Nos. 2020AP2081-AC & 2020AP2103-AC

In the Supreme Court of Wisconsin

No. 2020AP2081-AC

WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU,
PLAINTIFFS-RESPONDENTS-PETITIONERS,
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,
AND
MILWAUKEE JOURNAL SENTINEL,
INTERVENOR- APPELLANT.

No. 2020AP2103-AC

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

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

PETITION FOR REVIEW

Nos. 2020AP2081-AC & 2020AP2103-AC

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INTRODUCTION

This case began as eleventh-hour, emergency litigation to preserve the confidentiality of thousands—perhaps even tens or hundreds of thousands—of private health records. It has since turned into something more: a fight over access to the courts. In the opinion of the court of appeals, not only is the State free to release in bulk patient-identifiable information derived from Wisconsinites' private medical records (here in the form of lists of employers in the State with two or more workers who were diagnosed with COVID-19 over a certain period), but it cannot be made even to answer in court about the legality of its plan. 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 69 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 now the law of Wisconsin that, whenever the State 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 or the names of all patients at UW Health System who have been

diagnosed with meningitis or have sought abortion-related services—its decision is practically unreviewable and therefore unstoppable.

Until the court of appeals issued its published decision in this case, the law was otherwise. Under Wisconsin's Uniform Declaratory Judgments Act (DJA), 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 legally protectable interest. The Petitioners here (hereinafter "the Associations")—business groups with scores of members, both corporate and individual, who would be harmed by the release—have *several* legally protectable interests, any one of which would justify moving forward in the trial court. To name just two: (1) the Associations and their members have an interest in their tax money not being spent on activities that violate Wisconsin statutes, and (2) the Associations and their members are at least arguably within the zone of interests of the medical-records laws, which allow "person[s]," a statutory term encompassing Associations and their members, 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 the Associations an adequate and effective remedy sufficient to preclude a DJA action.

Siding with the State yet compounding its errors, the court of appeals issued a decision that will create immense confusion and will have devastating statewide consequences. The court's decision directly conflicts with this Court's case law regarding justiciability under the DJA, creates a sea change in the heretofore well-settled law of pleadings, and interprets Wis. Stat. § 146.82 contrary to its plain text. The opinion below, slated for publication, cries out for this Court's review.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Associations sufficiently alleged a justiciable controversy under the Uniform Declaratory Judgments Act.

The circuit court answered yes.

After granting Defendants' petitions for leave to appeal, the court of appeals answered no.

2. Whether the right to challenge a records release under the Uniform Declaratory Judgments Act survived the enactment of Wis. Stat. § 19.356, which states that "*[e]xcept as … otherwise provided by statute …*

no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record."

The circuit court answered yes.

After granting Defendants' petitions for leave to appeal, the court of appeals answered no.

CRITERIA FOR REVIEW

A decision by this Court is needed to develop, clarify, and harmonize the law on the issues presented for review and to resolve multiple conflicts between the court of appeals' decision and settled case law. Wis. Stat. § 809.62(1r)(c), (d).

This Court's review is needed to clarify and harmonize the law on the first issue presented not least because the court of appeals' holdings on multiple subsidiary questions are in direct and substantial conflict with controlling opinions of this Court and with other court of appeals' decisions. Wis. Stat. § 809.62(1r)(c), (d). Any one of these conflicts alone would warrant review. As a group, they beg this Court's intervention.

First, the court of appeals held that a party with standing to bring a claim may nevertheless *not* have a legally protectable interest creating a justiciable controversy under the DJA. App.017–18. This holding

patently conflicts with this Court's decisions, including this Court's weeks-old decision in *Fabick v. Evers*, 2021 WI 28, -- Wis. 2d --, 956 N.W.2d 856. This Court's review is necessary to restore harmony to the law. Wis. Stat. § 809.62(1r)(c), (d).

Second, the court of appeals' opinion revolutionizes the law of pleading. Rather than taking the complaint's factual allegations as true (as it should have), the court of appeals questioned their "plausibility" (as opposed to the plausibility of the complaint's *claims*), going so far as to require the Associations to plead "*plausible facts* supporting a reasonable inference" that the law had been violated. *See* App.020–22 (emphasis added). But as this Court and innumerable others have made clear, when reviewing a complaint on a motion to dismiss, courts must accept all factual allegations in the complaint as true—whether thought "plausible" or not—and then decide only whether the allegations plausibly support a claim or theory. The lower court's opinion therefore clearly and demonstrably conflicts with settled law, warranting this Court's review. Wis. Stat. § 809.62(1r)(d).[1]

[1] The court of appeals also held that a complaint can fail to adequately allege a violation of law if, on appeal, the plaintiffs fail to sufficiently develop legal arguments, App.011 n.6, which holding conflicts with the settled standard of review of the sufficiency of a complaint and with this Court's case law. Wis. Stat. § 809.62(1r)(c), (d).

Third, on top of these straightforward errors, the court of appeals also held, as a novel matter of statutory interpretation, that the information contained in medical records is *not* confidential under the medical-records statutes (Wis. Stat. §§ 146.81–.84). App.016 n.9. In other words, if the State (or other custodian of medical records) simply copies information out of a health-care record and places it in a new medium—a press release, a tweet, or the lists at issue here—that information is no longer protected by Wisconsin law. App.016 n.9. This novel and erroneous interpretation of law, which will have devastating statewide impact on medical privacy, cannot be squared with the language of the medical-records statutes, to say nothing of the opinions of this Court and the court of appeals. This error warrants this Court's review. *See* Wis. Stat. § 809.62(1r)(c).

The second issue presented also merits this Court's review. It is a novel legal question that will have statewide impact and is likely to recur. Wis. Stat. § 809.62(1r)(c). Neither this Court nor the court of appeals has squarely grappled with the meaning and extent of Section 19.356's "except as otherwise provided by statute" language. The answer to this question will govern how and whether records requesters, custodians,

subjects, and other community members may challenge in court the legality of a records release—including under the state constitution.

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).[2] Petitioner Wisconsin Manufacturers and Commerce (WMC) and other businesses sent a letter to the State, explaining that releasing such information, even in response to a public-records request, would violate several statutory and constitutional provisions. App.085–90. The State quickly reversed itself, 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

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

[3] App.079–83.

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]

Later that month, however, the State changed its position yet again, informing WMC that it would be releasing—within 48 hours—the names of over 1,000 employers across Wisconsin who had at least two employees test positive for COVID-19 or close contacts investigated by contact tracers, purportedly in response to public-records requests. R.7.[5]

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

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

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

further damage its business community, including many of its corporate and individual members. R.4.

That afternoon, the circuit court issued an *ex parte* temporary restraining order prohibiting the State from releasing the requested records and setting 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, the Associations 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.056–74.

In their First Amended Complaint, the Associations alleged that the State planned "to release the names of all Wisconsin businesses with over 25 employees that have had at least two employees test positive for COVID-19 or that have had close contacts that were investigated by contact tracers," that the Stated "plan[ned] to release the businesses' name and the number of known or suspected cases of COVID-19," that "there are more than 1,000 employers that meet the administration's

criteria," and that "the release is being made in response to public records requests." App.067. The Associations 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.061. In particular, the Associations 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 "Defendants seek to release the results of medical diagnostic tests conducted on numerous individuals." App.067.

The Associations further alleged that "releasing a patient's employer's name" would at least "permit"—even if not ensure or even make likely—"identification of the patient," including because an employer's name is "patient-identifiable data." App.068. Moreover, the Associations alleged that, "[g]iven 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.068. The Associations 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.069.

As to each association, the Associations 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.061–63. The Associations alleged that "Defendants' planned disclosure will irreparably harm [the Associations'] members by effectively blacklisting them and permanently harming their reputations." App.070. In particular, the Associations 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.070. As the Associations explained, "[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.071. And the Associations 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.071.

Additionally, the Associations alleged that either they or their members are Wisconsin taxpayers. App.061–63, 069. The Associations 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." App.070. As the Associations alleged, "[g]overnment 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.070. The Associations also alleged that "Defendants' unlawful actions will expose the State to liability for damages, which are paid out of the public fisc." App.070. Thus, the Associations alleged, "[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.070; *see also* App.061–63.

After a hearing, the circuit court denied the State and Journal Sentinel's motions to dismiss and granted the Associations' motion for temporary injunction. *See* App.027–55. The court held that the Associations had standing to bring the case under the zone-of-interests theory and that the action was justiciable under the DJA. App.029–47. The court further held that the Associations had satisfied the criteria for a temporary injunction. App.029–47. The court entered written orders on December 4. App.050–55.[6]

On December 17, the Journal Sentinel filed a petition for leave to appeal the circuit court's order denying its motion to dismiss. *See Wisconsin Manufacturers and Commerce v. Tony Evers*, No. 2020AP2081-AC. On December 18, the State followed suit, filing a petition for leave to appeal the circuit court's orders denying its motion to dismiss and granting the temporary injunction. *See Wisconsin Manufacturers and*

[6] On December 12, the Associations 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 COVID-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.

Commerce v. Tony Evers, No. 2020AP2103-AC. The Associations opposed the petitions, explaining that the circuit court had come to the correct conclusion and that, given the pending motion to amend the complaint, an interlocutory appeal would not serve to dispose of the case. *See* Response to Petition for Leave to Appeal, *Wisconsin Manufacturers and Commerce v. Tony Evers*, Nos. 2020AP2081-AC & 2020AP2103-AC (Wis. Ct. App. Jan. 4, 2021). The Court of Appeals granted the petitions on January 20, 2021, consolidated the appeals, and set the case for accelerated briefing. *See* Order, *Wisconsin Manufacturers and Commerce v. Tony Evers*, Nos. 2020AP2081-AC & 2020AP2103-AC (Wis. Ct. App. Jan. 20, 2021).

On April 5, the Court of Appeals issued its decision, reversing the circuit court's orders denying the motions to dismiss and ordering the circuit court, upon remand, to dismiss the complaint with prejudice and vacate the temporary injunction. App.025.

On the first issue presented, the court of appeals held that the medical-records statutes, particularly Wis. Stat. §§ 146.82 to .84, do not provide the Associations or their members with a legally protectable interest making their declaratory-judgment action justiciable. App.009–17. In particular, the court held that these statutes only "protect the

rights of health care patients, *as individual patients*." App.011–14. The court also held that "the information that is alleged to be released" is not protected by Section 146.82 because "the statutory definition" of patient health care record "does not encompass information that is merely derived from a record." App.016 n.9.

The court went on to hold that standing doctrines cannot satisfy the legally-protectable-interest requirement for justiciability of a declaratory-judgment action. App.017–20. In particular, the court held that "[i]n themselves, doctrines that can confer standing on a party cannot be substituted for a statutory or constitutional provision that creates a legally protectable interest." App.017.

When confronted with this Court's recent decision in *Fabick*, *v. Evers*, 2021 WI 28, the court of appeals did not alter its holding that standing cannot satisfy the legally protectable interest prong, but instead held that "the Associations' reliance on any of the three standing doctrines—taxpayer standing, zone of interest standing, or judicial policy—as entitling them to seek relief under the Declaratory Judgments Act would fail on its merits." App.018. As to taxpayer standing, the court held that, "[a]s we have explained above, the Associations' complaint fails to" "show that the government action that it seeks a court order to enjoin

is 'unlawful.'" App.019.[7] As to zone of interests, the court reiterated that Wis. Stat. §§ 146.82 and .84 "fail to provide the Associations' member businesses with a legally protectable interest." App.019. Finally, the court was "not persuade[d] ... that judicial economy or judicial policy require that courts adjudicate the issue [the Associations] raise here" or that it should "adopt the limitless version of judicial economy standing argued by the Associations." App.019–20.

The court further held that the first amended complaint failed to plausibly allege that the planned release would permit identification of patients. App.020–22. The court held that "the Associations do not allege plausible facts supporting a reasonable inference" that the planned "release would be unlawful because it would permit the identification of patients (employees)." App.020. The court opined that "the list could not violate any law cited by the Associations because the list by itself, considered in isolation, does not permit anyone to reasonably identify any of the employees or 'patients.'" App.021. The court rejected the Associations' factual allegation that, "[g]iven the relatively small number

[7] While the court did not refer to a specific page or paragraph number, presumably the court meant to cite its holding that the information contained in health care records is not protected under Wis. Stat. § 146.82. App.016 n.9.

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.021. The court held that factual premise that "there is a 'relatively small number of employees' for each business" was not plausible. App.021. The court thus explained that the Associations had failed to plausibly allege that the planned release would permit the identification of patients. App.022.[8]

Finally, the court addressed the second issue presented: whether Wis. Stat. § 19.356 prohibits declaratory-judgment actions challenging the legality of a public-records release. App.023–25. The court held that "the Association[s] failed to identify a statute that could apply here" to invoke Section 19.356's "except as otherwise provided by statute" language. App.024. The court did not explain why the Uniform Declaratory Judgments Act, Wis. Stat. § 806.04, was not such a statute. App.023–25.

The court recommended its opinion for publication. App.025.

[8] The court did not address the complaint's allegations that the planned release constitutes an unlawful redisclosure of records under Wis. Stat. § 146.82(5) because the planned release in response to public records requests is not for the same purpose as that for which the State originally obtained the records—communicable-disease surveillance. App.011 n.6. Instead, the court held that the Associations had failed to develop an appellate argument relating to these allegations. App.011 n.6.

ARGUMENT

I. The Court of Appeals' Published Decision, Which Directly Conflicts With Dozens of Its Own and This Court's Precedents, Will Produce Confusion and Disharmony if Left Intact

The court of appeals' published decision contains several legal holdings that flatly contradict the settled precedents of this Court and the court of appeals. Wis. Stat. § 809.62(1r)(c), (d). Each error independently warrants this Court's review.

A. The Court of Appeals Held, Contrary to Decades of Precedent, That Establishing a Legally Protectable Interest for Purposes of a Declaratory-Judgment Suit and Establishing Standing Are Different Things

1. To raise a justiciable controversy under the DJA, a plaintiff must meet four requirements. *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 627, 629 (1936) (citing Borchard, *Declaratory Judgments*, at 26–57); *see also Loy v. Bunderson*, 107 Wis. 2d 400, 409, 320 N.W.2d 175 (1982) (describing this legal development). "(1) There must exist a justiciable controversy—that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it"; "(2) [t]he controversy must be between persons whose interests are adverse"; "(3) [t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest"; "(4) [t]he issue

involved in the controversy must be ripe for judicial determination." *Loy*, 107 Wis. 2d at 409 (citation omitted).

This Court and the court of appeals have held repeatedly that the third requirement of this test—"legally protectable interest"—is "voiced in terms of standing." *Fabick*, 2021 WI 28, ¶ 11; *see also id.* ¶ 92 (Bradley, A.W., dissenting) ("a legally recognized interest in [a] case ... is called 'standing'"); *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.); *City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228, 332 N.W.2d 782, 784 (1983); *Tooley v. O'Connell*, 77 Wis. 2d 422, 438, 253 N.W.2d 335 (1977); *Chenequa Land Conservancy v. Vill. of Hartland*, 2004 WI App 144, ¶ 12, 275 Wis. 2d 533, 685 N.W.2d 579; *Milwaukee Dist. Council 48 v. Milwaukee Cty.*, 2001 WI 65, ¶¶ 37–40, 244 Wis. 2d 333, 627 N.W.2d 866 (holding that, because each plaintiff had a legal "interest" in the matter, "both ... have *standing* to seek a declaratory judgment" (emphasis added)); *State ex rel. Vill. of Newburg v. Town of Trenton*, 2009 WI App 139, ¶ 10, 321 Wis. 2d 424, 773 N.W.2d 500. "Thus the concepts of standing and justiciability (a legally protectable interest) have been viewed as overlapping concepts in declaratory judgment cases." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 47 (lead op.). In other words, to have a

"legally protectible interest"—giving rise, at the pleading stage, to a justiciable controversy under the DJA—a party need only sufficiently allege standing. *See City of Madison*, 112 Wis. 2d at 228.

A party may establish standing (and, therefore, a legally protectable interest) under the DJA by any of at least three independent paths. *See Fabick*, 2021 WI 28, ¶ 11 (taxpayer standing under DJA); *City of Madison*, 112 Wis. 2d at 228–32 (zone-of-interests standing under DJA); *McConkey v. Van Hollen*, 2010 WI 57, ¶¶ 17–18, 326 Wis. 2d 1, 783 N.W.2d 855 (judicial-policy standing under DJA).

One is the taxpayer-standing doctrine, which holds that a plaintiff "has a legal interest ... to contest governmental actions leading to an illegal expenditure of taxpayer funds." *Fabick*, 2021 WI 28, ¶ 10. "In order to maintain a taxpayer's action, it must be alleged that the complaining taxpayers and taxpayers as a class have sustained, or will sustain, some pecuniary loss" because of the sued-upon violation. *Id.* ¶ 11 (citation omitted). Under this doctrine, "*[a]ny* illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *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, emphasis added). And, critically, the loss occurs *any time* the

government expends resources to undertake an unlawful act. *See Fabick*, 2021 WI 28, ¶ 11 & n.5; *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] actions were unlawful, thereby conferring taxpayer standing." *Id.* ¶ 18. Thus, both this Court and the court of appeals have consistently adjudicated declaratory-judgment actions where the plaintiff had only taxpayer standing—without regard to whether the plaintiff also satisfied some *other* standing test. *See, e.g.*, *Fabick*, 2021 WI 28; *Hart v. Ament*, 176 Wis. 2d 694, 500 N.W.2d 312 (1993); *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 419 N.W.2d 249 (1988); *Tooley*, 77 Wis. 2d at 438–39; *Columbia Cty. v. Bd. of Trustees of Wis. Retirement Fund*, 17 Wis. 2d 310, 116 N.W.2d 142 (1962); *Coyne*, 361 Wis. 2d 225.

Second, a party may proceed under the DJA by satisfying the zone-of-interests test. That doctrine holds that a plaintiff has standing if she can point to an interest of hers 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). Wisconsin courts routinely adjudicate declaratory-judgment actions that satisfy this test—again, without also asking whether the plaintiff could pass some other standing test as well. *See, e.g.*, *Milwaukee Dist. Council 48*, 244 Wis. 2d 333; *City of Madison*, 112 Wis. 2d 224; *Vill. of Newburg*, 321 Wis. 2d 424; *Weber v. Town of Lincoln*, 159 Wis. 2d 144, 463 N.W.2d 869 (Ct. App. 1990).

Finally, a plaintiff may sue under the DJA so long as her case in some other way 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. Thus, a court should reach the merits so long as it is satisfied that the parties will "competently frame[ ] the issues and zealously argue[ ] [the] case," and "a different plaintiff would not enhance [the court's] understanding of the issues in this case." *Id.* ¶ 18. Judicial economy especially favors proceeding with a case when "it is likely that if [the case] were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit." *Id.*

2. Inexplicably, the court of appeals bypassed these settled principles and marked out a different analysis. The Associations have argued consistently that they meet all three tests for standing and, therefore, that they have three "legally protectable interest[s]" independently supporting justiciability under the DJA. *See* Resp. Br. 11–22, *Wisconsin Manufacturers and Commerce v. Evers*, Nos. 2020AP2081-AC & 2020AP2103-AC (Wis. Ct. App. Mar. 2, 2021) (hereinafter "Resp. Br."). Yet the court of appeals dismissed out of hand the bedrock principle that the "legally protectable interest" factor "is satisfied by any one of the three doctrines of standing: taxpayer, zone of interests, and judicial policy." App.17. The court concluded instead that "doctrines that can confer standing on a party cannot be substituted for a statutory or constitutional provision that creates a legally protectable interest." App.017.[9] The court seems to have ruled that the third factor of DJA justiciability ("legally protectable interest") *can no longer be* "voiced in terms of standing," *Fabick*, 2021 WI 28, ¶ 11—this Court's dozens of

[9] Even if this were correct, which, as explained below, it is not, it would fly in the face of countless declaratory-judgment actions addressing the terms of a contract, which, of course, is neither a statutory nor constitutional provision. *See, e.g.*, *Elliott v. Donahue*, 169 Wis. 2d 310, 323–24, 485 N.W.2d 403 (1992); *Loy*, 107 Wis. 2d 400.

precedents to the contrary notwithstanding. Instead, under its newly minted standard, courts must assess DJA standing solely by determining whether "a statutory or constitutional provision" directly confers a "legally protectable interest" upon the party suing. App.017.[10]

The court of appeals stated that the Associations had "conceded in their brief that such a provision is required to provide a legally protectable interest." App.017. Not so. The Associations instead argued that "if a party establishes standing, the party also satisfies the third factor for justiciability of a declaratory-judgment action," a "legally protectible interest," and that the Associations "pass all three tests for standing, any one of which would be grounds for affirming" the circuit court's decision here. Resp. Br. 12, 16. And while the Associations did explain that taxpayer standing requires an allegation that a statute or

[10] Early in the opinion, the court made much of the word "right" as used in the first factor for DJA justiciability: "[t]here must exist ... a controversy in which a claim of right is asserted against one who has an interest in contesting it." *Loy*, 107 Wis. 2d at 409; *see* App.010–11. The court seemed to suggest that this controversy requirement means that a plaintiff must have a "right" separate and distinct from its legally protectable interest under the third justiciability factor. *See* App.010–11. Yet in its analysis the court never again returned to this idea that the term "right" in factor one is somehow different than a legally protectable interest. *See* App.011–17. Instead, the court focused entirely on the legally protectable interest requirement of justiciability (although sometimes referring to it as a "legally protectable right," App.015). *See* App.011–17.

constitutional provision (a "law") is being violated, rendering the expenditure "unlawful," the provision does not itself create the legally protectable interest. Rather, the taxpayer's interest is solely in remedying (and, in the future, avoiding) the unlawful expenditure. *See* Resp. Br. 20–21, 47–48. The court of appeals' error undercuts the basic logic of standing.

B. The Court of Appeals Held, Contrary to Settled Law, That a Court Reviewing the Sufficiency of a Complaint May—and Should—Test the Plausibility of Its Factual *Allegations* (as Opposed to Its Legal *Claims*)

As every first-year law student learns, when reviewing the sufficiency of a complaint on a motion to dismiss, courts "construe the pleadings liberally and accept as true both the facts contained in the complaint and any reasonable inferences arising from those facts," as countless opinions of this Court state. *Doe 56 v. Mayo Clinic Health Sys.–Eau Claire Clinic, Inc.*, 2016 WI 48, ¶ 14, 369 Wis. 2d 351, 880 N.W.2d 681; *accord Serv. Emps. Int'l Union, Loc. 1 v. Vos*, 2020 WI 67, ¶ 26, 393 Wis. 2d 38, 946 N.W.2d 35; *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 27, 382 Wis. 2d 1, 913 NW.2d 131; *Hinrichs v. DOW Chem. Co.*, 2020 WI 2, ¶ 8, 389 Wis. 2d 669, 937 N.W.2d 37; *Yacht Club at Sister Bay Condo. Ass'n, Inc. v. Vill. of Sister Bay*, 2019 WI 4, ¶ 4, 385 Wis. 2d 158,

922 N.W.2d 95; *Wisconsin Carry, Inc. v. City of Madison,* 2017 WI 19, ¶ 7, 373 Wis. 2d 543, 892 N.W.2d 233; *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 18, 356 Wis. 2d 665, 849 N.W.2d 693. The court of appeals, unsurprisingly, also follows this rule, *see Jama v. Gonzalez*, 2021 WI App 3, ¶ 14, 395 Wis. 2d 655, 954 N.W.2d 1; *State ex rel. Zecchino v. Dane Cty.*, 2018 WI App 19, ¶ 8, 380 Wis. 2d 453, 909 N.W.2d 203, which also applies to allegations going to standing, *Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶ 18.

To assess whether the complaint's assumed-to-be-true facts state a claim for relief, courts look to the "substantive law that underlies the claim made" to assess whether the allegations plausibly state a cause of action. *Data Key Partners*, 356 Wis. 2d 665, ¶ 31. But, critically, nothing about this *Data Key Partners* "plausibility" test questions the factual *allegations themselves*. Instead it considers, as a matter of law, only whether "any legal theory" plausibly *arises from* those allegations, taken to be true. *Cattau v. Nat'l Ins. Servs. of Wisconsin, Inc.*, 2019 WI 46, ¶ 4, 386 Wis. 2d 515, 926 N.W.2d 756 (citation omitted). Indeed, "a well-pleaded complaint may proceed *even if it strikes a savvy judge that actual proof of [the alleged] facts is improbable*." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007) (emphasis added) (adopted by *Data Key Partners*).

The allegations in this case are straightforward. The Associations alleged that the State plans to release the names of patients' employers, which are "patient-identifiable data," and that "[g]iven the relatively small number of employees" at numerous employer locations in Wisconsin, "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.067–68.[11]

Although a court must be careful to "distinguish pleaded facts from pleaded legal conclusions," *Voters with Facts*, 382 Wis. 2d 1, ¶ 27, these allegations are not a close call. They are clearly factual, describing the "'who, what, where, when, why, and how.'" *Data Key Partners*, 356 Wis. 2d 665, ¶ 21 n.9. In particular, the allegations address the "who," "what," "where," and "how" of the identification of patients. They discuss what is being released: "a patient's employer's name," which is "patient-identifiable data." They identify who will be affected: "co-workers and community members" will easily "discern the identity" of the "employee or employees who have tested positive for COVID-19." And they address

[11] The Associations also have argued that a patient's employer's name "must *always* remain confidential" because it is categorically deemed "patient-identifiable data" by the Wisconsin statutes and DHS's regulations. R.36:19, 22–23, 25–26 (emphasis added).

where this will occur and how: at "any given facility," as a result of its "small number of employees." In other words, the allegations make claims about what the State is intending to do and what, if the act is done, the real-world consequences will be.[12]

It seems the court of appeals misconceived the "plausibility" test from *Data Key Partners*, looking to the plausibility of the facts themselves rather than the plausibility of the legal conclusions. App.020 (holding that "the Associations do not allege *plausible facts* supporting a reasonable inference" that the law has been violated (emphasis added)). In so holding, the court of appeals did not take the complaint's factual allegations as true but instead asked whether facts alleged in the complaint were sufficiently supported by *other facts* in the complaint to make the first set of facts believable, or, "plausible." App.020–21. In particular, the court rejected the Associations' factual allegation that "it would not be difficult for co-workers or community members" in certain situations "to discern the identity of the employee or employees who have tested positive for COVID-19," since the court dismissed as insufficiently

[12] Regarding those consequences, experts in the HIPAA context must draft *factual* reports (not legal analyses) on the question whether it would be difficult for the public to discern the identity of a patient from a particular release. *See* 45 C.F.R. § 164.514(b)(1).

supported (at the *pleading* stage) the Plaintiffs' premise that a "limited number of employees at any given facility" could make identification of COVID-positive employees possible. App.021.

The court's new "plausible facts" rule resembles the summary-judgment standard, which requires allegations to rest on a factual showing. *See Racine Cty. v. Oracular Milwaukee, Inc.*, 2010 WI 25, ¶¶ 25–26, 323 Wis. 2d 682, 781 N.W.2d 88. But at the dismissal stage, no one *shows* anything. A court must simply "accept[ ] as true" all "factual allegations in the complaint." *Data Key Partners*, 356 Wis. 2d 665, ¶ 18. The court of appeals has turned the law of pleading on its head.

C. The Court of Appeals Also Held For the First Time, As a Matter of Law, That Information *Within* Patient Health Care Records (As Opposed to the Records Themselves) Is Not Confidential

The law states that "[a]ll patient health care records shall remain confidential." Wis. Stat. § 146.82(1). The statutes define "patient health care records" as "all records related to the health of a patient prepared by or under the supervision of a health care provider; and all records made by an ambulance service provider, … an emergency medical services practitioner, … or an emergency medical responder … in administering emergency care procedures to and handling and transporting sick,

disabled, or injured individuals." Wis. Stat. § 146.81(4). Such records may be released only "with the informed consent of the patient or of a person authorized by the patient." Wis. Stat. § 146.82(1). Critically, the statutes define "informed consent" as "written consent to the disclosure of *information from patient health care records*," making clear that it is not only a diagnostic report that must be protected (*e.g.*, a patient's lipids-panel report) but also the information contained therein (*e.g.*, the fact of the patient's high cholesterol levels). Wis. Stat. § 146.81(2) (emphasis added).

Hence this Court explained in *Johnson v. Rogers Memorial Hospital, Inc.*, that a patient can consent to the release of only "specific information" contained in her health care records, and any release of "information" beyond that consent is unlawful. 2005 WI 114, ¶¶ 39–41, 283 Wis. 2d 384, 700 N.W.2d 27. Likewise, Judge Stark recognized in his recent concurring opinion in *State v. Crone* that Section 146.82 "recognizes the sensitive nature of a person's private medical *information* and therefore treats such *information* as being highly confidential." No. 2018AP1764-CR, 2021 WL 1538125, at *9 (Ct. App. April 20, 2021) (recommended for publication) (Stark, J., concurring) (emphasis added). Indeed, the medical-records statutes provide penalties for those who

fraudulently "request[ ] or obtain[ ] confidential *information* under s. 146.82," and for those who "disclose[ ] confidential *information* in violation of s. 146.82." Wis. Stat. § 146.84(2)(a)(1), (b)–(c) (emphases added).

Despite the statutes' clear protection of information from patient health care records, the court of appeals held that the information contained in such records is, somehow, *not* confidential. App.016 n.9. It could not have been clearer: "the statutory definition" of "patient health care record[ ]" "*does not encompass information that is merely derived from a record*." App.016 n.9 (emphasis added). In other words, while Section 146.82 requires that "[a]ll patient health care records shall remain confidential," Wis. Stat. § 146.82(1), that confidentiality does not extend to "information that is merely derived from a [patient health care] record." App.016 n.9.[13] The exception swallows the rule.

[13] The court incorrectly asserted that it had "previously ruled" that "information that is merely derived from a [patient health care] record" is not protected by Wis. Stat. § 146.82. In fact, the cases that the court cited did not involve information derived from a health care record. App.016 n.9. *State v. Thompson*, 222 Wis. 2d 179, 585 N.W.2d 905 (Ct. App. 1998), held that Section 146.82 did not give a criminal defendant a reasonable expectation of privacy in the room where he was receiving medical treatment. *Id.* at 188. It did not hold that the information contained in the defendant's medical records was not confidential. Similarly, in *State v. Straehler*, 2008 WI App 14, 307 Wis. 2d 360, 745 N.W.2d 431, the court held that a nurse's verbal statements to police of her observations of the defendant during medical treatment were not protected under

The court's breathtakingly incorrect interpretation of Section 146.82 will have massive and devastating statewide consequences for medical privacy if left uncorrected. It is not just the names of the employers of patients who have tested positive for COVID-19 that would lose protection—the patients' *own names* would lose protection, too. More, the name of every person who has been diagnosed with cancer, the name of every woman who has suffered a miscarriage, and the name of every person suffering from a mental illness would become public information. All of these facts, after all, are "merely derived from [patient health care] record[s]" and so, by the court's reasoning, are not protected. This cannot be the law. *Accord* Reply Br. 11, *State v. Jendusa*, No. 2018AP2357 (Wis. Oct. 9, 2020) (State brief in this Court discussing HIPAA and acknowledging that government "cannot make protected information disclosable simply by transferring it to another record or compiling it in a database").

Section 146.82. *Id.* ¶ 20. Again, the court did not hold that the information contained in the defendant's medical records was not confidential. Thus, the court of appeals' decision below is the first holding that the information contained in patient health care records is not confidential.

II. Whether Section 19.356 Precludes Declaratory-Judgment Actions Relating to Records Releases Is a Novel Legal Question Having Statewide Impact and Is Likely To Recur Unless Resolved by This Court

In *Woznicki v. Erickson*, this Court 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." 202 Wis. 2d 178, 191, 549 N.W.2d 699 (1996). This Court held that, "[s]hould [a records custodian] 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. This 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.[14]

[14] Three years later, in *Milwaukee Teachers' Education Association v. Milwaukee Board of School Directors*, 227 Wis. 2d 779, 596 N.W.2d 403 (1999), this Court expanded the cause of action it had created in *Woznicki*. In *Milwaukee Teachers'*, this 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, which serves the limited purpose of codifying and narrowing the cause of action created in *Woznicki*. 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. The Legislature then passed 2003 Wis. Act 47, adopting the Committee's recommendation. Indeed, the Act's Prefatory Note explains that "[t]his bill partially codifies *Woznicki* and *Milwaukee Teachers*'" and "applies the rights afforded by *Woznicki* and *Milwaukee Teachers'* only to a defined set of records pertaining to employees residing in Wisconsin." 2003 Wis. Act 47, Joint Legislative Council Prefatory Note.

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'*. *Schill v. Wisconsin Rapids Sch. Dist.*, 2010 WI 86, ¶ 42, 327 Wis. 2d 572, 786 N.W.2d 177 (lead op.); 2003 Wis. Act 47, Joint Legislative Council Prefatory Note. Specifically, Section 19.356 limits this right to *de novo* review to three discrete categories of records.

Whether Section 19.356 sweeps far more broadly—foreclosing *all* declaratory-judgment actions relating to records releases—is a novel question that this Court has not answered. In *Moustakis v. Department of Justice*, this Court addressed the contours of the three categories of

records reviewable under Section 19.356 but did not address the meaning of the phrase "as otherwise provided by statute" or whether this phrase encompasses declaratory-judgment actions. 2016 WI 42, 368 Wis. 2d 677, 880 N.W.2d 142. And in *Teague v. Schimel*, this Court explicitly did "not consider the applicability" of Section 19.356 to the plaintiffs' declaratory-judgment claims relating to the Department of Justice's records releases. 2017 WI 56, ¶ 80, 375 Wis. 2d 458, 896 N.W.2d 286.

The resolution of this novel question will have statewide impact. Section 19.356 applies to every release of public records by an "authority." *See* Wis. Stat. § 19.356. "Authorit[ies]" encompass nearly every unit of government throughout the State of Wisconsin, and even certain non-governmental entities. An "'[a]uthority' means any of the following having custody of a record: a state or local office, elective official, agency, board, commission, committee, council, department or public body corporate and politic … ; a governmental or quasi-governmental corporation … ; a special purpose district; any court of law; the assembly or senate; a nonprofit corporation which receives more than 50 percent of its funds from a county or a municipality … and which provides services related to public health or safety to the county or municipality; a university police department … ; or a formally constituted subunit of any of the foregoing."

Wis. Stat. § 19.32(1). Thus, Section 19.356 affects records-release decisions by countless entities throughout Wisconsin. A decision by this Court as to the meaning of Section 19.356's "as otherwise provided by statute" language will therefore have statewide impact.

Moreover, this question is likely to recur. Given the extensive application of the public-records law, it is likely that members of the public will seek to challenge the legality of the government's records-release practice. Indeed, in *Teague*, the plaintiffs argued that the Department of Justice's records releases would violate various constitutional provisions. *See* 375 Wis. 2d 458, ¶ 1. The issue presented here directly affects these kinds of claims.

CONCLUSION

This Court should grant the Petition for Review.

Dated: May 4, 2021

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in s. 809.62(4)(a) for a petition produced with a proportional serif font. The length of this petition is 7,954 words.

Dated: May 4, 2021.

RYAN J. WALSH

CERTIFICATE OF COMPLIANCE WITH RULE 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ 809.62(4)(b) & 809.19(12)(f).

I further certify that:

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

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

Dated: May 4, 2021.

RYAN J. WALSH

APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as part of this brief, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum:

(1) a table of contents;

(2) the decision and opinion of the court of appeals;

(3) the judgments, orders, findings of fact, conclusions of law and memorandum decisions of the circuit court and administrative agencies necessary for an understanding of the petition;

(4) any other portions of the record necessary for an understanding of the petition; and

(5) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b).

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

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix

are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated: May 4, 2021.

RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2021, I caused three true and correct paper copies of the foregoing petition and separate appendix to be delivered to counsel of record, addressed as follows:

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