the DJA. 68 Wis. 2d at 773–75. By contrast, the present case involves a request for a declaration and injunction against planned government action, both of which are available under the Act. *See* Wis. Stat. § 806.04(1), (8); *Town of Booming Grove*, 275 Wis. at 336.

Both Defendants also argue that *Moustakis v. DOJ*, 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142, supports the argument that Plaintiffs cannot challenge a records release under the DJA. State's Br. 33; MJS Br. 22–23. But neither the litigation before the Wisconsin Supreme Court nor the subsequent litigation before this Court addressed whether the Act is "as otherwise provided by statute" as that phrase is used in Section 19.356. *See generally*, *Moustakis*, 368 Wis. 2d 677; *Moustakis v. DOJ*, No. 18AP373, 2019WL1997288 (Wis. Ct. App. May 7, 2019) (unpublished). Thus, neither case is "[]applicable as precedent for interpreting" the meaning of that phrase. *See Zarder*, 324 Wis. 2d 325, ¶¶ 44, 57.[19]

[19] Nor does *Sharp v. Sharp*, 185 Wis. 2d 416, 518 N.W.2d 254 (Ct. App. 1994) or *State v. Greene*, 2008 WI App 100, 313 Wis. 2d 211, 756 N.W.2d 411, help the State here. State's Br. 30. In *Sharp*, the statute in question was "silent" on the issue of venue, 185 Wis. 2d at 421, while the DJA clearly and explicitly allows for judicial review. *See supra* pp.39–40. And *Greene* does not discuss the meaning of the statutory phrase "as otherwise provided by statute" and is therefore inapposite. *See generally*, 313 Wis. 2d 211.

The State relies on an unpublished opinion from this Court as persuasive authority, State's Br. 30, but *Wetzler v. Div. of Hearings & Appeals*, No. 2010AP824, 2011 WL 520552 (Wis. Ct. App. Feb. 16, 2011), actually supports Plaintiffs. In that case, the plaintiff in an interlocutory appeal of an ALJ's decision to admit evidence argued that the evidence was confidential and sought a declaration to that effect. *Id.* at *1. This Court first addressed whether the disputed records were required to be kept confidential under Wis. Stat. §§ 146.38 and 905.04. *Id.* at *3–*5. Only *after* deciding that these statutes did not apply did this Court address Section 19.356 and the plaintiff's ability to seek a declaration that the records were confidential. *Id.* at *5. If a plaintiff could never seek a judgment that a records release violates confidentiality statutes, then there would have been no need for this Court to address the plaintiff's arguments under Sections 146.83 and 904.05: this Court would simply have thrown the challenges out.[20] Instead, this Court reached the merits

[20] While the case came to the circuit court as a review of an agency decision under Chapter 227, *see Wetzler*, 2011 WL 520552, at *2, as with the Declaratory Judgments Act, Chapter 227 does not explicitly provide for review of a decision to release records. *See generally* Wis. Stat. § 227.52, .57. Nor have Defendants ever argued that Chapter 227 should be treated differently than the DJA in this regard. *See generally* State's Br. 26–34; MJS Br. 12–36; R.21; 30; 38; 46.

of the plaintiff's arguments regarding the confidentiality statutes, which is precisely what Plaintiffs argue should happen here.

The Journal Sentinel briefly asserts that the DJA merely "creates a remedy for an existing claim that might otherwise not yet be ripe for adjudication." MJS Br. 19. But that is not the law.[21] The Act "enable[s] controversies of a justiciable nature to be brought before the courts for settlement." *PRN Assocs. LLC v. State, Dep't of Admin.*, 2009 WI 53, ¶ 53, 317 Wis. 2d 656, 766 N.W.2d 559 (citation omitted). Whether a controversy is "justiciable" turns on four factors, none of which is whether the plaintiff would have an independent cause of action under another law. *See Olson*, 309 Wis. 2d 365, ¶ 29. Indeed, the Act itself states that courts "have the power to declare rights, status, and other legal relations *whether or not further relief is or could be claimed*." Wis. Stat. § 806.04(1) (emphasis added). As explained in the very case that the Journal Sentinel cites, "declaratory relief is appropriate wherever it will serve a useful purpose, and the fact that another remedy exists is only one factor to consider in determining whether to entertain the action." *Lister*, 72 Wis.

[21] Indeed, even if this were the law, Plaintiffs would meet this standard because Section 146.84 permits Plaintiffs to bring a claim against the State for violating Section 146.82.

2d at 307. Thus plaintiffs commonly bring claims under the Act that have no other cause of action, such as claims of federal and state constitutional violations, *e.g. Olson*, 309 Wis. 2d 365, ¶ 18; *Serv. Employees Intn'l Union*, 393 Wis. 2d 38, ¶ 28, that a state agency is improperly interpreting a statute, *e.g. Papa*, 393 Wis. 2d 1, ¶¶ 1–3, or that a particular statute does not apply to them, *e.g. Planned Parenthood*, 367 Wis. 2d 712, ¶ 1.

Finally, both Defendants argue that allowing declaratory-judgment actions to challenge unlawful records releases would render Section 19.356 meaningless. State's Br. 30–31; MJS Br. 28–29. But Section 19.356 would still do work under Plaintiffs' plain-language interpretation. The statute limits the common-law cause of action created by *Woznicki* and *Milwaukee Teachers'* because a plaintiff bringing a declaratory-judgment action must have an underlying legally protectable interest, created by some law. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶¶ 56–57 (lead op.).[22] Even under taxpayer standing, the challenged government action must still be unlawful, meaning that some law must provide the basis for the plaintiff's claim. *See Voters with Facts*, 376 Wis. 2d 479, ¶ 1. A plaintiff

[22] That certain plaintiffs in the *Woznicki* era may also have been able to show that they had a separate, legally protectable interest under the DJA does not change this result. MJS Br. 34.

alleging reputational harm from a records release can no longer simply ask the circuit court to reweigh the public-interest balancing test. Instead, plaintiffs must either fall within the ambit of Section 19.356 or must seek a declaratory judgment based on an alleged violation of a statutory or constitutional provision.[23]

Indeed, it is Defendants' interpretation of Section 19.356 that would lead to absurd results.[24] This is yet another reason to reject that strained interpretation. Instead, this Court should read Section 19.356 as it is written: allowing judicial review of public-records releases so long as such review is "provided by statute," which includes review under Wis. Stat. § 806.04.

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[23] For these same reasons, allowing parties to pursue declaratory-judgment actions challenging the legality of planned records releases does not give those parties "greater legal rights than requesters." MJS Br. 30.

[24] The Journal Sentinel's responses on this score are unavailing. MJS Br. 32–33. First, the State has sovereign immunity, and damages are not available against the State for violations of constitutional rights. *Town of Eagle v. Christensen*, 191 Wis. 2d 301, 319, 529 N.W.2d 245 (Ct. App. 1995); *Wynn v. Southward*, 251 F.3d 588, 592 (7th Cir. 2001); *see also Barnes v. Bd. of Trustees of Univ. of Illinois*, 946 F.3d 384, 391 (7th Cir. 2020). Second, even if parties could bring their federal constitutional claims in federal court, Defendants' reading of Section 19.356 prevents any party, outside of three narrow categories, from vindicating their rights under the *Wisconsin* Constitution, and from vindicating any state statutory rights that do not contain a concomitant injunction provision. *See Schultz v. Pugh*, No. 10-CV-581-BBC, 2010 WL 4363567, at *1 (W.D. Wis. Oct. 27, 2010).

CONCLUSION

This Court should affirm the circuit court.[25]

Dated: March 2, 2021

Respectfully submitted,

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[25] Neither the State nor the Journal Sentinel raises any arguments relating to the circuit court's application of the four-part test for a temporary injunction, instead focusing their arguments entirely on dismissal. *See generally*, State's Br. 11–34; MJS Br. 11–50; *see also Serv. Employees Int'l Union*, 393 Wis. 2d 38, ¶ 93 (describing the test for a temporary injunction). Defendants have therefore conceded the validity of the court's application of this test and have waived any challenge to the temporary injunction beyond their arguments in support of dismissal. *See Sands v. Menard*, 2016 WI App 76, ¶ 52, 372 Wis. 2d 126, 887 N.W.2d 94 ("Failure to address the grounds on which the circuit court ruled constitutes a concession of the ruling's validity."). It is therefore undisputed that the circuit court properly applied the equitable factors in granting a temporary injunction.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8) (b) and (c) for a brief and appendix produced with a proportional serif font. The length of this brief is 10,845 words.

Dated: March 2, 2021.

RYAN J. WALSH

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)(F)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12)(f).

I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: March 2, 2021.

RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2021, I caused three true and correct paper copies of the foregoing response and supporting memorandum to be delivered to counsel of record via U.S. Mail, first-class postage, addressed as follows:

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