STATE OF WISCONSIN

IN SUPREME COURT

Case 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 Secretary-designee of the Wisconsin Department of Health Services, and JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration,

Defendants,

MILWAUKEE JOURNAL SENTINEL,

Intervenor-Appellant.

Case 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 Secretary-designee of the Wisconsin Department of Health Services, and JOEL BRENNAN, in his official capacity as Secretary of the Wisconsin Department of Administration,

Defendants-Appellants,

MILWAUKEE JOURNAL SENTINEL,

Intervenor.

ON APPEAL FROM NONFINAL ORDERS ENTERED BY THE WAUKESHA COUNTY CIRCUIT COURT THE HONORABLE LLOYD V. CARTER, PRESIDING

STATE'S RESPONSE IN OPPOSITION TO THE PETITION FOR REVIEW

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INTRODUCTION

This is a statutory-interpretation case. The issues it presents are uncomplicated and not close calls.

The case is about requests for public records containing the names and addresses of Wisconsin businesses and the number of COVID-19 cases and contacts associated with them. The Department of Health Services (DHS) created and has the disputed records. The legal issues involve the patient health care records confidentiality laws in Wis. Stat. ch. 146 and, separately, who may seek pre-release judicial review of an authority's decision granting access to records under Wis. Stat. § 19.356(1).

The plaintiffs are three business trade associations. Their case fails from the outset, as the court of appeals held. There are two independent grounds for dismissal based upon unambiguous statutes.

First, the patient health care records laws do not apply to or protect the plaintiffs. These laws apply to *individual patients* and *their* records, not to business trade associations who are not individuals, not patients, and who did not receive health care from a health care provider. The plaintiffs therefore lack a legally protectable interest to pursue a declaratory-judgment action.

Second, Wis. Stat. § 19.356(1) bars their action. They have no right in a declaratory-judgment action to obtain judicial review of DHS's decision to release the records.

Ignoring these statutory limitations, the plaintiffs ask this Court to take their case to issue a decision that would contradict the unambiguous patient health care record laws, expand the taxpayer-standing rule, upend decades of declaratory-judgment precedent, and ignore the public records law's clear limitations. This Court should carefully

consider and then reject their invitation, which could have far-reaching unintended consequences for declaratory-judgment and public-records jurisprudence.

There are three reasons to deny review. First, the court of appeals resolved this case correctly in a decision that is recommended for publication. Second, the plaintiffs' legal theories are incorrect and would require this Court to rewrite the law, muddying the "legally protectable interest" requirement of justiciability. Third, granting review could harm the public interest by further delaying responses to valid, pending public records requests in a case that should have been dismissed at the outset.

This Court should deny the petition.

REASONS THE PETITION SHOULD BE DENIED

The petition for review does not present "special and important reasons" sufficient to warrant review. Wis. Stat. § (Rule) 809.62(1r). It should be denied for three reasons.

I. The court of appeals resolved this case correctly in a decision that is recommended for publication.

First, there is no meaningful work for this Court to do other than deny the petition for review. The court of appeals resolved this case correctly in a decision that is recommended for publication. This Court should deny the petition because the court of appeals got it right, and this Court need not redo the analysis.

A. The court of appeals reversed and remanded with directions, holding that the plaintiffs failed to state a justiciable claim.

The circuit court held that the plaintiffs, Wisconsin Manufacturers and Commerce, Muskego Area Chamber of

Commerce, and New Berlin Chamber of Commerce and Visitors Bureau, were entitled to a temporary injunction halting DHS's release of records in response public records requests, and the court denied the defendants' motions to dismiss. (R. 100:12, 18; 73–75 (all record citations are to case number 2020AP2103-AC).)

After granting an interlocutory appeal, the court of appeals reversed and remanded with directions in a decision that is recommended for publication. *Wis. Mfrs. & Commerce v. Evers*, 2021 WI App ___, ¶ 46, ___ Wis. 2d ___, ___ N.W.2d ___ (recommended for publication). It concluded that the plaintiffs' first amended complaint failed to state a justiciable claim upon which relief can be granted and remanded with directions to dismiss the complaint and vacate the temporary-injunction order. *Id.* ¶¶ 8, 33, 39, 46.

The court of appeals' decision addressed three topics: (1) whether the specific statutes the plaintiffs relied upon for their action—Wis. Stat. §§ 146.82 and 146.84—apply to them; (2) whether the allegations in the first amended complaint showed that DHS's planned release of the disputed records will cause harm to any legally protectable interest; and (3) whether Wis. Stat. § 19.356(1) bars the plaintiffs' action. *See Wis. Mfrs. & Commerce*, ¶¶ 8, 13–45.

1. The court of appeals held that the plaintiffs lack a legally protectable interest because Wis. Stat. §§ 146.82–146.84 do not protect them.

The court of appeals first explained that it was following "the same analytical approach" used by this Court in *Moustakis v. DOJ*, 2016 WI 42, ¶¶ 3 n.2, 5, 368 Wis. 2d 677, 880 N.W.2d 142, and *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 4, 382 Wis. 2d 1, 913 N.W.2d 131. *Wis. Mfrs. & Commerce*, ¶ 8. Namely, courts are to consider that

"the question whether [an] interest is legally protected for standing purposes is the same as the question whether plaintiff (assuming his or her factual allegations are true) has a claim on the merits." *Id.* (quoting *Moustakis*, 368 Wis. 2d 677, ¶ 3 n.2). "Standing and statutory interpretation are distinct and should not be conflated." *Moustakis*, 368 Wis. 2d 677, ¶ 3 n.2. The court of appeals correctly treated the plaintiffs' case as one about statutory interpretation. *See Wis. Mfrs. & Commerce*, ¶¶ 11, 15–24.

The court of appeals stated the standards of review, *id.* ¶¶ 10–11, and then focused on the Declaratory Judgments Act, Wis. Stat. § 806.04. *Id.* ¶ 12. The court recited the familiar factors of a "justiciable" controversy appropriate for a declaratory-judgment action. *Id.* ¶ 13 (relying upon *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 29, 309 Wis. 2d 365, 749 N.W.2d 211). Focusing on two of the factors, the court determined that the plaintiffs "must assert at least one 'right' satisfying the first factor and at least one 'legally protectable interest' satisfying the third factor in order to maintain this declaratory judgment action." *Id.* ¶ 14.

The court of appeals then addressed the statutes that the plaintiffs relied upon for their "right" and "legally protectable interest," namely, Wis. Stat. §§ 146.82 and 146.84. *Id.* ¶ 15. The court specifically addressed Wis. Stat. §§ 146.81(3) (defining "patient"), 146.82(1), (2), and (3), 146.84(1)(b) and (bm), and 146.84(1)(c). *See id.* ¶¶ 16–21.

Wisconsin Stat. § 146.82(1) provides that "[a]ll patient health care records shall remain confidential." "Patient" means "a person who receives health care services from a health care provider." Wis. Stat. § 146.81(3). Wisconsin Stat. § 146.84(1)(c) states, "*[a]n individual* may bring an action to enjoin any violation of s. 146.82 . . . or to compel compliance with s. 146.82 . . . and may, in the same action, seek

damages as provided in this subsection." *See Wis. Mfrs. & Commerce*, ¶¶ 16, 18, 19, 21 (addressing these provisions).

The court of appeals held that it was "not persuaded that the alleged harm to the reputations of the [plaintiffs'] member businesses could constitute an injury contemplated by these statutes, because the statues are focused on individual patients and their health care records." *Id.* ¶ 21. There is an "obvious disconnect between any purported rights of the [plaintiffs'] member businesses and the protected rights of individual employees of member businesses." *Id.* In particular, "the rights of the [plaintiffs'] member businesses, on the one hand, and the rights of the *employee patients* as specific individuals, on the other hand, are several distinct levels removed from each other." *Id.*

The court of appeals held that "Wis. Stat. §§ 146.82 and 146.83 protect the rights of health care patients, *as individual patients*." *Id.* ¶ 22. "[O]nly 'an individual' can seek the pre-release injunctive relief that the [plaintiffs] seek here," which "excludes the [plaintiffs'] member businesses." *Id.* ¶ 23. "Not only do the provisions [of Wis. Stat. §§ 146.82–146.84] not create a right to enjoin the planned release of records for entities such as the [plaintiffs'] member businesses, they expressly exclude them from that right by categorically identifying who may be a potential plaintiff." *Id.* ¶ 24. The plaintiffs did not "explain how the law protects an interest that the law does not permit them to sue to protect" and sought "to rewrite the statute to expand the universe of potential injunction plaintiffs to establish a legally protected right." *Id.*

The court of appeals next addressed and rejected the plaintiffs' arguments that they had a legally protectable interest under three standing doctrines: taxpayer standing, zone of interests, or judicial policy. *See id.* ¶¶ 27–32. The court held that "doctrines that can confer standing on a

party cannot be substituted for a statutory or constitutional provision that creates a legally protectable interest" and that "the [plaintiffs] conceded in their brief that such a provision is required to provide a legally protectable interest to support a declaratory judgment action." *Id.* ¶ 27. "Standing refers to a party's role that enables it to enforce a substantive right, not to a substantive right in itself." *Id.* ¶ 28. The court rejected that this Court's decision in *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 865, supports the plaintiffs' taxpayer-standing theory. *See id.* ¶ 30.

2. The court of appeals held that the plaintiffs' first amended complaint does not plausibly allege that DHS's release of records would be unlawful.

The court of appeals next held that the plaintiffs' first amended complaint failed to state a claim upon which relief can be granted because it did not plausibly allege that releasing the records would be unlawful. *Id.* ¶¶ 34–39.

The court of appeals relied upon *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, 356 Wis. 2d 665, 849 N.W.2d 693. *Wis. Mfrs. & Commerce*, ¶¶ 34, 39. Specifically, a complaint's "allegations must 'plausibly suggest [the plaintiff] is entitled to relief,'" *id.* ¶ 34 (quoting *Data Key Partners*, 356 Wis. 2d 665, ¶ 31) (alteration in original), and "must cross 'the line between possibility and plausibility of entitle[ment] to relief.'" *Id.* (quoting *Data Key Partners*, 356 Wis. 2d 665, ¶ 26) (alteration in original).

The court of appeals observed that the plaintiffs "request a declaration that [DHS's] release of the list [of businesses] would be 'unlawful'" because they would permit the identification of patients. *Id.* ¶ 35. The court held that the plaintiffs did not allege plausible facts supporting a

reasonable inference to that effect, focusing on paragraphs 24, 25, and 31 of the first amended complaint. *Id.* ¶¶ 35–37; (*see also* R. 37:12, 13.) Based upon the allegations in paragraphs 24 and 25 of the complaint, "the State is not planning to include on the list the names of any employees of any business," only the names of businesses. *Wis. Mfrs. & Commerce*, ¶ 36. "Any reasonable view of the complaint shows that release of the list could not violate any law cited by the [plaintiffs] because the list by itself, considered in isolation, does not permit anyone to reasonably identify any of the employees or 'patients.'" *Id.*

Paragraph 31 of the first amended complaint alleged: "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." *Id.* ¶ 37 (quoting R. 37:10). The "necessary premise" is that "there is a 'relatively small number of employees' for each business." *Id.* (quoting R. 37:10). "But the complaint alleges no factual basis to show that premise is plausible," so the court of appeals rejected it. *Id.* The court concluded that the plaintiffs' "allegations do not 'plausibly suggest a violation of applicable law.'" *Id.* ¶ 39 (quoting *Data Key Partners*, 356 Wis. 2d 665, ¶ 31).

3. The court of appeals held that Wis. Stat. § 19.356(1) bars the plaintiffs' claim.

Lastly, the court of appeals held that Wis. Stat. § 19.356(1) bars the plaintiffs' claim for pre-release review of DHS's decision granting access to public records. *See Wis. Mfrs. & Commerce*, ¶¶ 40–45.

Under Wis. Stat. § 19.356(1), "[e]xcept as authorized in this section or 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." *Wis. Mfrs. & Commerce*, ¶ 42 (quoting the statute). In the public records law, "the exceptions in Wis. Stat. § 19.356(2)(a)1., 2., and 3. are the only instances in which a record subject has a statutory right to receive notice and seek pre-release judicial review of a response to a public records request." *Id.* ¶ 43 (quoting *Moustakis*, 368 Wis. 2d 677, ¶ 28).

"The [plaintiffs] concede[d] that the exceptions in Wis. Stat. § 19.356(2)(a) do not apply to their claim." *Id.* ¶ 44. And the language "except as otherwise provided by statute" in section 19.356(1) "[does] not apply to their claim" because the plaintiffs "failed to identify a statute that could apply here." *Id.*

The court of appeals rejected the plaintiffs' policy arguments, holding that their "recourse is not to . . . disregard the narrowly drawn restrictions that the legislature has imposed on challenges to the planned release of records" by arguing "a statutory interpretation that diametrically contradicts the legislative limitations in both Wis. Stat. § 146.84 and § 19.356 and the legislative policy stated in §§ 19.31 and 19.356." *Id.* ¶ 45. Instead, the plaintiffs' "only recourse would be to ask the legislature to change that policy." *Id.*

B. The court of appeals' analysis was correct, and its decision is recommended for publication, leaving no work to do.

The court of appeals' decision need not be revisited by this Court.

1. The court of appeals correctly held that the plaintiffs have no legally protectable interest because the patient health care records law does not apply to them.

The court of appeals correctly held that the statutes upon which the plaintiffs relied to support their declaratory-judgment action do not give legal recognition to the interest they assert. *Wis. Mfrs. & Commerce*, ¶¶ 8, 13–33. In other words, the patient health care records law does not apply to the plaintiffs, and they cannot sue for an injunction under it. This is a straightforward statutory-interpretation question, and it is not a close call.

The plaintiffs sought an injunction under a statute that applies to *individual patients* and *their* records, not business trade associations alleging harm to their reputations. *See id.* ¶¶ 21–22. The plaintiffs have no right to an injunction under the patient health care records law. *Id.* ¶¶ 19, 23, 24.

Wisconsin Stat. § 146.82(1) states that "[a]ll patient health care records shall remain confidential." "Patient" means "a person who receives health care services from a health care provider." Wis. Stat. § 146.81(3). "Patient health care records" means "all records related to the health of a patient prepared by or under the supervision of a health care provider." Wis. Stat. § 146.81(4). "Health care provider" means practitioners that include nurses, chiropractors, dentists, physicians, physicians assistants, physical therapists, podiatrists, dieticians, etc. Wis. Stat. § 146.84(1)(a)–(s).

Wisconsin Stat. § 146.84 solely covers violations related to disclosures of patient health care records and provides a way to pursue relief. "Any person, including the state or any political subdivision of the state, who violates s.

146.82 or 146.83" knowingly or willfully "shall be liable to any person injured as a result of the violation for actual damages to that person, exemplary damages of not more than $25,000 and costs and reasonable actual attorney fees." Wis. Stat. § 146.84(1)(b). And, relevant here, "*[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, seek damages as provided in this subsection." Wis. Stat. § 146.84(1)(c).

Considering the law and the plaintiffs' allegations about the records DHS planned to release, the court of appeals correctly held that the plaintiffs have no legally protectable interest. *Wis. Mfrs. & Commerce*, ¶ 26.

First, the plaintiffs are not "patients" under the statute; they are business trade groups. *See id.* ¶¶ 21–22. The statute is about individual patient records.

Second, the plaintiffs are not individuals; they have no right to an injunction under Wis. Stat. § 146.84(1)(c), which allows only "[a]n individual" to bring an action to enjoin a violation of Wis. Stat. §§ 146.82 or 146.83. *See Wis. Mfrs. & Commerce*, ¶ 23.

Further, DHS is not a "health care provider" under the statute; it is a state agency that has records and provided no health care, especially not to the plaintiffs. The records are not even *the plaintiffs'* records; they are summaries of data that DHS compiled in response to records requests.

Thus, interpreting unambiguous provisions in chapter 146, the court of appeals correctly held that they do not apply to the plaintiffs and, therefore, cannot provide a legally protectable interest for a declaratory-judgment action. *See id.* ¶¶ 8, 13–33.

2. The court of appeals correctly held that Wis. Stat. § 19.356(1) bars the plaintiffs' claim.

The court of appeals correctly held that the plaintiffs' claim is barred by the public records law and that they pointed to no applicable statutory exception to the prohibition on their pre-release challenge. *Wis. Mfrs. & Commerce*, ¶¶ 8, 40–45. This statutory question also is not a close call.

The court of appeals appropriately quoted and applied this Court's *Moustakis* decision in reaching its conclusion that Wis. Stat. § 19.356(1) bars the plaintiffs' claim. *Id.* ¶ 43. The statutory language is plain and unambiguous: "Except as authorized in this section or otherwise provided by statute . . . no person is entitled to judicial review of the decision of an authority to provide a requester with access to records." Wis. Stat. § 19.356(1). There are exceptions found in Wis. Stat. § 19.356(2)(a) but, as the court held, the plaintiffs conceded they do not apply. *Wis. Mfrs. & Commerce*, ¶ 44.

The bottom line is that the plaintiffs "failed to identify a statute that could apply here." *Id.* The only statutes they identified were the patient health care records law in Wis. Stat. ch. 146 and the Declaratory Judgments Act, and the court of appeals explained why those laws do not provide an exception. *See id.* ¶¶ 8, 13–33. Thus, Wis. Stat. § 19.356(1) bars their claim. *See id.* ¶¶ 8, 40–45.

3. The court of appeals correctly held that the plaintiffs' allegations did not plausibly suggest a violation of applicable law.

The court of appeals correctly held that the plaintiffs failed to show that their member businesses have a legally protectable interest because it is implausible, based upon the

first amended complaint's allegations, that the release of records will impact their individual employees. *Wis. Mfrs. & Commerce*, ¶¶ 8, 34–39.

The court of appeals appropriately quoted and relied upon this Court's decision in *Data Key Partners* as the basis for its holding. *Id.* ¶¶ 34, 39. This Court has stated that "Data Key controls Wisconsin's pleading standard." *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 7, 386 Wis. 2d 515, 926 N.W.2d 756 (per curiam).

The linchpin is that "the [plaintiffs'] allegations do not 'plausibly suggest a violation of applicable law.'" *Wis. Mfrs. & Commerce*, ¶ 39 (quoting *Data Key Partners*, 356 Wis. 2d 665, ¶ 21). The first amended complaint had to plausibly suggest that DHS would violate the plaintiffs' rights. It did not because the allegations required a leap of logic that made such a violation implausible.

The complaint alleged only two "data points" in the disputed records: "there are over twenty-five employees at the business and there are at least two positive COVID cases or investigations by contact tracers among the employees." *Id.* ¶ 38. The court of appeals correctly held that those data points do not "reveal the actual size of each business or, more importantly, the chance (expressed as a percentage or otherwise) that someone could figure out from the list who was the 'patient' who allegedly had his or her rights under Ch. 146 violated." *Id.* That would be "sheer speculation." *Id.*

Under *Data Key Partners*, inferences from the allegations must be reasonable and plausibly suggest that the plaintiff is entitled to relief. *See Wis. Mfrs. & Commerce*, ¶ 34 (relying upon *Data Key Partners*, 356 Wis. 2d 665, ¶¶ 19, 31). The allegations did not meet this standard, so the court of appeals' alternative holding was correct.

* * *

The court of appeals' decision got the analysis right for the right reasons. It is recommended for publication. There is no work left to do. This Court should deny review.

II. The plaintiffs' legal theories are inconsistent with the law.

Second, this Court should deny the petition because the plaintiffs' legal theories are inconsistent with the law and would require an overhaul of declaratory-judgment jurisprudence. Their arguments contradict unambiguous confidentiality laws, would rewrite the rules of taxpayer standing, and ignore the public records law's direct limitation on who may seek judicial review of an authority's decision granting access to records.

A. The plaintiffs would have this Court rewrite declaratory-judgment law when the patient-specific confidentiality statutes they rely upon do not apply to them.

The plaintiffs would like this Court to address their first issue presented to reform declaratory-judgment law. (*See* Pet. 18–25.) The case is much simpler than that, and that is why this Court should deny review.

No justiciability or standing doctrine makes sense when a statute does not apply to you. That is basic. The plaintiffs would have this Court throw that concept out and replace it with a rule that taxpayer standing alone is sufficient for a declaratory judgment when the statute you rely upon does not apply to you. (*See* Pet. 20–25.) That would be a sea change in the law, and without foundation.

1. The plaintiffs would have this Court create a rule that taxpayer standing is a substitute for when a statute does not apply to that taxpayer.

The plaintiffs want this Court to supplant the "legally protectable interest" requirement and replace it with taxpayer standing.

This case primarily involves the third component of a justiciable declaratory-judgment action: the plaintiff must have a "legally protectable interest" in the controversy. *Papa v. DHS*, 2020 WI 66, ¶ 29, 393 Wis. 2d 1, 946 N.W.2d 17; (*see also* Pet. 2, 4, 18–25); *Wis. Mfrs. & Commerce*, ¶¶ 13–26. "Legally protectable interest" is synonymous with standing. *See Fabick*, 396 Wis 2d 231, ¶ 11.

In cases involving a statute—here, Wis. Stat. ch. 146—the phrase "legally protectable interest" "means interests protected by a statute or constitutional provision at issue." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 43, 333 Wis. 2d 402, 797 N.W.2d 789. "The essence of the question of standing in these cases . . . is whether there is an injury and whether the injured interest of the party whose standing is challenged falls within the ambit of the statute or constitutional provision involved." *Id.* ¶ 54. "In other words, the question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision." *Id.* ¶ 55.

The plaintiffs would have this Court set aside these bedrock principles. In their view, it would not matter if a statute applied to a plaintiff. Instead, they believe this Court should expand taxpayer-standing doctrine so that *any* Wisconsin taxpayer can challenge *any* state-government action even when the specific statute relied upon for his declaratory-judgment action does not protect him. (*See* Pet. 20–21.)

Fabick does not endorse this result, contrary to the plaintiffs' position. *Fabick* involved taxpayer standing in a

different context, and it did not blow a gaping hole in justiciability doctrine.

First, *Fabick* does not address a standing scenario like the one here. The plaintiffs assert that a statutory scheme underlies their claim, and that scheme pertains to patient health care records. (*See* Pet. 8, 29–30.) Where, as here, an analysis of the statute reveals that the plaintiffs are not covered by it—that the law has nothing to do with protecting business trade associations or their members—then it follows that the plaintiffs lack standing. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶¶ 43, 54, 55.

Fabick does not address this kind of statutory scheme or interpretive framework, but rather addresses the Governor's emergency powers. *Fabick*, 396 Wis 2d 231, ¶ 11. It does not, as the plaintiffs suggest, hold that a relevant statutory scheme is ignored when a plaintiff asserts taxpayer standing. (*See* Pet. 20 (arguing that taxpayer standing is an "independent path" to justiciability).) It did not overrule *Foley-Ciccantelli* or the line of cases that require interpreting a statute's legally protectable interests, where a particular statute's coverage is at issue.

Unsurprisingly, the plaintiffs have cited no case where a plaintiff was plainly outside the relevant statutes' zone of interests but still had taxpayer standing. That makes logical and legal sense. Where a statute creates the sphere of coverage in the first place, the statutory scope should govern. Were it otherwise, *Foley-Ciccantelli* and the cases that rely on its sound principles would be nullities, as a plaintiff would simply turn to taxpayer standing in every case, ignoring the statutes he says apply to him. Put differently, the plaintiffs ask this Court to ignore the binding precedent that the "substantive statutory . . . provisions . . . govern standing." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 54.

Second, even if taxpayer standing mattered here, the plaintiffs would not meet its basic requirements. To retain any meaning, taxpayer standing requires that a bona fide expenditure be at issue. That held true in *Fabick*.

There, this Court relied on a bona fide expenditure: "[T]he National Guard had been deployed pursuant to the emergency declarations. *This expenditure of taxpayer funds* gives Fabick a legally protected interest to challenge the Governor's emergency declarations." *Fabick*, 396 Wis 2d 231, ¶ 11 (emphasis added). In particular, when the case began, "Wisconsin taxpayers [had] the responsibility to fund 25 percent of the National Guard forces deployed in response to COVID-19," and money indeed had been spent in that manner. *Id.* ¶ 11 n.5. Thus, "under the circumstances of [that] case," there was taxpayer standing. *Id.* That is nothing like this case. No taxpayer funds have been designated for a new expenditure.

Fabick does not hold that any activity undertaken by government employees to implement a governmental decision is enough to confer taxpayer standing. Instead, *Fabick* confirms that there must be a bona fide government expenditure—actually spending money on something in the world that concretely affects taxation.

Lastly, standing is not the only problem with the plaintiffs' case. While standing is dispositive, Wis. Stat. § 19.356(1) provides a second, standalone reason that the plaintiffs' case was properly dismissed. This is different from *Fabick*. Thus, this case is a poor vehicle to request that this Court upend declaratory-judgment doctrine and grow the taxpayer-standing rule when there is a separate, sufficient reason why the case fails as a matter of law.

2. The plaintiffs would have this Court revisit the pleading-standard law in *Data Key Partners* that the court of appeals correctly applied.

The plaintiffs would like this Court to reevaluate *Data Key Partners* and its clear standards because their first amended complaint is insufficiently pled. (*See* Pet. 25–29.) That would be a mistake.

When reviewing a motion to dismiss, "factual allegations in the complaint are accepted as true for purposes of" review. *Data Key Partners*, 356 Wis. 2d 665, ¶ 18. A court "accept[s] as true all facts well-pleaded in the complaint and the *reasonable* inferences therefrom." *Id.* ¶ 19 (emphasis added). In other words, *un*reasonable inferences are not accepted when determining whether a complaint states a claim upon which relief can be granted. *See id.* The plaintiff "must allege facts that, if true, plausibly suggest a violation of applicable law." *Id.* ¶ 21.

The court of appeals applied these principles. It held that to find that the plaintiffs' complaint stated a viable claim would require that *un*reasonable inferences be accepted about whether disclosing the disputed records leads to the identification of patients. *See Wis. Mfrs. & Commerce*, ¶ 38. That inference requires "sheer speculation," *id.*, that the court was unable to engage in under *Data Key Partners*. *Id.* ¶ 39.

This Court should not revisit *Data Key Partners'* "plausibility" standard because the plaintiffs' first amended complaint was insufficiently pled.

3. The plaintiffs misunderstand the court of appeals' footnote 9 dicta regarding information within records, which was consistent with precedent.

The plaintiffs argue that the court of appeals erred when it addressed that information within a patient health care record (as opposed to the record itself) is not confidential. (*See* Pet. 29–32.) But that is not what the court of appeals held. The plaintiffs' misunderstanding of the court of appeals' footnote 9 dicta is not a reason to grant review. And what the court stated is consistent with precedent.

Reading all of footnote 9 is necessary to understand the plaintiffs' lapse:

> We also question whether the information that is alleged to be released constitutes one or more patient health care records protected by Wis. Stat. §§ 146.82 and 146.83. The term "patient health care records" means "all records related to the health of a patient prepared by or under the supervision of a health care provider[.]" Wis. Stat. § 146.81(4). *We have ruled that the statutory definition does not encompass information that is merely derived from a record. See State v. Thompson*, 222 Wis. 2d 179, 188, 585 N.W.2d 905 (Ct. App 1998) ("By its terms, the statute applies to only records...."); *State v. Straehler*, 2008 WI App 14, ¶¶ 16, 19–20, 307 Wis. 2d 360, 745 N.W.2d 431 (following *Thompson* ruling that Wis. Stat. § 146.82 "does not reach beyond protection of health care records"). *We express no view as to whether some other scenarios might present a close question as to whether the content of released information so closely matches the content of a record that the release of the information is the functional equivalent of release of the record*. In any case, we are not presented with a close case here. At a minimum, the statutory definition of patient health care records could not encompass lists of names of businesses accompanied by the numbers *at issue here*.

Wis. Mfrs. & Commerce, ¶ 24 n.9 (emphasis added).

The plaintiffs selectively quoted this footnote in their petition for review, leaving out key language. (*See* Pet. 15, 31.) As the emphasized text shows, the court of appeals "express[ed] no view" regarding the release of information contained in a record generally. *Id.* Instead, the court *specifically* held that "the statutory definition of patient health care records could not encompass lists of names of businesses accompanied by the numbers *at issue here*." *Id.* (emphasis added). Thus, the plaintiffs read footnote 9 as more than it is, rendering hollow their rhetoric about "massive and devastating consequences for medical privacy." (Pet. 32.)

Further, the court of appeals' dicta in footnote 9 is supported by *Thompson*, *Straehler*, and a third decision, *Wall v. Pahl*, 2016 WI App 71, 371 Wis. 2d 716, 886 N.W.2d 373. In *Wall*, the court of appeals held that the definition of "patient health care record" in Wis. Stat. § 146.81(4) "has three salient facets." *Id.* ¶ 28. "First, a patient health care record must be a 'record.' The statutory definition does not encompass mere information that is not reduced to a record." *Id. Wall* was discussed during oral argument in the court of appeals, and it is consistent with footnote 9.

In sum, the plaintiffs misread the court of appeals' footnote 9 dicta, which is consistent with precedent. It provides no reason for this Court's review.

B. Wisconsin Stat. § 19.356(1)'s limitation on who may seek pre-release review of a decision granting access to records is clear, and this Court recently interpreted it in *Moustakis*.

The plaintiffs argue that this Court should take up their second issue presented regarding Wis. Stat. § 19.356(1)

(*see* Pet. 33–37), but that is unnecessary. This Court interpreted section 19.356(1) recently in *Moustakis*, and the statute is clear, particularly as applied to the plaintiffs.

The plaintiffs discuss *Woznicki* and *Milwaukee Teachers' Education Association* (Pet. 33), but those cases have little relevance when Wis. Stat. § 19.356(1) "narrow[ed] and codif[ied] the notice and judicial review rights" from those cases. *Schill v. Wis. Rapids Sch. Dist.*, 2010 WI 86, ¶ 42, 327 Wis. 2d 572, 786 N.W.2d 177. In other words, *the statute* governs pre-release judicial review, not two decisions that were abrogated by the statute.

Moustakis addressed Wis. Stat. § 19.356(1) in some detail, and this Court decided the case just five years ago. This Court confirmed that "subject to three narrow exceptions, 'no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record.'" *Moustakis*, 368 Wis. 2d 677, ¶ 24 (citation omitted). And the statute is clear enough that it does not need this Court's further review.

"[N]o person is entitled judicial review of the decision of an authority to provide a requester with access to a record," except in limited circumstances: (1) "as authorized in this section [i.e., 19.356], or (2) "as otherwise provided by statute." Wis. Stat. § 19.356(1). The plaintiffs have not argued that (1) applies. And, as for (2), the court of appeals' decision resolved that question. Neither the Declaratory Judgments Act nor chapter 146 "otherwise provid[e]" a cause of action. *See Wis. Mfrs. & Commerce*, ¶ 45. Accordingly, there is no reason for this Court to take up the plaintiffs' second issue, either.

III. Delay would harm the public interest by preventing responses to requests that have been postponed for months.

Finally, granting review would delay responses to valid public records requests. This would further harm the public interest when the law requires that responses be provided "as soon as practicable and without delay," Wis. Stat. § 19.35(4)(a), and DHS intended to comply.

Some of the public records requests here were made in March, May, and June 2020. (R. 19:1, 3–4.) DHS planned to issue responses on October 2, 2020. (R. 37:5 ¶ 2.) If this Court grants review, this case is likely to be argued in fall 2021 or winter 2022, and a decision could be released as late as July 2022, at the close of the 2021–22 term. That would be a significant delay caused by a case that should have been dismissed at the outset. It would contradict the public policy of the public records law. *See* Wis. Stat. §§ 19.31, 19.35(4)(a); *Wis. Mfrs. & Commerce*, ¶ 43.

This Court should deny the petition to avoid more delay caused by the plaintiffs. If the court of appeals got it right for the right reasons, there is no reason to harm the public interest by delaying responses to the requests.

CONCLUSION

This Court should deny the petition for review.

Dated this 18th day of May 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response in opposition conforms to the rules contained in Wis. Stat. §§ (Rule) 809.19(8)(b) and 809.62(4) for a brief produced with a proportional serif font. The length of this response is 5848 words.

Dated this 18th day of May 2021.

CLAYTON P. KAWSKI
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. §§ (RULE) 809.19(12) and 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this response in opposition, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rule) 809.19(12) and 809.62(4)(b).

I further certify that:

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

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

Dated this 18th day of May 2021.

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