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 DEFENDANTS' RESPONSE BRIEF

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INTRODUCTION

This is a straightforward statutory-interpretation case. It is about requests for public records containing the names and addresses of businesses and the number of COVID-19 cases and contacts associated with them. The Wisconsin Department of Health Services (DHS) has the disputed records, which contain no personally identifiable information of individuals. The issues involve the patient health care confidentiality records 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 pre-release judicial review halting the release of public records.

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

could have far-reaching unintended consequences for declaratory-judgment and public-records jurisprudence.

ISSUES PRESENTED

1. Wisconsin Stat. § 146.84(1)(c) provides that "[a]n individual may bring an action to enjoin any violation of s. 146.82," which concerns patient health care records. The plaintiffs filed a declaratory-judgment action solely to enjoin the release of records they believe are confidential "patient health care records" under section 146.82(4), even though the records contain no personally identifiable information. The data concerns reported COVID-19 cases associated with businesses that are the plaintiffs' members. DHS planned to release the records in response to public records requests, but the circuit court enjoined it from doing so.

Can the plaintiffs—who are not individuals and not patients—pursue a declaratory-judgment action for an injunction under section 146.84(1)(c)?

The circuit court answered yes.

The court of appeals answered no.

This Court should answer no.

2. Wisconsin Stat. § 19.356(1) provides that "[e]xcept as authorized in this section or as otherwise provided by statute . . . no person is entitled to judicial review of the decision of an authority to provide a requester with access to a record." The plaintiffs disavowed reliance on section 19.356 and instead filed a general declaratory-judgment action under Wis. Stat. § 806.04, seeking an injunction prohibiting DHS from releasing the records.

Does Wis. Stat. § 806.04 create an exception to Wis. Stat. § 19.356(1)'s limits on seeking judicial review of the decision to provide a requester with access to a public record?

The circuit court answered yes.

The court of appeals answered no.

This Court should answer no.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument and publication are warranted.

STATEMENT OF THE CASE

This case is about public records requests made to DHS for records it has relating to businesses that had two or more COVID-19 cases associated with their business. DHS has not produced the responsive records, as the circuit court's temporary injunction prevents their release.

The operative pleading is the first amended complaint, (R. 37, App. 064–079), which is summarized below. Citations are to the record in case number 2020AP2103.

I. Overview of DHS's authority to gather and report information about communicable disease

Before addressing the facts, it is useful to understand DHS's authority to gather and report information about communicable diseases like COVID-19. Chapters 250 and 252 of the Wisconsin statutes give DHS the power to investigate the existence of communicable diseases and the duty to report its findings to the public.

A. Wisconsin Stat. ch. 250 – Health; Administration and Supervision

Chapter 250 establishes general powers and duties of DHS, including powers related to investigating and reporting about public-health issues. DHS "may investigate the cause and circumstances of any special or unusual disease or inspect

any public building and may do any act necessary for the investigation." Wis. Stat. § 250.04(1). DHS must "establish and maintain surveillance activities sufficient to detect any occurrence of acute, communicable or chronic diseases," "analyze occurrences, trends and patterns of" such diseases "and distribute information based on the analyses," and cooperate with local health departments to "maintain a public health data system." Wis. Stat. § 250.04(3)(a), (b)1. & 2.

Under Wis. Stat. § 250.04(3)(b)3., DHS "may conduct investigations, studies, experiments and research pertaining to any public health problems which are a cause or potential cause of morbidity or mortality and methods for the prevention or amelioration of those public health problems." While raw data in the form of "[i]ndividual questionnaires or surveys shall be treated as confidential patient health care records under ss. 146.81 to 146.835," the statute contemplates public disclosure of de-identified data: "the information in those questionnaires and surveys may be released in statistical summaries," Wis. Stat. § 250.04(3)(b)3. In addition, "patient health care records shall be released without informed consent" if they "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.

DHS may also "use hospital emergency room and inpatient health care records, abstracts of these records and information the state or federal government collects to correlate exposure to certain occupational and high risk environments with resulting acute or chronic health problems." Wis. Stat. § 250.04(3)(b)4. "If [DHS] finds that an occupational health hazard exists, it shall disseminate its findings and promote efforts to educate employees and employers about the health hazard." *Id.*

B. Wisconsin Stat. ch. 252 – Communicable Diseases

Chapter 252 specifically addresses communicable diseases and gives DHS and local officials additional powers and duties related to investigation, data gathering, and data distribution. Further, DHS may promulgate and enforce administrative rules "for guarding against the introduction of any communicable disease into the state" and for controlling it. Wis. Stat. § 252.02(4). It has done so in Wis. Admin. Code. ch. DHS 145 (entitled "Control of communicable diseases").

Under Wis. Stat. § 252.02(1), DHS "may establish systems of disease surveillance and inspection to ascertain the presence of any communicable disease." In this context, "surveillance" means "the systematic collection of data pertaining to the occurrence of specific diseases, the analysis and interpretation of these data and the dissemination of consolidated and processed information to those who need to know." Wis. Admin. Code DHS § 145.03(26).

Local health officials also play a role in identifying communicable disease in the community. "Every local health officer, upon the appearance of any communicable disease in his or her territory, shall immediately investigate all the circumstances and make a full report to the appropriate governing body and also to [DHS]." Wis. Stat. § 252.03(1).

DHS obtains data several ways. Wisconsin Stat. § 252.05 addresses reporting communicable diseases, and it requires that observed cases be reported to DHS and other entities. Health care providers, as defined in chapter 146, must report to a local health officer the appearance of a communicable disease in a person they treat or visit. Wis. Stat. § 252.05(1); *see also* Wis. Admin. Code DHS § 145.04(1)(a). The local health officer must report the information to DHS or direct the health care provider to do so.

Id. Laboratories analyzing specimens that indicate an individual has a communicable disease also must report it to DHS. *See* Wis. Stat. § 252.05(2); *see also* Wis. Admin. Code DHS § 145.04(1)(b). Further, "[a]nyone having knowledge or reason to believe that any person has a communicable disease shall report the facts to the local health officer or to [DHS]." Wis. Stat. § 252.05(3); *see also* Wis. Admin. Code DHS § 145.04(1)(e).

Reports by local health care providers and labs under Wis. Stat. § 252.05(1) and (2) "shall state so far as known the name, sex, age, and residence of the person, the communicable disease and other facts [DHS] or the local health officer requires," and may be made on forms DHS furnishes and the local health officer distributes. Wis. Stat. § 252.05(4); *see also* Wis. Admin. Code DHS § 145.04(2). To illustrate, a copy of the Acute and Communicable Disease Case Report form, F-44151 (Rev. 07/2019), is found at: https://www.dhs.wisconsin.gov/forms/f4/f44151.pdf. Reports must be made within 24 hours unless otherwise specified by DHS. Wis. Stat. § 252.05(5).

"Any local health officer, upon receiving a report, shall cause a permanent record of the report to be made and upon demand of [DHS] transmit the original or a copy to [DHS], together with other information [DHS] requires." Wis. Stat. § 252.05(6). DHS "may store these records as paper or electronic records and shall treat them as patient health care records under ss. 146.81 to 146.835." *Id.*

II. Factual background

Plaintiffs Wisconsin Manufacturers and Commerce ("WMC"), Muskego Area Chamber of Commerce, and New Berlin Chamber of Commerce and Visitors Bureau are trade associations whose members are Wisconsin businesses. (R. 37:3–5 ¶¶ 5–13, App. 066–069.) Each plaintiff alleges that the

"release of confidential medical information of the employees of [their] members will violate those employees' right to privacy and unfairly harm the reputation of [their] members." (R. 37:3–5 ¶¶ 5, 8, 11, App. 066–069.)

Defendants Governor Tony Evers, DHS Secretary-designee Karen Timberlake, and Department of Administration Secretary Joel Brennan are sued in their official capacities. (R. 37:6–7 ¶¶ 14–16, App. 069–070.) The intervenor-defendant is Milwaukee Journal Sentinel. (R. 37:7 ¶ 17, App. 070.)

On September 30, 2020, as a courtesy, Secretary Brennan informed WMC that, in response to a public records request, the defendants "plan 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." (R. 37:9 ¶ 24, App. 072.) That referenced outbreak data would include in its count positive cases related to employees, their family members or close contacts, and customers. The planned release would include "the businesses' name and the number of known or suspected cases of COVID-19," dating back to at least May 2020. (R. 37:9 ¶ 25, App. 072.) He told WMC that "there are more than 1,000 employers that meet [that] criteria," and that the release would occur on October 2. (R. 37:9 ¶¶ 26–28, App. 072.)

The appellate record contains an example of a records request that led to DHS's planned release. (*See* R. 19:2–3 (June 6, 2020, request from the Milwaukee Journal Sentinel)). The other requests are not in the record. However, the defendants filed under seal in the circuit court response letters dated October 2, 2020, and examples of the responsive records. Those records are found at R. 43 to 45.

The plaintiffs allege that the "information that Defendants plan to release is derived from diagnostic test results and the records of contact tracers investigating COVID-19." (R. 37:3 ¶ 3, App. 066.) They allege that the information constitutes "patient health care records" that "must be kept confidential" under Wis. Stat. §§ 146.81 and 146.82. (R. 37:3 ¶ 3, App. 066.) Releasing the records to the requesters would allegedly "violate the privacy of thousands of Wisconsin citizens employed by the businesses that Plaintiffs represent, would contravene the substantial protection that Wisconsin statutes provide to the privacy of an individual's medical information, further damage Wisconsin's business community, and undermine the efforts of local health authorities to control the virus." (R. 37:3 ¶ 4, App. 066.)

III. Procedural history

A. The circuit court entered nonfinal orders denying dismissal and granting a temporary injunction.

The plaintiffs filed their initial complaint on October 1, 2020, with a motion for an ex parte temporary restraining order and temporary injunction, and the circuit court entered an ex parte temporary restraining order prohibiting the defendants from releasing the requested records. (R. 4–8, 13:2.)

On October 6, the defendants filed a brief in opposition to the plaintiffs' motion. (R. 21.) The circuit court held a motion hearing on October 7 on the issuance of an injunction and an extension of the temporary restraining order. (R. 26:2.) On October 8, the court entered an order extending the temporary restraining order to November 30, and it set another motion hearing for that day. (R. 26:2; 23.)

Milwaukee Journal Sentinel filed an unopposed motion to intervene, which the circuit court granted. (R. 15; 18; 24.) It also filed a motion to dismiss, and the parties proceeded to further brief the pending motions to dismiss and to temporarily enjoin release. (R. 30–31.) On October 23, the plaintiffs filed a first amended complaint. (R. 32–37, App. 064–079.) Subsequently, the defendants filed proposed public records response letters and examples of the responsive records DHS sought to release, along with a motion to seal, which the court granted. (R. 38; 41; 43–45 (sealed records); 67.) The defendants also filed a motion to dismiss and relied on their prior briefing in support of it. (R. 69:1.)

After briefing, the circuit court held a motion hearing. (R. 100 (transcript), App. 032–054.) The court orally denied the motions to dismiss and granted the motion for a temporary injunction. (R. 100:12, 18, App. 043, 049.)

The court noted that "[i]t appears that the primary issue here is the party seeking declaratory relief has a legally protectible interest in the controversy," which "has been expressed in the terms of standing in the past." (R. 100:4–5, App. 035–036.) The court briefly addressed the plaintiffs' taxpayer-standing argument—which the court characterized as "rather tenuous," (R. 100:6, App. 037)—and focused instead on the plaintiffs' "zone of interests assertion of standing." (R. 100:6, App. 037.) The court determined that it was "satisfied under the facts and circumstances of this case that the plaintiff has established standing primarily under the zone-of-interests concept." (R. 100:11, App. 042.) The court also determined that the plaintiffs' action was justiciable under the declaratory judgments act. (R. 100:11–12, App. 042–043.)

Regarding the temporary-injunction motion, the court held that it was "certainly satisfied that these are confidential patient health care records," protected from disclosure by state and federal law, and that "[t]he identity of employers

are considered part of those confidential patient health care records." (R. 100:12–13, App. 043–044.) "Disclosure can only be appropriate when they are de-identified," which was an issue the parties disputed. (R. 100:13, App. 044.) The court could not "make any findings that appropriate de-identification has been demonstrated in compliance with state law and HIPAA law" and believed the plaintiffs had "a reasonable probability of ultimate success on the merits."[1] (R. 100:13–14, App. 044–045.)

Regarding irreparable harm to the plaintiffs, the court identified the harm as being to businesses whose "names will be supplied in conjunction with data that says two or more of their employees tested positive for COVID-19 . . . and what that will do to these businesses." (R. 100:15–16, App. 046–047.) The court found "that there is irreparable harm to these businesses by the disclosure of the information." (R. 100:17, App. 048.)

The court entered written orders denying the motions to dismiss and granting the temporary-injunction motion. (R. 73–75, App. 055–060.) The injunction orders that the defendants "and their officers, agents, and employees . . . are temporarily enjoined from releasing any information relating to businesses whose employees have tested positive for COVID-19 or who contract tracing has shown close connections." (R. 75:2, App. 060.)

The plaintiffs filed a motion for leave to file a second amended complaint. (R. 76–78.) The proposed complaint seeks to add two individual plaintiffs who allege they are employees at entities that would be included in the records

[1] The plaintiffs pled no HIPAA claim and there is no such claim before the Court. Consistent with that, the plaintiffs develop no HIPAA argument (or explain how they would have standing or a protected right under it) in their brief.

release. (R. 78:6–7 ¶¶ 14–15.) The motion is being held in abeyance pending this appeal.

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

After granting an interlocutory appeal, the court of appeals reversed and remanded with directions in a published decision. *Wis. Mfrs. & Commerce v. Evers*, 2021 WI App 35, ¶ 46, ___ Wis. 2d ___, 960 N.W.2d 442. The court held 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 made two main holdings that are relevant here.

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

The court 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, a case nominally about standing may be more appropriately addressed "as a matter of statutory interpretation." *Moustakis*, 368 Wis. 2d 677, ¶ 3 n.2. The court correctly treated the plaintiffs' threshold flaw as one about statutory interpretation where, as here, "the statutes on which the [plaintiffs] rely to support their declaratory judgment action '[do] not give legal recognition to the interest' they assert." *Wis. Mfrs. & Commerce*, ¶ 8 (citation omitted).

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 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 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 statutes 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 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 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 held that Wis. Stat. § 19.356(1) bars the plaintiffs' claim.

The court also held that Wis. Stat. § 19.356(1) bars the plaintiffs' claim for pre-release review halting the release of public records. *See id.* ¶¶ 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." *Id.* ¶ 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 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.*

STANDARDS OF REVIEW

Standing. Whether a party has standing is a question of law reviewed de novo. *Krier v. Vilione*, 2009 WI 45, ¶ 14, 317 Wis. 2d 388, 766 N.W.2d 517.

Statutory interpretation. The interpretation of Wis. Stat. § 146.84, Wis. Stat. § 19.356, and other statutes at issue are questions of law reviewed de novo. *Tetra Tech EC, Inc. v. DOR*, 2018 WI 75, ¶ 84, 382 Wis. 2d 496, 914 N.W.2d 21.

ARGUMENT

I. The plaintiffs may not pursue a declaratory-judgment action for an injunction under Wis. Stat. § 146.84(1)(c) because they are not individuals whose patient health care records are at issue.

This is a statutory-interpretation case, and the statutes the plaintiffs rely upon simply do not protect them. These statutes apply to patients and *their* records, so the plaintiffs lack both standing and a legally protectable interest to pursue a declaratory-judgment action.

A. Legal principles regarding standing and statutory interpretation

To address standing, the "first step is to determine 'whether the decision of the agency directly causes injury to the interest of the petitioner.'" *Fox v. DHSS*, 112 Wis. 2d 514, 524, 334 N.W.2d 532 (1983) (citation omitted). Under the first step, plaintiffs "must have 'suffered "some threatened or actual injury resulting from the putatively illegal action."'" *Id.* at 524–25 (citations omitted).

"The second step is to determine whether the interest asserted is recognized by law." *Id.* at 524 (citation omitted). Under that step, which is a standalone hurdle, courts look to

the "provision on which the claim rests" and ask whether it "properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc.*, 2011 WI 36, ¶ 46, 333 Wis. 2d 402, 797 N.W.2d 789 (citation omitted). "[T]he question is whether the party's asserted injury is to an interest protected by a statutory or constitutional provision," which is sometimes referred to as the "zone of interests protected." *Id.* ¶¶ 55–56 (citation omitted).

B. Chapter 146 does not apply to the plaintiffs, so it cannot provide a basis for standing.

Here, the plaintiffs' standing is lacking under the zone of interests requirement. Their complaint is premised on Wis. Stat. §§ 146.81, 146.82, and 146.84, but those patient health care records laws do not create a means for the plaintiffs to obtain an injunction. The express language of the statutes simply does not apply to the plaintiffs or the statewide injunction they obtained.

Specifically, the plaintiffs rely on chapter 146's treatment of patient health care records. (*See* R. 37:3, 6–11, 14 ¶¶ 3, 14–16, 18, 20, 21, 29–32, 34, 35, 48–51, App. 066, 069–074, 077.) As they argue here, their case "turns entirely on Section 146.82." (Br. 43.)

Wisconsin Stat. § 146.82(1) states that "[a]ll patient health care records shall remain confidential." "Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient." *Id.* Wisconsin Stat. § 146.83 also provides certain mechanisms for accessing the records.

Significantly, "patient health care records" is a defined term. It means "all records related to the health of a patient prepared by or under the supervision of a health care

provider," and all records made by an ambulance service provider, an emergency medical services practitioner, or an emergency medical responder, in administering emergency care procedures. Wis. Stat. § 146.81(4).

A "patient" is defined as "a person who received health care services from a health care provider." Wis. Stat. § 146.81(3). "Health care provider" means practitioners that include nurses, chiropractors, dentists, physicians, physician assistants, physical therapists, podiatrists, dieticians, etc. Wis. Stat. § 146.81(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).

For standing, one characteristic of this statutory scheme is key: it has nothing to do with the plaintiff trade associations and their purported interest in their members' business reputations. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 55 (standing is limited to "an interest protected by a statutory . . . provision"). There are two main reasons that the plaintiffs lack standing to assert a violation of chapter 146 and pursue an injunction.

1. Wisconsin Stat. § 146.84(1)(c) applies only to individuals and their records, not organizations.

First, the controlling statute for the plaintiffs' temporary relief—an injunction—applies only to individuals and their health care records, not to organizations. The plaintiffs have conceded that they are not even covered by the pertinent statute: "Section 146.84(1)(c) provides [them] with no relief at all." (Br. 40.)

Wisconsin Stat. § 146.84(1)(c) states that "[a]n *individual* may bring an action to enjoin any violation of s. 146.82." The plaintiffs, however, are not "individuals." For example, the relevant dictionary definition states that an individual is "a single human being as contrasted with a social group or institution." *Individual*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/individual (last visited Nov. 16, 2021); *see State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 53, 271 Wis. 2d 633, 681 N.W.2d 110 (stating that a dictionary may be consulted).

No plaintiff is "a single human being" that may invoke that injunction provision. And there is little wonder why: the entire statutory scheme is designed to provide mechanisms and protections for an individual's particular patient health care records. Nothing about the substantive provisions in chapter 146 or the injunction provision in Wis. Stat. § 146.84(1)(c) suggest that the plaintiffs have any arguable rights.

Appropriately, the plaintiffs conceded below that they are not covered by Wis. Stat. § 146.84 or the related statutes. They explained that they "did not sue under the health care records confidentiality statutes" because they do not "have a direct cause of action under those statutes." (R. 101:44; *see also* 101:45 ("Do we have a cause of action under that statute?

No.").) The statute's plain coverage, and that concession, are dispositive: a statute that potentially offers relief regarding individual patient health care records has nothing to even arguably offer the plaintiffs. That is determinative under the zone of interests test because standing is limited to "an interest protected by a statutory . . . provision." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 55. The on-point statutory provision here has nothing to do with the plaintiffs.

The plaintiffs point to the "any person" language in separate subsections of Wis. Stat. § 146.84(1), *see* Br. 12, 37–40, arguing that the use of "person" there was more expansive. In particular, Wis. Stat. § 146.84(1)(b) and (bm) make "any person . . . who violates s. 146.82 or 146.83" "liable to any person injured as a result of the violation" for certain "damages." But that use of "person" can change nothing about the injunction analysis here.

First, the injunction provision in Wis. Stat. § 146.84(1)(c) does not say "person"; it says "individual." And "individual" does not include the plaintiffs, as they concede. (Br. 40.) The plaintiffs are not pursuing a claim under Wis. Stat. § 146.84(1)(b) or (bm). They argue that "*if* the Associations or their members are 'injured as a result of [a] violation' of Section 146.82, *then* they may sue for such damages under Section 146.84." (Br. 37 (emphasis added).) But they have not filed a claim for damages under subsections (1)(b) or (bm); they seek only declaratory and injunctive relief. (R. 37:7 ¶ 18, 37:15, App. 070, 078.)

Second, even if the word "person" mattered here, simply using the word "person" in a remedy provision of a statute that otherwise covers individual patient health care records can do nothing to expand its coverage.

The court of appeals recognized as much in *Milwaukee Deputy Sheriff's Association v. City of Wauwatosa*, which held

that a sheriff's association lacked standing to sue under Wis. Stat. § 51.30(4), which concerns certain treatment records. 2010 WI App 95, ¶¶ 32–33, 327 Wis. 2d 206, 787 N.W.2d 438. There, the court construed Wis. Stat. § 51.30(4) and (9)(a). *Id.* ¶ 32. Wisconsin Stat. § 51.30(4) "states that 'all treatment records shall remain confidential and are privileged to the subject individual.'" *Id.* (emphasis omitted) (quoting Wis. Stat. § 51.30(4)). The damages provision, section 51.30(9)(a), "states that '[a]ny person, including the state or any political subdivision of the state, violating this section shall be liable to any person damaged as a result of the violation for such damages." *Id.* (emphasis omitted) (quoting Wis. Stat. § 51.30(9)(a)). Of further note, like Wis. Stat. § 146.84(1)(c), under Wis. Stat. § 51.30(9)(c), only "[a]n individual may bring an action to enjoin any violation."

The court held that the sheriff's association lacked standing because it was not in the "zone of interests" protected. *Id.* ¶ 30. That was because "the focus of the statute is on the individual—the patient—whose treatment records have been released, and the damage to be protected from is the release of confidential information." *Id.* ¶ 32. In other words, the use of "any person" in the damages provision did not somehow expand who could seek relief beyond those already covered under the statute's substantive provisions.

Here, too, Wis. Stat. §§ 146.82–.84 are focused on protecting the confidentiality of patients' health care records. The plaintiff trade organizations have no right to an injunction under the plain language of Wis. Stat. § 146.84(1)(c) and are not even arguably covered by the patient health care records statutes.

The plaintiffs point to nothing in the statute that remotely protects their asserted reputational interest—that the release of truthful information about COVID-19 occurrences may be embarrassing to their member

businesses. Rather, they cite *Federal Election Commission v. Akins*, 524 U.S. 11, 14 (1998), a case about political committees' disclosures under a federal election law. When citing that case, the plaintiffs suggest that it concerns "reputational interest," and they add the words "medical-records statutes" into a quote. (Br. 37.) But *Akins* was about neither reputational interests nor medical records. It is off point. Rather, this state's public records jurisprudence makes explicit that "the potential for embarrassment is not a basis for precluding disclosure." *Milwaukee Journal Sentinel v. DOA*, 2009 WI 79, ¶ 62, 319 Wis. 2d 439, 768 N.W.2d 700.

The plaintiffs' citation of a campaign finance case shows just how far afield they are. They are not within the zone of interests of the patient health care records law and thus lack standing.

2. The disputed records are not patient health care records under chapter 146.

The plaintiffs have no right to invoke chapter 146 for a second reason: the records at issue are not covered "patient health care records." That phrase 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). DHS—the custodian of the records—is not a health care provider in the present context.

For example, DHS did not provide care to a patient and memorialize that care in the records at issue. *See Wall v. Pahl*, 2016 WI App 71, ¶ 28, 371 Wis. 2d 716, 886 N.W.2d 373. Rather, the records merely summarize aspects of information DHS gathered as part of investigations into the community spread of COVID-19. *See* Wis. Stat. § 250.04(3)(b)3. ("information . . . may be released in statistical summaries"). These records say nothing about any individual patient or his treatment by a health care provider.

In contrast, Wis. Stat. §§ 252.05(6) and 250.04(3)(b)3. describe categories of records that DHS may possess that *are* treated as patient health care records, unlike the disputed records here. For example, the records are not a "permanent record of [a] report" of an instance of COVID-19 made to a local health officer under Wis. Stat. § 252.05(6), which must be treated by DHS as patient health care records under chapter 146. Wis. Stat. § 252.05(6). The disputed records do not include any information such as the "name, sex, age, and residence of the person" who was exposed to COVID-19. Wis. Stat. § 252.05(4). Likewise, the disputed records are not "[i]ndividual questionnaires or surveys" that "shall be treated as patient health care records" under Wis. Stat. § 250.04(3)(b)3. The disputed records contain no information about individual patients.

Relatedly, the plaintiffs state that "the court of appeals' decision below is the first holding that the information contained in patient health care records is not confidential." (Br. 33–35, n.19.) Not only do they mischaracterize the court of appeals' decision, but they also tack on a sky-is-falling argument about "massive and devastating statewide consequences for medical privacy." (*Id.* 35.)

The sky is not falling—this appeal involves whether the plaintiffs can *pursue* a claim under the patient health care records law, not the *merits* of such a claim. In any event, precedent holds that the statutory definition "does not encompass mere information that is not reduced to a record." *Wall*, 371 Wis. 2d 716, ¶ 28. In other words, the thrust of Wis. Stat. § 146.82(1) is protecting confidential information found *in patient health care records*. The plaintiffs do not acknowledge *Wall*.

In addition to the requirement of there being a "record" and not just "information," precedent provides two other guiding principles regarding what is a "patient health care

record." "Second, the record must have been prepared by or under the supervision of a health care provider." *Wall*, 371 Wis. 2d 716, ¶ 28. And "[t]hird, the record must relate to the patient's health." *Id.*; *see also Banuelos v. Univ. of Wis. Hosps. & Clinics Auth.*, No. 202AP1582, 2021 WL 4468448, *3 n.4 (Wis. Ct. App.) (Sept. 30, 2021) (recommended for publication) (reiterating *Wall*'s "three requirements" for the definition of "patient health care record").

None of this is true here. Instead, the records are data summaries that list businesses, their locations, and counts of COVID-19 cases. (R. 43–45 (sealed records).) They do not replicate the information contained in or constitute copies of reports local health officials made to DHS about individual COVID-19 cases. Thus, the disputed records are not patient health care records in the first place.

C. The plaintiffs' standing arguments are unpersuasive.

The plaintiffs raise "three independent tests," Br. 24, under which they believe they have standing: (1) the zone of interests test, addressed above; (2) taxpayer standing; and (3) judicial policy. (*Id.* 22–43.) Further, the plaintiffs assert that a plaintiff may raise a claim under the declaratory judgments act based only upon taxpayer standing, regardless of whether the plaintiff is within the zone of interests of the law that actually addresses the topic. (*Id.* 24; *see also id.* 11–12, 26–31.) Their standing theories are incorrect on multiple fronts.

First, the zone of interests test cannot be satisfied just by invoking the declaratory judgments act. It remains a standalone requirement not met here. Second, taxpayer standing does nothing to cure this problem where, as here, the relevant statute has nothing to do with the plaintiffs. Lastly, the plaintiffs' apparent view that standing rules can be ignored as a matter of "judicial policy" holds no water.

1. Invoking the declaratory judgments act does not satisfy the zone of interests requirement.

Despite conceding that the patient health care records law's injunction provision is inapplicable to them, *see* Br. 40, the plaintiffs maintain that they can pursue an action based on the declaratory judgments act—that the act somehow is a back door to pursue a statutory claim. (*See id.* 22–25.) Not so.

As the plaintiffs recognize, in a declaratory-judgment action a court declares a party's rights under some *other* source, separate from the declaratory judgments act itself. (*See id.* 24–25 (such as a contract).) Relevant here, the law states that "[a]ny person . . . whose rights, status or other legal relations are *affected by a statute* . . . may have determined any question of construction or validity *arising under the* . . . *statute* . . . and obtain a declaration of rights, status or other legal relations *thereunder*." Wis. Stat. § 806.04(2).

In other words, the declaratory judgments act is a *means* by which to vindicate a legally protectable interest (whether statutory, constitutional, or contractual); it is not itself the *source* of a legally protectable interest. That is obvious in light of the requirements to bring a declaratory-judgment action: "The party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest." *Olson*, 309 Wis. 2d 365, ¶ 29.

Invoking the declaratory judgments act does not supply that protected interest, and the plaintiffs have no right under Wis. Stat. § 146.84(1)(c)—or chapter 146 generally—to obtain an injunction or declaration.

That is dispositive because, despite what they have asserted, the plaintiffs indeed must point to a legally protectible interest—if it were otherwise, standing would be

meaningless. *See Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 11, 275 Wis. 2d 533, 685 N.W.2d 573 (describing justiciability requirements for declaratory-judgment actions, including "a legally protectible interest"). The "essence of" a standing analysis in a declaratory-judgment case "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 . . . involved*." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 54 (emphasis added). Thus, under Wisconsin's standing law a court "*must* determine . . . whether the interest allegedly injured is arguably within the zone of interests . . . protected or regulated by the statute.' *Milwaukee Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 31 (emphasis added) (citation omitted); *see also Cook v. Pub. Storage, Inc.*, 2008 WI App 155, ¶ 33, 314 Wis. 2d 426, 761 N.W.2d 645 (stating that "the person *must* nonetheless meet the standing *requirement* of injury to an interest that is arguably within the zone of interests to be protected by the statute" (emphasis added)).

Invoking the declaratory judgments act does nothing to cure the plaintiffs' lack of a legally protectable interest here.

2. The taxpayer standing doctrine does not cure the plaintiffs' statutory standing problem.

The plaintiffs believe that they need not satisfy the zone of interests test because they allege taxpayer standing. (*See* Br. 24.) But that misunderstands the doctrine. Taxpayer standing, if present, would be a form of a legally protectable interest; it is not an exception to that basic requirement.

Here, the basic qualifications for taxpayer standing would not be met. It requires an actual governmental expenditure and one that monetarily affects the plaintiffs.

That doctrine has no relationship to the supposed patient health care records that the plaintiffs target.

Generally, for taxpayers to meet this standard, they must have suffered, or will suffer, some actual "pecuniary loss." *S.D. Realty Co. v. Sewerage Comm'n,* 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). It may apply where the result is a "governmental unit having less money to spend for legitimate governmental objectives, or in the levy of additional taxes to make up for the loss resulting from *the expenditure*." *Id.* at 22 (emphasis added). When pointing to such an expenditure, "the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public." *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988).

To illustrate, in *City of Appleton* this Court addressed whether the plaintiff had taxpayer standing to challenge a statute governing the apportionment of assets and liabilities between municipalities when one annexed territory from the other. 142 Wis. 2d at 873–74. The Town of Menasha taxpayer's interests included that the arrangement would have required "him and other Menasha property owners to pay additional taxes." *Id.* at 874. That admitted effect—his taxes being raised—meant that the individual had "a direct and personal pecuniary interest in the apportionment statute." *Id.* at 883.

In *S.D. Realty Co. v. Sewerage Commission of Milwaukee*, a county landowner sued to challenge the county's sewage commission lease that would require "expenditure of public funds" "to construct [a] tunnel" rather than employ "an open water course." 15 Wis. 2d at 22. And in *Tooley v. O'Connell*, "plaintiffs [we]re property owners/taxpayers in the city of Milwaukee" challenging "the financing of the Milwaukee school system and the taxing of the plaintiffs'

property," which was taxed "pursuant to the provisions" in question, which "require expenditures of public monies for school purposes." 77 Wis. 2d 422, 431, 438, 253 N.W.2d 335 (1977).

Similarly, in *Thompson v. Kenosha County*, county residents challenged a statute authorizing a county to establish a county assessor system. 64 Wis. 2d 673, 676, 221 N.W.2d 845 (1974). Under it, the county would jointly finance the system. *Id.* at 680. That satisfied taxpayer standing because "the statute does require expenditure" of the county's money. *Id.* The bottom line was that "[t]axpayers' actions have been utilized to contest the validity of a variety of governmental activities *accompanied by* expenditure of public moneys." *Id.* (emphasis added).

Here, the plaintiffs would read these expenditure requirements out of the standard by simply asserting that, as taxpayers, they can challenge what they believe to be an illegal government act. But taxpayer standing requires an alleged illegal action (1) be *accompanied by* an expenditure *and* (2) that the expenditure affects a direct and personal pecuniary loss on the plaintiff, different than the general public.[2] *Id.*; *City of Appleton*, 142 Wis. 2d at 877. Neither of these things are true here.

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[2] The plaintiffs assert that, unlike in Wisconsin, federal taxpayer standing would require a "logical nexus" between the taxpayer's status and the claim they raise as a taxpayer. (Br. 26 n.9 (citing *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 78–79 (1978)).) They say that Wisconsin law is different (apparently, that it allows for any illogical connection), but as the precedent in the text makes clear, that is not so. Rather, there must be a bona fide expenditure and a unique connection to the plaintiff taxpayer. Indeed, elsewhere, the plaintiffs affirmatively

The plaintiffs' claim is that the defendants misapplied the public records law. (*See* R. 37:3, 4, 12 ¶¶ 5, 7, 41, App. 066, 067, 075; Br. 27–30.) In their view, the defendants should have concluded that the disputed records cannot be released. That alleged misapplication of the patient health care records laws to the public records law is not a taxpayer-standing "expenditure." DHS does not expend additional funds or raise taxes to decide that records should, or should not be, released. Rather, agency employees simply perform their normal jobs. It is not an expenditure subject to taxpayer standing and, further, the allegations point to no direct and personal pecuniary loss to the plaintiffs from an expenditure (like raising their taxes, in particular). Neither requirement is met.

Thus, unsurprisingly, the circuit court found this taxpayer standing theory "rather tenuous." (R. 100:6, App. 037.) And the court of appeals rightly rejected it. *See Wis. Mfrs. & Commerce*, ¶ 30.

Rather than meaningfully grapple with these requirements, the plaintiffs rely upon *Fabick*, but it does not advance their position; rather, it only helps demonstrate what is different here. (*See* Br. 19, 23–25, 27, 31.)

First, *Fabick* does not address a standing scenario like the one in this case. Where, as here, an analysis of the statute reveals that the plaintiffs are not arguably covered by it—the patient health care records law has nothing to do with protecting business trade associations or their members—then it follows that the plaintiffs lack standing:

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acknowledge that federal jurisprudence is persuasive authority, citing *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855 (proposing that this Court should "look[] to federal case law as persuasive authority regarding standing questions." (Br. 21 n.7).)

> In cases . . . initiated as declaratory judgment actions, the decisions most often examine and interpret a particular statute or constitutional provision at issue in the case to determine whether the party has standing. Thus, these cases often refer to "legally protectable interests." This phrase or a similar phrase means interests protected by a statute or constitutional provision at issue.

Foley-Ciccantelli, 333 Wis. 2d 402, ¶ 43. The "substantive statutory or constitutional provisions . . . govern standing." *Id.* ¶ 54.

Fabick does not address this kind of statutory scheme or interpretive framework, but rather addressed the Governor's emergency powers. 396 Wis. 2d 231, ¶ 11. It does not hold that a relevant statutory scheme is ignored when a plaintiff asserts taxpayer standing. 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 sense and also makes legal sense. Where a statute creates the sphere of coverage in the first place, the statutory scope should govern. 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, unlike here, the *Fabick* analysis involved a bona fide expenditure of taxpayer funds: "[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.*

Fabick is nothing like this case. No taxpayer funds have been designated for a new expenditure. And, more fundamentally, the plaintiffs' concept of taxpayer standing ignores the scope of the actual statutes at issue—something courts do not do. *See Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 54. This Court should decline the plaintiffs' invitation to make the taxpayer standing doctrine essentially limitless.

3. "Judicial policy" is not a basis for standing when the statute at issue does not apply to the plaintiffs.

Third, the plaintiffs argue that, setting aside the zone of interests requirement and taxpayer standing, they "satisfy the prudential considerations underlying the doctrine of standing and should therefore be permitted to proceed with this action, at least past the pleadings stage." (Br. 42.) They rely primarily upon *McConkey v. Van Hollen*, 2010 WI 57, ¶ 15, 326 Wis. 2d 1, 783 N.W.2d 855. (*Id.* 41–42.)

It is true that "[s]tanding is not a question of jurisdiction, but of sound judicial policy." *Milwaukee Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 31 (citation omitted). But the so-called "policy purposes of standing," Br. 41, at play in *McConkey* cannot serve as a substitute for the plaintiffs failing to invoke a statute that applies to them.

If the plaintiffs were correct, any person could sue to enjoin the release of patient health care records, which clearly is not the case. Rather, the fact that standing principles *derive from* judicial policy does not mean the principles cease to apply, as the plaintiffs seem to suggest. Rather, the judicial policy is accomplished by applying the principles discussed above—including the policy decisions made by the Legislature when crafting the patient health care records statute—which

do not support standing. *See Milwaukee Deputy Sheriff's Ass'n*, 327 Wis. 2d 206, ¶ 31 (noting that standing is derived from judicial policy and then applying the zone of interests and injury requirements).

D. The second amended complaint adding individual plaintiffs is not before this Court.

Lastly, the plaintiffs have attempted to add two individual plaintiffs in a proposed second amended complaint, and they suggest that this Court might remand with directions to dismiss *without* prejudice in light of their motion to amend. (Br. 17–18, 47 n.27.) This attempted amendment does not matter to the issues presented for multiple reasons.

First, procedurally, the second amended complaint is not before this Court. It was proposed but has yet to be accepted by the circuit court. (R. 77.) The court of appeals did not address it. *Wis. Mfrs. & Commerce*, ¶ 45 n. 11.

Second, even if the circuit court were to accept that amendment, it would not cure what ills the plaintiffs' case. The plaintiffs have sought broad relief that, in the words of the circuit court's temporary injunction, generally enjoins the defendants "from releasing any information relating to businesses whose employees have tested positive for COVID-19 or who contract tracing has shown close connections." (R. 75:2, App. 060.) Two individuals would have no right to that relief; rather, at most, they might have a right to challenge release of their own records.

Again, Wis. Stat. § 146.84(1)(c) states that "[a]n *individual* may bring an action to enjoin any violation of s. 146.82," the patient health care records law. Thus, if otherwise covered, two people whose patient health care records were at issue might properly come to court, but only as to their own records. The default is that "standing prohibits

a litigant from raising another's legal rights." *Foley-Ciccantelli*, 333 Wis. 2d 402, ¶ 62 (citation omitted).

II. Wisconsin Stat. § 19.356(1) bars the plaintiffs' declaratory-judgment action seeking to halt the release of public records.

There is a second reason the plaintiffs' claim fails: Wis. Stat. § 19.356(1) bars it.

A. The statute's plain language bars the plaintiffs' suit.

Wisconsin Stat. § 19.356(1)'s plain language does not allow for a prelease court challenge here. *See Kalal*, 271 Wis. 2d 633, ¶ 46 (stating the principles of statutory interpretation). The statute specifically limits who receives prior notice of public records' release and who may seek prerelease injunctions of them. None of Wis. Stat. § 19.356's limited exceptions apply here, and the plaintiffs have not argued that they do. (*See* Br. 45.) Lacking an exception, prerelease review is barred by the Legislature's clear language:

> Except 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). There are only limited exceptions (for a record subject's employee discipline records, records obtained through subpoenas or search warrants, and certain other employee records), unless another statute specifically provides one. Wis. Stat. § 19.356(1), (2)(a)1.–3.

Here, the plaintiffs conceded below they are not relying on the Wis. Stat. § 19.356 exceptions: "We're not proceeding under that statute." (R. 100:19, App. 050.) Thus, a detailed argument need not be presented about them. It suffices to point out that, among other potential reasons, the exceptions have no application because they apply only to a "record subject," which is defined as "an individual about whom personally identifiable information is contained in a record." Wis. Stat. § 19.356(2)(a) (triggering language); Wis. Stat. § 19.32(2g) (definition). Here, the plaintiff trade associations are not "individuals" and, further, no personally identifiable information about individuals is provided in the records.

Because none of the exceptions apply, it also means that there is no notice requirement. The statute provides: "Except 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." Wis. Stat. § 19.356(1). Only when notice is required does the review process kick in: under subsection (2)(a), the covered records subject receives three-days' notice and then has a limited time to commence a court action. Wis. Stat. § 19.356(2)(a), (4), (5).

That was not the kind of notice provided here; rather, the plaintiffs were informed of the planned release merely as a courtesy. That courtesy in no way transformed the statute into covering them or their circumstances—circumstances that, ordinarily, would come with no notice prior to release.

Lacking one of the limited exceptions, the express bar applies: the plaintiffs are not entitled to be "notif[ied]" and "no person is entitled to judicial review" of the decision to "provide . . . access." Wis. Stat. § 19.356(1). That express language should be given effect, and this action should have been dismissed for this additional reason.

B. The declaratory judgments act does not provide an exception to Wis. Stat. § 19.356(1).

The plaintiffs argue that the declaratory judgments act is an exception to the express limits in Wis. Stat. § 19.356(1) and (2)(a), *see* Br. 45–46, but that position is untenable for two main reasons: (1) the public records law expressly does not allow it, and (2) case law recognizes that general declaratory-judgment actions may not be used as an end-run around specific statutory schemes.

1. The public records law expressly prohibits the plaintiffs' attempted use of the declaratory judgments act.

First, as summarized above, the public records law expressly limits when a prerelease injunction may be sought: where an exception is specifically listed in that law or in another law on the topic.

Contrary to the plaintiffs' position, the declaratory judgments act has no bearing on when a prerelease injunction properly may be sought. (*See* Br. 45.) It simply allows parties to potentially bring actions to declare "rights, status, and other legal relations" when a party has a proper "interest," among other requirements. Wis. Stat. § 806.04(1), (11). It does not "otherwise provide[ ]" that someone may seek prerelease review of an authority's decision to release patient health care records. Wis. Stat. § 19.356(1).

That is clear as a matter of plain statutory text and common sense. "Provide" means "to supply or make available." *Provide*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/provide (last visited Nov. 16, 2021); *see Kalal*, 271 Wis. 2d 633, ¶ 53. The declaratory judgments act does not "make available" a right to enjoin public records or health care records; at most, it provides a

means for someone to seek a declaration *about* those other laws, where the challenger has standing to do so. That might be contrasted with laws like Wis. Stat. § 146.84(1)(c) that, when properly invoked, may provide for an injunction of the release of patient health care records.

To illustrate, this Court may look to an unpublished but persuasive authored opinion that addressed this very pattern. *Wetzler v. Div. of Hearings & Appeals*, 2011 WI App 44, ¶¶ 1, 15–16, 332 Wis. 2d 317, 797 N.W.2d 935 (unpublished; judge-authored); *see* Wis. Stat. § (Rule) 809.23(3)(b). There, a challenger sought to halt release of certain records created as part of an investigation's medical report, and to do so through a declaratory-judgment action. The court concluded that the particular statutes the challenger invoked—related to the patient/physician privilege under Wis. Stat. § 905.04 and confidential patient health care records under Wis. Stat. § 146.81—did not apply. *Id.* ¶ 14.

It followed that the language "as otherwise provided by statute" in Wis. Stat § 19.356(1) also did not apply because the statutes invoked on the topic (Wis. Stat. § 905.04 and Wis. Stat. § 146.81) did not otherwise provide coverage. The attempt to raise these topics through a declaratory-judgment action did nothing to change that. It was not a *source* of something "otherwise provided" on the relevant topic.

Other types of cases reflect this, as well. For example, in a visitation case, one might discuss an exception to venue "otherwise provided by statute" by examining the statute (Wis. Stat. § 767.025) governing "all enforcement or modification petitions . . . for actions affecting the family." *Sharp v. Sharp*, 185 Wis. 2d 416, 420, 518 N.W.2d 254 (Ct. App. 1994); *see also State v. Greene*, 2008 WI App 100, ¶ 12 n.6, 313 Wis. 2d 211, 756 N.W.2d 411 (discussing whether an exception to restitution obligations was "otherwise provided by law" found in "ERISA's anti-alienation clause").

Further, if a declaratory-judgment action was an exception to the limits in Wis. Stat. § 19.356(1), that would render those limits meaningless. But when interpreting statutes, creating surplusage is not allowed. *Kalal,* 271 Wis. 2d 633, ¶ 45. Nor can an entire subsection be rendered meaningless. *See In re Commitment of Gilbert*, 2012 WI 72, ¶ 43, 342 Wis. 2d 82, 816 N.W.2d 215 (courts may not "ignore" subsections).

It makes no sense that the declaratory judgments act itself—which is an empty vessel for bringing an action—is an exemption "otherwise provided by statute" to any particular law. Thus, when a plaintiff comes to court seeking to enforce a particular statutory, constitutional, or contractual right (which the plaintiffs have not pled here), they ground their claims in that specific right external to the declaratory judgments act. *See*, *e.g.*, *Olson*, 309 Wis. 2d 365, ¶ 44 (challenging an ordinance that rezoned the plaintiff's property as illegal under particular statutes and constitutional provisions); *Serv. Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶¶ 32–36, 393 Wis. 2d 38, 946 N.W.2d 35 (involving a constitutional separation of powers challenge between litigants whose powers were at issue); *Papa v. DHS*, 2020 WI 66, ¶ 3, 393 Wis. 2d 1, 946 N.W.2d 17 (challenging an agency's statutory authority to recoup payments from the plaintiff); *Planned Parenthood of Wis., Inc. v. Schimel*, 2016 WI App 19, ¶ 19, 367 Wis. 2d 712, 877 N.W.2d 604 (rejecting standing to bring a declaratory-judgment claim seeking interpretation of abortion statutes where the plaintiffs lacked a stake in the outcome and were not "directly affected" by the issue in controversy).

The plaintiffs have no answer to this basic principle. They just assert that the declaratory judgments act must be available because otherwise they lack an adequate remedy—but a remedy for what? (Br. 40.) They have never pointed to a

statutory provision that covers them, much less a constitutional or contractual one. Courts do not rewrite statutes and jettison precedent for an illusory claim.

2. That the declaratory judgments act provides no exception is further supported by the principle that the specific statute governs over the general.

The foregoing is the entire analysis needed to address the declaratory judgment act's role here—there is none. But there is further support for that conclusion in the principle that the specific statute governs over the general.

Courts recognize that, where there is a specific "statutory means of review," it is not "subject to collateral attack in a different forum or under different procedures." *Sewerage Comm'n of Milwaukee v. DNR*, 102 Wis. 2d 613, 631, 307 N.W.2d 189 (1981). In particular, that is true of the declaratory judgments act: "the more specific statute . . . controls" and the declaratory judgment statute cannot "be used to do an end run around" it. *Darboy Joint Sanitary Dist. No. 1 v. City of Kaukauna*, 2013 WI App 113, ¶ 17, 350 Wis. 2d 435, 838 N.W.2d 103 (applying limits to challenges contained in an annexation-challenge statute in the face of an attempted declaratory-judgment action).

To illustrate, an attempt to bring a separate declaratory-judgment action to challenge a decision that had its own statutory-review mechanism—a permit decision—was rejected because the statutory mechanism was the "exclusive method" of seeking review; no "end run around" was allowed. *Sewerage Comm'n of Milwaukee*, 102 Wis. 2d at 621, 623. "[W]here a specified method of review is prescribed by an act creating a new right or conferring a new power, the method so prescribed is exclusive." *Id.* at 630; *see also City of*

Superior v. Comm. on Water Pollution of State, 263 Wis. 23, 25, 27, 56 N.W.2d 501 (1953) (rejecting an attempt to avoid a statutory-review mechanism with a separate declaratory-judgment action). Likewise, an attempt to avoid limits in an annexation-challenge statute through a general declaratory action was not appropriate. *Darboy Joint Sanitary Dist. No. 1*, 350 Wis. 2d 435, ¶¶ 17, 26.

The same holds true here: the public records law has limited exceptions to the rule that no prerelease review is available when an authority responds to a public records request. There is nothing odd about giving effect to those statutory parameters. The statutory scheme is specifically built to strongly presume release is required and to require that a response proceed reasonably expeditiously. *Milwaukee Journal Sentinel*, 319 Wis. 2d 439, ¶ 59 ("[T]here is a strong, legislatively-created presumption in favor of disclosure"); Wis. Stat. § 19.35(4)(a) (authorities should act "as soon as practicable and without delay"). The plaintiffs' apparent view that, regardless of that statutory scheme's explicit limits, someone else could always tie up record access in court based on a general declaratory-judgment action runs contrary to the public records law's express language and principles of statutory interpretation.

This reality is reflected in the court of appeals and this Court's decisions in the *Moustakis* litigation. There, this Court reconfirmed 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). Rather, "[t]he general rule is that 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." *Id.* ¶ 19.

Having failed under the public records law, the challenger there then attempted to frame his claim as sounding in common law mandamus. But that was not allowed: "to put it bluntly, Moustakis has no right to seek to enjoin the release of the records under the circumstances here. The authority's obligation is to release the records if its consideration of the balancing test leads it to that conclusion, and *Moustakis has not demonstrated he is entitled to any form of judicial review or relief prior to that occurring*, including review by mandamus." *Moustakis v. DOJ*, No. 18AP373, 2019WL1997288, at *6 (Wis. Ct. App. May 7, 2019) (unpublished; judge-authored) (emphasis added). Rather, "the 'right' Moustakis seeks to vindicate is not recognized at law." *Id.* ¶ 35. The same is true here.

* * * *

A declaratory-judgment action cannot do the work that the patient health care records law plainly does not contemplate and that the public records law forbids. DHS intends to carry out its duty to release requested public records about a serious public health issue. The plaintiffs' attempt to stop it, regardless, should be rejected.

CONCLUSION

This Court should affirm the court of appeals.

Dated this 16th day of November 2021.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,795 words.

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I hereby certify that:

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

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Dated this 16th day of November 2021.

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