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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

Nos. 2020AP2081-AC & 2020AP2103-AC

OPENING BRIEF OF WISCONSIN MANUFACTURERS AND COMMERCE, MUSKEGO AREA CHAMBER OF COMMERCE, AND NEW BERLIN CHAMBER OF COMMERCE AND VISITORS BUREAU

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INTRODUCTION

The pandemic's persistence has only elevated the significance of the question at the heart of this case, and it is one that this Court someday will need to answer: When, if ever, do private patient files, which typically must remain confidential, become public records, which normally must be released? In particular, is the State free to publish in bulk patient-identifiable information derived from Wisconsinites' medical records (here in the form of lists of employers with two or more workers diagnosed with COVID-19) where the circumstances of the release "would permit the identification of [ ] patient[s]," Wis. Stat. § 146.82(2)(a)20, and, if done by a "covered entity," would violate HIPAA.[1] Plaintiffs will prove, on remand, that that answer is no.

For now, though, we are merely at the pleading stage. So the question is this: Have Plaintiffs alleged facts that, if taken to be true, at least *plausibly suggest* that they have standing to pursue a declaratory judgment on their merits theory? Answering yes will not require this Court to decide whether the Plaintiffs (hereinafter, "the Associations") will ultimately prevail. Nor will it require this Court to decide whether the Associations will still have standing at later stages of the litigation (such as at summary judgment).

The court of appeals erred in many respects. First, and most fundamentally, it evaluated the sufficiency of the Associations' complaint under a plainly incorrect standard. The court thought its job was to assess not only whether the Associations' *legal theories* are

[1] HIPAA stands for the Health Insurance Portability and Accountability Act.

plausible, which is correct, but also whether their *factual allegations* are plausible, which is wrong.

Compounding that mistake, the court asserted that only individual patients can potentially challenge the release of *their own* records. This cannot be. 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 medical-records 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 District IV 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 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 justifies 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 the 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 the 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.

Because the appellate 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 Section 146.82 contrary to its plain text, the decision should be reversed. This matter should then be remanded to the trial court so that the Associations may build their case and prove their claims.

ISSUES PRESENTED

1. Whether, at the pleading stage, 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.

This Court should answer yes.

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." (emphasis added).

The circuit court answered yes.

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

This Court should answer yes.

ORAL ARGUMENT AND PUBLICATION

By granting review, this Court has indicated that this case is appropriate for oral argument and publication.

STATEMENT OF THE CASE

On July 1, 2020, media outlets 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.[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.090–95. The State reversed course, announcing that it decided not to publish the

[2] M.D. Kittle, *BREAKING*: *Evers' DHS outing businesses with COVID cases*, Empower Wisconsin (July 1, 2020), https://tinyurl.com/ys6pwps9.

information.[3] Indeed, Governor Evers admitted that the information was "not public" and that posting it would raise "privacy issues."[4]

Later that month, however, the State changed its position again. Defendant Joel Brennan informed WMC that, in response to public-records requests, the State 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. 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 "patient health care records," which must be kept confidential under Wis. Stat. § 146.82. R.4. The Associations also explained that releasing employer names would violate the privacy of numerous Wisconsin citizens and further damage its business community, including the Associations' members. R.4.

That afternoon, the circuit court issued an *ex parte* temporary restraining order and set a motion hearing. R.13; 20. At the hearing, the circuit court granted the Journal Sentinel's motion to intervene, set a briefing schedule and hearing, and extended the temporary restraining order to the hearing date. R.22; 24; 26. Both the State and the Journal

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[3] 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), App.084–88.

[4] 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), https://tinyurl.com/3hn52hze.

[5] All record citations are to the record in case number 2020AP2103-AC.

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 dismissal and in support of a temporary injunction. R.36; 37, App.061–79.

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 case contacts that were investigated by contact tracers," that the State "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.072. 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.066. In particular, the Associations alleged that "[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.072.

The Associations further alleged that "releasing a patient's employer's name" would "permit identification of the patient," including because an employer's name is "patient-identifiable data." App.073. 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.073. 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.074.

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.066. The Associations alleged that "Defendants' planned disclosure will irreparably harm [the Associations'] members by effectively blacklisting them and permanently harming their reputations." App.075. 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.075. 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.076. 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.076.

Additionally, the Associations alleged that either they or their members are Wisconsin taxpayers, App.065–68, 074, and 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.075. 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.075. 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.075. 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.075; *see also* App.066–68.

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.032–60. The court held that the Associations had standing to bring this declaratory-judgment action under the zone-of-interests theory and that the action was justiciable. App.029–47. The court further held that the Associations had satisfied the criteria for a temporary injunction. App.034–52. The court entered written orders on December 4. App.055–60.

On December 12, the Associations filed a motion for leave to file a Second Amended Complaint and proposed Second Amended Complaint. R.77; 78. The proposed Second Amended Complaint adds claims from 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. The individual plaintiffs seek an injunction under 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.

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. 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 Commerce v. Tony Evers*, No. 2020AP2103-AC.[6] 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, consolidated the appeals, and set the case for accelerated briefing. *See* Order, *Wisconsin Manufacturers*

[6] Although the State appealed the circuit court's temporary injunction order, the State made no argument in the court of appeals relating to the temporary-injunction factors. *See generally* State's Opening Br. 11–34, *WMC v. Evers*, Nos. 2020AP2081 & 2020AP2103 (Wis. Ct. App. Feb. 17, 2021); State's Reply Br. 1–10, *WMC v. Evers*, Nos. 2020AP2081 & 2020AP2103 (Wis. Ct. App. March 12, 2021); *see also Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶ 93, 393 Wis. 2d 38, 946 N.W.2d 35 (describing the test for a temporary injunction). Any argument relating to the circuit court's application of these factors is therefore forfeited. *See In re Termination of Parental Rts. to Darryl T.-H.*, 2000 WI 42, ¶ 37 n.5, 234 Wis. 2d 606, 610 N.W.2d 475.

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.030.

On the first issue presented, the court of appeals held that the medical-records statutes, Wis. Stat. §§ 146.82 to .84, do not provide the Associations or their members with a legally protectable interest. App.014–22. In particular, the court held that these statutes "protect [only] the rights of . . . individual patients," App.019 (emphasis omitted), and that the information to be released was "merely derived from" health care records and therefore did not fall under the protection of Section 146.82, App.021 n.9.

The court further 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." App.022. When confronted with this Court's decision in *Fabick v. Evers*, 2021 WI 28, 396 Wis. 2d 231, 956 N.W.2d 856, the court of appeals did not alter its holding, but instead explained that "the Associations' reliance on any of the three standing doctrines . . . would fail on its merits." App.023. As to taxpayer standing, the court held that the Associations' complaint fails to "show that the government action that it seeks a court order to enjoin is 'unlawful.'" App.024. As to zone of interests, the court reiterated that the medical-records statutes "fail to provide the Associations' member businesses with a legally protectable interest." App.024. Finally, the court was "not persuade[d] . . . that judicial economy or judicial policy

require that courts adjudicate the issue [the Associations] raise here." App.024–25.

The court also 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.025. The court opined that "the list by itself, considered in isolation, does not permit anyone to reasonably identify any of the employees or 'patients,'" App.026, despite the fact that both state and federal law treat an employer's name as personally identifiable information, App.073 (citing state and federal law), a fact that the court did not address. *See generally* App.025–27. The court rejected as implausible the Associations' factual allegation that there is a "relatively small number of employees at any given facility," App.026, and declined to address the Associations' allegations that the planned release constitutes an unlawful redisclosure of records under Wis. Stat. § 146.82(5). *See* App.016 n.6, 068–69.

Finally, the court addressed the second issue presented: whether Wis. Stat. § 19.356 prohibits declaratory-judgment actions regarding the lawfulness of a public-records release. App.028–30. 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.029.

The Associations petitioned this Court for review, which this Court granted.

STANDARD OF REVIEW

This Court reviews de novo "[w]hether a complaint states a claim upon which relief can be granted." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 17, 356 Wis. 2d 665, 849 N.W.2d 693. This Court "accept[s] as true all facts well-pleaded in the complaint and the reasonable inferences therefrom." *Id.* ¶ 19. "Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law." *Id.* ¶ 21.

Similarly, this Court reviews de novo the question of whether a party has standing. *See State v. Popenhagen*, 2008 WI 55, ¶ 23, 309 Wis. 2d 601, 749 N.W.2d 611. As with review of whether a complaint states a claim, when reviewing a challenge to standing as alleged in the complaint, this Court "take[s] all facts alleged . . . to be true." *McConkey v. Van Hollen*, 2010 WI 57, ¶ 14 n.5, 326 Wis. 2d 1, 783 N.W.2d 855. Likewise, "a plaintiff must plead sufficient factual allegations, taken as true, that 'plausibly suggest' each . . . element[ ]" of standing. *Berger v. Nat'l Collegiate Athletic Ass'n*, 843 F.3d 285, 289 (7th Cir. 2016);[7] *accord Data Key Partners*, 356 Wis. 2d 665, ¶ 21 ("Plaintiffs must allege facts that, if true, plausibly suggest a violation of applicable law.").

[7] While this standard comes from federal law, this Court "looks to federal case law as persuasive authority regarding standing questions." *McConkey*, 326 Wis. 2d 1, ¶ 15. The Supreme Court has explained that standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), and therefore "it follows that the *Twombly-Iqbal* facial plausibility requirement for pleading a claim is incorporated into the standard for pleading" standing. *Silha v. ACT, Inc.*, 807 F.3d 169, 173–74 (7th Cir. 2015).

ARGUMENT

I. THIS CONTROVERSY IS JUSTICIABLE UNDER THE UNIFORM DECLARATORY JUDGMENTS ACT FOR THREE INDEPENDENTLY SUFFICIENT REASONS

The Uniform Declaratory Judgments Act (DJA) liberally permits plaintiffs to seek judicial relief before suffering an injury. It states that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." Wis. Stat. § 806.04(1). Enacted in 1927 and remaining largely unchanged today, *compare* Wis. Stat. § 806.04, *with* Chapter 212, Laws 1927, the Act "provides a remedy which did not exist prior to its enactment except in a limited number of cases," namely "[j]udicial relief . . . without the necessity of prior violence." *State ex rel. La Follette v. Dammann*, 220 Wis. 17, 264 N.W. 628, 629 (1936). It is "to be liberally construed and administered." Wis. Stat. § 806.04(12); *see also Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 42, 309 Wis. 2d 365, 749 N.W.2d 211. "[I]ts purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Wis. Stat. § 806.04(12). Thus, the DJA's "underlying philosophy . . . is to enable controversies of a justiciable nature to be brought before the courts for settlement and determination prior to the time that a wrong has been threatened or committed." *Olson*, 309 Wis. 2d 365, ¶ 28 (citation omitted).

This Court has distilled justiciability under the DJA into a four-factor test. *Dammann*, 264 N.W. 629 (citing Edwin Borchard, *Declaratory Judgments* 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). The third requirement of this test—"legally protectable interest"—is "voiced in terms of standing," *Fabick*, 396 Wis. 2d 231, ¶ 11, and it is the only factor disputed here, *see* R.21:4–8; 30:4, 13–18.

In general, "[s]tanding is the aspect of justiciability that focuses on the qualifications of the party bringing the suit." *Frank Rosenberg, Inc. v. Tazewell Cnty.*, 882 F.2d 1165, 1168 (7th Cir. 1989); *see also Flast v. Cohen*, 392 U.S. 83, 98 (1968) ("Standing is an aspect of justiciability."). "[T]he gist of the requirements relating to standing . . . is to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of [legal] questions." *Moedern v. McGinnis*, 70 Wis. 2d 1056, 1064, 236 N.W.2d 240 (1975); *accord Baker v. Carr*, 369 U.S. 186, 204 (1962).

In Wisconsin, standing is a low bar. Indeed, it is not even a bar. *McConkey*, 326 Wis. 2d 1, ¶ 15 ("standing in Wisconsin is not a matter of jurisdiction [or competency], but of sound judicial policy"). "Under Wisconsin law, standing 'should not be construed narrowly or restrictively,' but rather should be construed broadly in favor of those seeking access to the courts." *Popenhagen*, 309 Wis. 2d 601, ¶ 24. Thus,

"even an injury to a trifling interest" can confer standing. *McConkey*, 326 Wis. 2d 1, ¶ 15 (citation omitted).

This Court has adopted at least three independent tests under which a plaintiff may satisfy standing and thereby demonstrate justiciability under the DJA. First, a plaintiff can satisfy taxpayer standing. *See Fabick*, 396 Wis. 2d 231, ¶ 11. Second, a plaintiff can establish standing under the zone-of-interests test. *See City of Madison v. Town of Fitchburg*, 112 Wis. 2d 224, 228–32, 332 N.W.2d 782 (1983). Finally, a plaintiff has standing when she satisfies the judicial policy purposes underlying the standing doctrine. *See McConkey*, 326 Wis. 2d 1, ¶¶ 17–18.

For its part, and contrary to this Court's precedents, the court of appeals concluded that establishing a legally protectable interest for purposes of a DJA suit and establishing standing are different things. This would mean that, as the court put it, the "legally protectable interest" element of justiciability *cannot* be "satisfied by any one of the three doctrines of standing: taxpayer, zone of interests, and judicial policy." App.022 Instead, in the court's view, justiciability requires a "statutory or constitutional provision" that directly confers a "legally protectable interest" upon the plaintiff, or else the DJA offers her no remedy. App.019–23. This is patently wrong for several reasons.

To begin, it is well settled that there need not be a statutory or constitutional provision at issue *at all* in a DJA case. In fact, DJA actions are commonly pursued by parties to contracts who seek orders from courts clarifying their rights and obligations *under their agreements*. *See, e.g.*, *Elliott v. Donahue*, 169 Wis. 2d 310, 323–24, 485 N.W.2d 403 (1992); *Loy*, 107 Wis. 2d at 401–02. Under the court's curious view, however,

these extremely common DJA cases are inappropriate. That cannot be correct.

What is more, the court of appeals' view flies in the face of the bedrock principle, which this Court has reiterated time and time again, that the "legally protectable interest" prong of justiciability is "voiced in terms of standing." *Fabick*, 396 Wis. 2d 231, ¶ 11; *see also id*. ¶ 92 (A.W. Bradley, J., dissenting) ("a legally recognized interest in [a] case . . . is called 'standing'"); *Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc.*, 2011 WI 36, ¶ 47, 333 Wis. 2d 402, 797 N.W. 2d 789 (lead op.) ("[T]he concepts of standing and justiciability (a legally protectable interest) have been viewed as overlapping concepts in declaratory judgment cases."). In fact, decades' worth of precedents confirms that standing and a legally protectable interest under the DJA are the same thing. *See Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶¶ 37–40, 244 Wis. 2d 333, 627 N.W.2d 866; *City of Madison*, 112 Wis. 2d at 228; *Tooley v. O'Connell*, 77 Wis. 2d 422, 438, 253 N.W.2d 335 (1977). Indeed, if establishing a "legally protectable interest" for purposes of the DJA is not the same as establishing "standing," then the DJA's four-factor test for justiciability would fail to require any showing of standing *at all*, notwithstanding that "[s]tanding" is a critical "aspect of justiciability," *Flast*, 392 U.S. at 98, since none of the remaining factors arguably embodies standing. The court of appeals' reasoning, in other words, proves too much.

Under this Court's precedents, the Associations have plausibly alleged standing—and, therefore, a justiciable controversy—under any one of the three tests, at this early pleading stage of the litigation.[8]

A. The Associations Have Taxpayer Standing

1. A taxpayer-plaintiff adequately alleges taxpayer standing when it plausibly alleges an unlawful government expenditure. Taxpayers "have a financial interest in public funds which is akin to that of a stockholder in a corporation." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee,* 15 Wis. 2d 15, 22, 112 N.W.2d 177 (1961). "Any illegal expenditure of public funds directly affects taxpayers and causes them to sustain a pecuniary loss." *Id.*[9] This occurs any time the government

[8] The Associations bring claims on behalf of themselves and their members, *see* App.065–69, and therefore invoke associational standing, which they have adequately alleged and which is undisputed here. Associational standing requires an organization asserting a claim on behalf of its members to allege "facts sufficient to show that a member of the organization would have had standing to bring the action in his own name," *Wis. Env'l Decade, Inc. v. Pub. Serv. Comm'n*, 69 Wis. 2d 1, 20, 230 N.W. 2d 243 (1975), that "the interests at stake in the litigation are germane to the organization's purpose[,] . . . and . . . neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit," *Munger v. Seehafer*, 2016 WI App 89, ¶ 54, 372 Wis. 2d 749, 890 N.W.2d 22 (citation omitted). Here, the Associations alleged that the purpose of each organization is to represent the interests of their member businesses and (by extension) their employees, to support area businesses generally, and to create a community and environment hospitable to businesses, which purposes are germane to the interests asserted here—preventing pecuniary losses to taxpayers, including the Associations' members, and protecting the Associations' members form unlawful reputational harm. App.067–69. Moreover, the Associations' claims will not require any evidence or testimony from any members, nor does the relief requested require participation of any member. Finally, as explained below, the Associations' members would have standing to bring this action in their own names because they satisfy any of the three tests for standing.

[9] This differs from federal law, which requires a "logical nexus" between a taxpayer's status as taxpayer and the claim raised. *See Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 78–79 (1978).

expends resources undertaking an unlawful course of action. *See Fabick*, 396 Wis. 2d 231, ¶ 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.[10] Of course, at the pleading stage, the plaintiff need not (and often cannot) *prove* that its merits theory is correct, which would in turn confirm that the taxpayer expenditure is unlawful. Instead, to plead taxpayer standing sufficiently at the dismissal stage, a plaintiff need only allege facts that *plausibly suggest* that the government's expenditure of resources is unlawful. *See Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶¶ 17–18, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds* 2018 WI 63; *Data Key Partners*, 356 Wis. 2d 665, ¶ 21. This is a far cry from proving its entire case, which is seemingly what the court of appeals would require.

2. The Associations here have adequately alleged taxpayer standing. First, the Associations alleged that either they (in the case of WMC) or their members (in the case of all three associations) are Wisconsin taxpayers and that the State has expended and will continue to expend "time and resources" to "collect, review, and release" these records, which involves the "expenditure of public funds" that "the government will not fully recoup." App.075.[11] Second, as explained in the next paragraphs, the Associations alleged facts plausibly suggesting that

[10] This, too, differs from federal law, which applies taxpayer standing only when Congress has exercised its constitutional taxing and spending power. *See Hein v. Freedom From Religion Foundation, Inc.*, 551 U.S. 587, 604 (2007).

[11] The Associations also alleged that "Defendants' unlawful actions will expose the State to liability for damages, which are paid out of the public fisc. And defending against claims for damages arising out of this unlawful action will again require government employees to expend time and resources, which resources cannot be recovered." App.075.

this expenditure was and is unlawful. *See Voters with Facts*, 376 Wis. 2d 479, ¶¶ 16–18.

Section 146.82(1) of the Wisconsin Statutes requires that "[a]ll patient health care records shall remain confidential." The statute then permits the release of such records in only limited circumstances. Wis. Stat. § 146.82. If a person discloses "information" required to remain confidential under Section 146.82, then that person is subject to various civil and criminal penalties. *See* Wis. Stat. § 146.84. The statutes define "patient health care records" as, among other things, "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). The term "health care provider," in turn, encompasses myriad medical professionals, including a "nurse," "physician," "physician assistant," "pharmacist," a "partnership," "corporation or limited liability company" "of any [such] providers," a "rural medical center," or an "inpatient health care facility." Wis. Stat. § 146.81(1). Moreover, the Department of Health Services must treat reports of "communicable diseases" received from local health officers "as patient health care records under [Sections] 146.81 to 146.835." Wis. Stat. § 252.05(6). These reports include reports from laboratories' "specimen results that indicate that an individual providing the specimen has a communicable disease." Wis. Stat. § 252.05(2).

The Associations alleged facts plausibly suggesting that the Defendants' planned release would violate these medical-records statutes, Wis. Stat. §§ 146.82 and .84. 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.066. In particular, "[i]nformation about whether an

employee of a facility has tested positive for COVID-19" comes from "medical diagnostic tests." App.072. These allegations plausibly suggest a violation of the medical-records statutes. The results of "medical diagnostic tests" are plausibly "related to the health of a patient" and "prepared by or under the supervision of a health care provider," and therefore plausibly fall under the definition of health care records. Wis. Stat. § 146.81(1), (4). Moreover, the results of diagnostic tests for a communicable disease and the "records of contact tracers" plausibly come from reports of local health officers, which reports must be treated as health care records under Wis. Stat. § 252.05. Thus, release of the information would violate Section 146.82's requirement that "[a]ll patient health care records shall remain confidential."

The Associations also alleged facts plausibly suggesting that the planned release did not fall under the exception in Section 146.82 that allows for release where "the patient health care records do not contain information and the circumstances of the release do not provide information that would permit the identification of the patient." Wis. Stat. § 146.82(2)(a)20. To "permit" means "to make possible." *Permit*, Merriam-Webster;[12] *Permit*, Lexico by Oxford;[13] *see State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 53, 271 Wis. 2d 633, 681 N.W.2d 110. The Associations alleged that "a patient's employer's name" "is classified in other statutes as 'patient-identifiable data.'" App.073 (citing Wis. Stat. § 153.50(1)(b)1.i. and 45 C.F.R. § 164.514(b)). More, "[g]iven

[12] https://www.merriam-webster.com/dictionary/permit.

[13] https://www.lexico.com/en/definition/permit.

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.073.[14] Thus, the Associations alleged facts at least plausibly *suggesting*—not necessarily *showing* or *proving*, which will come later—that Defendants' planned release would permit, or make possible, the identification of patients and would therefore fall outside the exception to confidentiality in Section 146.82(2)(a)20.[15]

The Associations therefore adequately alleged that the Defendants' planned course of action was and is unlawful. And because, according to the Associations' allegations, the Defendants expended and would continue to expend public funds engaging in this unlawful course

[14] Indeed, that is why HIPAA presumptively forbids most entities from doing exactly what DHS is proposing here. HIPAA protects "individually identifiable health information" by prohibiting its disclosure except in certain circumstances. *See* 45 C.F.R. §§ 164.502 (prohibiting disclosure of "protected health information"), 160.103 (defining "protected health information" as certain "individually identifiable health information"). "A covered entity may determine that health information is not individually identifiable health information only if" it removes, among other things, "employer" "identifiers," or if a particularly qualified expert shows that identification was very unlikely. *See* 45 C.F.R. § 164.514 (b). Thus, a patient's employer's name presumptively cannot be disclosed under HIPAA, unless an expert finds that patient identification would be very unlikely.

[15] Even if Section 146.82(2)(a)20's exception applied, the Associations also alleged facts plausibly suggesting that the Defendants' planned release violated Section 146.82(5)(c)'s limitations on the redisclosure of confidential information. That section provides that one who is not a "covered entity" under HIPAA "may redisclose a patient health care record it receives" only with consent, under a court order, or if "[t]he redisclosure is limited to the purpose for which the patient health care record was initially received." Wis. Stat. § 146.82(5)(c). Here, the Associations alleged that the Defendants received the records "for the purpose of communicable-disease surveillance," and that releasing the records in response to public-records requests "is not communicable disease surveillance." App.074. These allegations plausibly suggest that the planned release violates the redisclosure provisions of Section 146.82(5)(c). *See* App.073–74.

of action, the Associations adequately alleged taxpayer standing. *See Fabick*, 396 Wis. 2d 231, ¶ 11 & n.5; *Coyne*, 361 Wis. 2d 225, ¶¶ 12–13.

3. The court of appeals concluded that the Associations lack taxpayer standing, but its reasoning errs in several respects.

Start with its assertion that one of the Associations' key factual claims—that release of the information will permit patient identification—is "implausible" and therefore can be disregarded at the pleading stage. App.025 ("the Associations do not allege plausible facts supporting a reasonable inference" that the release would "permit the identification of patients"). This gets the law exactly backwards. In truth, the "implausibility" standard does not apply to facts; it applies to pleaded legal theories. Alleged facts, in stark contrast, must be accepted as true, whether "plausible" in the court's view or not. Hence the familiar standard holds that courts must "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. *E.g.*, *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*, 393 Wis. 2d 38, ¶ 26; *Voters with Facts v. City of Eau Claire*, 2018 WI 63, ¶ 27, 382 Wis. 2d 1, 913 NW.2d 131. Normally, the court of appeals also follows this rule, *see, e.g.*, *Jama v. Gonzalez*, 2021 WI App 3, ¶ 14, 395 Wis. 2d 655, 954 N.W.2d 1; *State ex rel. Zecchino v. Dane Cnty.*, 2018 WI App 19, ¶ 8, 380 Wis. 2d 453, 909 N.W.2d 203—which also applies to allegations going to standing just the same as allegations going to the merits, *Chenequa Land Conservancy*,

Inc. v. Village of Hartland, 2004 WI App 144, ¶ 18, 275 Wis. 2d 533, 658 N.W. 2d 573.[16]

Plausibility analysis comes in when assessing whether the complaint's assumed-to-be-true facts state a claim for relief. Here 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 *allegations themselves*. 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.072–73.[17] And, while 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

[16] The court's novel "plausible facts" rule resembles the summary-judgment standard, which requires allegations to rest on a factual showing. *See Racine Cnty. 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.

[17] 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).

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 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.[18]

On top of its procedural error, the court of appeals also made a significant substantive error, holding—for the first time in Wisconsin—that, as a matter of law, information *within* patient health care records (as opposed to the records themselves) is not confidential. For this reason, according to the court, the Associations lack taxpayer standing, since they cannot show that any of the challenged government activity undertaken at taxpayer expense is unlawful. This conclusion, too, is plainly wrong.

The law states that "[a]ll patient health care records shall remain confidential." Wis. Stat. § 146.82(1). A record may be released, however, "with the informed consent of the patient or of a person authorized by

[18] Regarding those consequences, experts in the HIPPA 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).

the patient." Wis. Stat. § 146.82(1). Critically, the statutes define "[i]nformed 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 her 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." 2021 WI App 29, ¶ 40, -- Wis. 2d --, 961 N.W.2d 97 (Stark, J., concurring) (emphasis added). Indeed, the medical-records statutes provide penalties for those who fraudulently "[r]equest[ ] or obtain[ ] confidential *information* under [Section] 146.82," and for those who "[d]isclose[ ] confidential *information* in violation of [Section] 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 patient health care records is, somehow, *not* confidential. App.021 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(1) requires that "[a]ll patient health care records shall remain confidential," that confidentiality does not extend to "information that is merely derived from a [patient health care] record." App.021 n.9.[19] The exception swallows the rule.

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. Even the State admits, in other litigation, that this is not 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 the

[19] 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.021 n.9. *State v. Thompson*, 222 Wis. 2d 179, 188, 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. 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, ¶ 20, 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 Section 146.82. 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.

government "cannot make protected information disclosable simply by transferring it to another record or compiling it in a database").

B. The Associations Also Satisfy the Zone-of-Interests Test for Standing

1. Consistent with Wisconsin's liberal standing regime and the DJA's stated policy of liberality, Wisconsin law allows a plaintiff to bring a declaratory-judgment action under a generous zone-of-interests test. Courts "construe standing in declaratory judgment actions liberally, in favor of the complaining party." *State ex rel. Vill. of Newburg v. Town of Trenton*, 2009 WI App 139, ¶ 10, 321 Wis. 2d 424, 773 N.W.2d 500. So, in determining whether a plaintiff has standing to bring a declaratory-judgment action, courts ask only whether the plaintiff's asserted interest is "*arguably* within the zone of interests that [the law at issue] seeks to protect." *Chenequa Land Conservancy*, 275 Wis. 2d 533, ¶¶ 15–16 (emphasis added) (explaining that this test "track[s] federal law"). As the Supreme Court has explained, this test "is not meant to be especially demanding." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (citation omitted).[20] "The test forecloses suit only when a plaintiff's 'interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that [the Legislature] intended to permit the suit.'" *Id.* (citation omitted). "[T]he benefit of any doubt goes to the plaintiff." *Id.* Finally, when the Legislature explicitly authorizes suit,

[20] Wisconsin courts "look to federal case law as persuasive authority regarding standing questions." *See McConkey*, 326 Wis. 2d 1, ¶ 15 n.7.

that authorization "eliminates any prudential standing limitations." *FEC v. Akins*, 524 U.S. 11, 20 (1998) (citation omitted).

2. Here, the Associations and their members are within the zone of interests protected by the medical-records statutes because the statutes provide the Associations and their members with a cause of action: the statutes authorize the Associations to sue for damages. Section 146.84 provides that "[a]ny person, including the state or any political subdivision of the state, who violates s. 146.82 . . . shall be liable to any person injured as a result of the violation for [damages]." Wis. Stat. § 146.84(1)(b), (bm). "Person," as used in the statute, includes non-human entities such as the Associations and their members. The statute explicitly includes "the state or any political subdivision" as "person[s]," *id.*, and the statutes use the terms "individual" and "patient" in other sections, *e.g.* Wis. Stat. §§ 146.82(1); 146.84(1)(c), indicating that "person" bears a different meaning than "individual" or "patient." *See Pawlowski v. Am. Fam. Mut. Ins. Co.*, 2009 WI 105, ¶ 22, 322 Wis. 2d 21, 777 N.W.2d 67; *Cook v. Public Storage, Inc.*, 2008 WI App 155, ¶ 32, 314 Wis. 2d 426, 761 N.W.2d 645; *see also Townsend v. ChartSwap, LLC*, 2020 WI App 79, ¶ 15, 395 Wis. 2d 229, 952 N.W.2d 831 (limited liability company qualifies as "any person" under Section 146.84(1)(b)). Thus, if the Associations or their members are "injured as a result of [a] violation" of Section 146.82, then they may sue for damages under Section 146.84.

Moreover, there is no question that the Associations or their members could sue for reputational damage under the medical-records statutes. Reputational damage "is injury of a kind that [the medical-records statutes] seek[ ] to address." *Akins*, 524 U.S. at 20. Medical privacy statutes like Sections 146.82 and 146.84 protect against

reputational damage caused by the release of confidential medical information. *Cf. In re Flint's Estate*, 34 P. 863, 864 (Cal. 1893) (discussing physician-patient privilege in rules of evidence). And there is "nothing in the [medical-records statutes] that suggests that [the Legislature] intended to exclude [third-parties] from the benefits of these provisions." *Akins*, 524 U.S. at 20; *see also Cook*, 314 Wis. 2d 426, ¶ 33 ("The text of the statute does not indicate an intent to restrict the protection to persons who are 'lessees.'"). Indeed, courts have recognized that family members have a privacy interest in a deceased family member's medical records. *See Barkai v. Ruppert*, No. 21-CV-3695 (LTS), 2021 WL 3621359, at *4 n.2 (S.D.N.Y. Aug. 16, 2021) (collecting cases). And medical providers have a reputational interest in maintaining the confidentiality of their patient records. *See Nw. Mem'l Hosp. v. Ashcroft*, 362 F.3d 923, 929 (7th Cir. 2004). Consistent with this notion, the medical-records statutes extend protection to all health care records at all times, regardless whether there exists a patient who has a privacy interest in the records, *see* Wis. Stat. § 146.82, and the statutes do not limit recovery for damages to "patients." *See* Wis. Stat. § 146.84.

Here, the Associations adequately alleged their members would have a cause of action under the medical-records statutes if the Defendants carried out their planned release.[21] As explained above, the Associations adequately alleged that Defendants' actions here would violate Section 146.82. And the Associations alleged that at least "some"

[21] Again, the Associations have invoked associational standing, which permits the Associations to raise claims on behalf of their members if they allege, among other things, "facts sufficient to show that a member of the [Association] would have had standing to bring the action in his own name." *Wis. Env'l Decade*, 69 Wis. 2d at 20.

of their members "most assuredly will be" "listed in Defendants' release" "given the breadth of [the Associations'] memberships and of the Defendants' planned release." App.075. Finally, the Associations alleged that the "Defendants' planned disclosure will irreparably harm [the Associations'] members by effectively blacklisting them and permanently harming their reputations," as the release "will imply that the businesses are somehow at fault for COVID-19." App.075–76.

Because the Associations' members would have a cause of action under the medical-records statutes to recover for injuries of the kind that the statutes are concerned with, the Associations' members' interest in preventing such injury is squarely within the zone of interests protected by the statutes. At the very least, it is arguable that the Associations' members are within the medical-records statutes' zone of interests here, and any doubt on that score must be resolved in favor of the Associations. *See Patchak*, 567 U.S. at 225. It simply not the case that the Associations' members' "interests are so marginally related to or inconsistent with the purposes implicit in [the medical-records statutes] that it cannot reasonably be assumed that [the Legislature] authorized [the Associations' members] to sue." *See Lexmark Intern. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (citation omitted).

3. The court of appeals' decision effectively rewrites Section 146.84. The court held that the Associations' members could not be "person[s] injured by a violation of s. 146.82" because Section 146.84 implicitly contains a limitation on the type of "injury" recoverable—injury to patients. App.018–20. In other words, the court of appeals held that only "patients" could be "injured by a violation of s. 146.82." But if the Legislature had intended to limit recovery to patients, it would have said

so. *See Cook*, 314 Wis. 2d 426, ¶ 32. Instead, Section 146.84's provisions apply to "*any person* injured." And "any person" extends beyond patients, "including the state or any political subdivision of the state," Wis. Stat. § 146.84(1)(b), (bm), and other non-human entities like the Associations' member businesses, *see Townsend*, 395 Wis. 2d 229, ¶ 15.

The court of appeals further erred by holding that Section 146.84(1)(c), which allows "individual[s]" to seek injunctive relief for violations of Section 146.82, precludes declaratory relief relating to Section 146.82 for anyone other than an individual. App.020–23. "To preclude declaratory relief, [an] alternative remedy should be speedy, effective and adequate, or at least as well-suited to the plaintiff's needs as declaratory relief." *Lister v. Bd. of Regents of the Univ. Wis. Sys.*, 72 Wis. 2d 282, 307–08, 240 N.W.2d 610 (1976). Here, Section 146.84(1)(c) is not "speedy, effective[,] adequate, or . . . as well-suited to the [Associations'] needs as declaratory relief" because Section 146.84(1)(c) provides the Associations with no relief at all.[22] The DJA is the only mechanism by which non-individual entities like the Associations and their members can seek an "anticipatory or preventative" "remedy" relating to Section 146.82, and therefore Section 146.84(1)(c) does not preclude declaratory relief. *See id.* at 307.[23]

[22] Nor are the damages provisions of Section 146.84 an adequate remedy, since both the harm that flows from an unlawful expenditure of public funds and harm to a business's reputation are irreparable. *See Rath v. City of Sutton*, 673 N.W.2d 869, 884 (Neb. 2004) ("[T]he injury that flows from an illegal expenditure of public funds is inherently irreparable."); *Meridian Mut. Ins. Co. v. Meridian Ins. Grp., Inc.*, 128 F.3d 1111, 1120 (7th Cir. 1997) (injury to goodwill "can constitute irreparable harm for which a plaintiff has no adequate remedy at law").

[23] The court of appeals appears to have erred by asking whether the statute in question provides the plaintiff with injunctive relief, *see* App.020–21, rather than

C. Permitting the Associations to Continue to Pursue This Litigation Would Promote the Policy Purposes of Standing

1. Finally, a plaintiff has standing so long as her case satisfies the judicial policy purposes of standing. As this Court has explained, "[s]tanding requirements in Wisconsin are aimed at ensuring that the issues and arguments presented will be carefully developed and zealously argued, as well as informing the court of the consequences of its decision." *McConkey*, 326 Wis. 2d 1, ¶ 16. Thus, this Court has held that a plaintiff has standing when she satisfies these policy considerations. *See id.* ¶¶ 16–18. In *McConkey*, the plaintiff, as "a registered voter and taxpayer," brought a declaratory-judgment action challenging, among other things, the procedures by which certain constitutional amendments were brought before the people for a vote. *Id.* ¶ 9. The circuit court held that the plaintiff had standing because "all voters were injured" "[i]f an amendment were invalidly submitted to voters." *Id.* ¶ 10. This Court affirmed that decision, despite finding it "difficult to determine the precise nature of the injury" at issue. *Id.* ¶ 17. This Court explained the considerations that supported its decisions, including that the plaintiff would "competently frame[ ] the issues and zealously argue[ ] [the] case," and "a different plaintiff would not enhance [the court's] understanding of the issues." *Id.* ¶ 18. Moreover, judicial economy favors proceeding when "it is likely that if [the case] were

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whether the interest that the plaintiff asserts is arguably within the zone of interests that the statute in question seeks to protect.

dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit." *Id.*[24]

2. Here, even if the Associations did not possess both taxpayer standing and standing under the zone-of-interests test, the Associations satisfy the prudential considerations underlying the doctrine of standing and should therefore be permitted to proceed with this action, at least past the pleading stage. The Associations have "competently framed the issues and zealously argued [their] case." *McConkey*, 326 Wis. 2d 1, ¶ 18. Moreover, "[t]he consequences of [the court's] decision are sufficiently clear; a different plaintiff would not enhance [the court's] understanding of the issues in this case." *Id.* Finally, "it is likely that if [the Associations'] claim were dismissed on standing grounds, another person who could more clearly demonstrate standing would bring an identical suit," which "rais[es] judicial efficiency concerns." *Id.* Indeed, two individuals whose medical records are at issue are seeking even now to join this case as plaintiffs. R.77; 78.

3. Contradicting *McConkey*, the court of appeals instead held that the Associations should not be allowed to bring suit even when they satisfy the judicial policy purposes of standing. App.024–25. Notably, the

[24] Additionally, four Justices of this Court have explained that standing can turn on either "judicial policy," *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 40 (lead op.), or "prudential considerations," *id.* ¶¶ 130–35 (Prosser, J., concurring). As to the former, judicial policy calls for protecting the Associations' and their members' interests here. *See id.* ¶¶ 56–57 (lead op.). The Associations have a stake in preventing an unlawful release of information that will cause them and their members harm, and the law recognizes that "the unlawful disclosure of legally protected information constitute[s] a clear *de facto* injury." *See In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 636 (3d Cir. 2017) (citation omitted). Therefore, the Associations' and their members' interests "are sufficiently significant and [ ] good policy calls for protecting them." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 41 (lead op.) (citation omitted). As such, the Associations have standing to bring this declaratory-judgment action.

court did not hold that the Associations failed to satisfy the purposes of the standing doctrine: "to assure that the party seeking relief has alleged such a personal stake in the outcome of the controversy as to give rise to that adverseness necessary to sharpen the presentation of issues for illumination of [legal] questions." *Moedern*, 70 Wis. 2d at 1064. Instead, the court held that the Associations' challenge implicated "no constitutional or other statutory provision" and therefore should not be heard. App.025. But, of course, the Associations' challenge does implicate a statute—it turns entirely on Section 146.82. And whether the State may publicly release a slew of private, patient-identifiable data that it has gathered pursuant to its statutory mandate to monitor communicable disease is an important question of law. Because the Associations satisfy the judicial policy purposes of standing, the court of appeals erred in concluding that they lack standing.

II. SECTION 19.356 DOES NOT PRECLUDE THE ASSOCIATIONS' DECLARATORY-JUDGMENT ACTION

A statutory remedy is exclusive, precluding all other forms of relief, only if the text of the statute does not foreclose exclusivity and the procedure and remedy it provides are "adequate." *See Joint Dist. No. 1, Vills. of Waterford & Rochester, Towns of Waterford, Dover, Norway & Rochester, Racine Cnty. v. Joint Dist. No. 1, Towns of Dover, Norway & Raymond, Racine Cnty.*, 89 Wis. 2d 598, 608, 278 N.W.2d 876 (1979). And a statutory remedy "preclude[s] declaratory relief" only where that remedy is "speedy, effective and adequate, or at least as well-suited to the plaintiff's needs as declaratory relief." *See Lister*, 72 Wis. 2d at 307–08. Courts generally find a statute inadequate when it fails "to afford *any* relief to the party filing the court action." *Lamar Cent. Outdoor, LLC v.*

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

In 2003, the Legislature enacted Wis. Stat. § 19.356, which codified and limited the cause of action created by this Court's decision in *Woznicki v. Erickson*, 202 Wis. 2d 178, 549 N.W.2d 699 (1996). In that case, this Court held that, "[s]hould [a records custodian] choose to release [requested] records after" "balancing the public interest and the private interests" involved, "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 191–92. 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.[25] In response, the Legislature passed 2003 Wis. Act 47, which, among other things, created Wis. Stat. § 19.356. *See* 2003 Wis. Act 47, Joint Legislative Council Prefatory Note ("This 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").

[25] Three years later, this Court expanded the cause of action it had created in *Woznicki*. *Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.* 227 Wis. 2d 779, 596 N.W.2d 403 (1999) . 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." *Id.* at 782.

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 categories of records: employee-discipline records, records obtained by subpoena or search warrant, and records prepared by an employer other than "an authority." Wis. Stat. § 19.356(2)(a). Section 19.356 thus limits the *Woznicki* right to *de novo* review to three discrete categories of records.

Section 19.356 is not exclusive and does not preclude declaratory relief. First, the statute explicitly allows for judicial review of a records release when such review is "otherwise provided by statute." Wis. Stat. § 19.356(1). The DJA is such a statute, allowing for judicial review of governmental action. *See Weber v. Town of Lincoln*, 159 Wis. 2d 144, 148, 463 N.W.2d 869 (Ct. App. 1990) (the DJA "is singularly suited to test the validity of [governmental] action"); *e.g.*, *Papa v. Wis. Dept. of Health Servs.*, 2020 WI 66, ¶¶ 1–3, 393 Wis. 2d 1, 946 N.W.2d 17; *League of Women Voters of Wis. v. Evers*, 2019 WI 75, ¶ 10, 387 Wis. 2d 511, 929 N.W.2d 209. Indeed, plaintiffs in other States commonly use the Uniform Declaratory Judgments Act to challenge public-records releases. *See, e.g.*, *Montgomery Cnty. Md. v. Shropshire*, 23 A.3d 205, 206 n.1, 208 (Md. Ct. App. 2011); *Cnty. of Berks v. Pa. Off. of Open Recs.*, No. 170 M.D. 2018, 2019 WL 81861, at *5 (Pa. Commw. Ct. Jan. 3, 2019) (collecting cases). Second, Section 19.356 is inadequate because it fails to provide any relief when a records custodian acts unlawfully in releasing records

outside of the three narrow categories. *See Lamar Cent. Outdoor*, 315 Wis. 2d 190, ¶ 32. Section 19.356 therefore does not preclude declaratory relief.[26]

Nor does Section 19.356 effect an implied partial repeal of the DJA. Before 2003, plaintiffs could seek a declaration that a public-records release was contrary to a statute. *See*, *e.g.*, *Atlas Transit, Inc. v. Korte*, 2001 WI App 286, ¶¶ 1, 20, 249 Wis. 2d 242, 638 N.W.2d 625 (seeking declaration under the DJA that release was "barred by the federally-enacted Driver's Privacy Protection Act"). Section 19.356 did not implicitly repeal this legal remedy. "Repeals by implication are not favored in the law," and this Court will hold that a later enactment implicitly repealed an earlier one only if the earlier act "is so manifestly inconsistent and repugnant to the later act that they cannot reasonably stand together or when the intent of the legislature to repeal by implication clearly appears." *Heaton v. Larsen*, 97 Wis. 2d 379, 392–93, 294 N.W.2d 15 (1980) (citations omitted). Here, there is no conflict between Section 19.356 and the DJA and no clear intent of the Legislature to partially repeal the DJA by implication. Section 19.356 explicitly allows for judicial review of records releases when such review is "otherwise provided by statute," Wis. Stat. § 19.356(1), and the DJA is a statute that provides for judicial review of the legality of government action, including records releases.

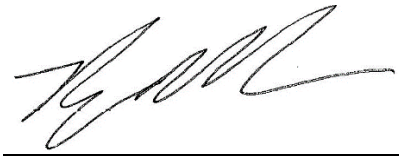
[26] The court of appeals did not hold that Section 19.356 precludes declaratory relief, and indeed appeared to accept that Section 19.356 allows for judicial review of records releases under other statutes. App.029.

CONCLUSION

This Court should reverse the decision of the court of appeals and remand this case to the circuit court for further proceedings in due course.[27]

Dated: October 27, 2021

Respectfully submitted,



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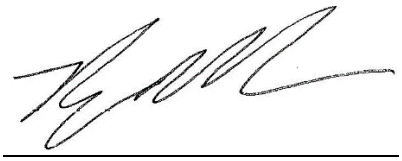
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[27] If this Court concludes that the Associations' allegations cannot survive dismissal, this Court should nevertheless vacate the court of appeals' decision dismissing the Associations' claims *with* prejudice and remand with instructions that the claims be dismissed *without* prejudice. Dismissal without prejudice is the customary remedy for a failure-to-state-a-claim motion. It would also be an eminently sensible remedy here, since Plaintiffs have already moved to include individual patients, whom undersigned counsel represent, in its action. *See* Wis. Stat. § 802.09(1) (leave to amend "shall be freely given at any stage of the action when justice so requires"); *accord, e.g.*, *Sharp Healthcare v. Leavitt*, No. 08-CV-0170 W POR, 2009 WL 790113, at *6 (S.D. Cal. Mar. 25, 2009) (giving plaintiff specified time to amend while maintaining preliminary injunction); *Nguyen v. Specialized Loan Servicing LLC*, No. 3:18-cv-655-SI, 2018 WL 4059292, at *5 (D. Or. Aug. 24, 2018) (same).

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b), (bm), and (c) for a brief produced with a proportional serif font. The length of this brief is 10,891 words.

Dated: October 27, 2021.



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

I hereby certify that:

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I further certify that:

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

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

Dated: October 27, 2021.



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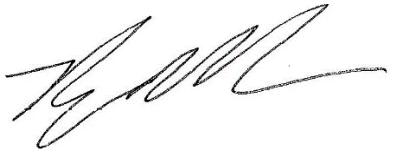
APPENDIX CERTIFICATION

I hereby certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

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: October 27, 2021.



RYAN J. WALSH

CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2021, I caused three true and correct paper copies of the foregoing brief and separate appendix to be delivered to counsel of record, addressed as follows:

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