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## INTRODUCTION

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

meningitis—its decision is practically unreviewable and therefore unstoppable.

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

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

This Court should affirm.

### **ISSUE PRESENTED**

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

The circuit court answered yes.

This Court should answer yes.

### **ORAL ARGUMENT AND PUBLICATION**

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

### **STATEMENT OF THE CASE**

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





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

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

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<sup>5</sup> All appendix cites refer to the State’s Appendix.

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

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

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

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

### STANDARD OF REVIEW

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

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

*Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 18, 275 Wis. 2d 533, 685 N.W.2d 573.<sup>7</sup>

## ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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<sup>9</sup> Additionally, an organization asserting a claim on behalf of its members must allege “facts sufficient to show that a member of the organization would have had standing to bring the action in his own name.” *Wis. Env’l Decade, Inc.*















release would be unlawful, which is enough to support taxpayer standing.

*See Voters with Facts*, 376 Wis. 2d 479, ¶¶ 16, 18.<sup>14</sup>

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

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

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

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

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

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<sup>15</sup> Contrary to the State’s assertion, State’s Br. 15, Plaintiffs have always argued that they are covered by Section 146.84.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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





























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

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

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







### **FORM AND LENGTH CERTIFICATION**

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

Dated: March 2, 2021.

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**RYAN J. WALSH**



**CERTIFICATE OF SERVICE**

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

Thomas C. Kamenick  
Wisconsin Transparency Project  
Kamenick Law Office, LLC  
1144 Noridge Trl.  
Port Washington, WI 53074

Anthony Russomanno  
Clayton P. Kawski  
Assistant Attorneys General  
Wisconsin Department of Justice  
17 West Main Street  
PO Box 7857  
Madison, WI 53707-7857

Dated: March 2, 2021.

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RYAN J. WALSH