IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

1789 Foundation, INC. d/b/a Citizen AG and Jennifer McKinney,

Plaintiffs,

Case No. 3:24-CV-00755-WMC

v.

Electronic Registration Information Center, Center for Election Innovation and Research, David J. Becker, and the Wisconsin Department of Transportation,

Defendants.

DEFENDANT ELECTRONIC REGISTRATION INFORMATION CENTER'S BRIEF IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

The Complaint in this case is a press release masquerading as a legal pleading. Whatever its merit as a press release, it is insufficient as a complaint to this Court. Plaintiffs 1789 Foundation, d/b/a Citizen AG, and Jennifer McKinney accuse the Electronic Registration Information Center (ERIC), Center for Election Innovation and Research (CEIR), David J. Becker, and the Wisconsin Department of Transportation of a far-ranging, far-fetched conspiracy to undermine the integrity of our elections through misuse of data related to driver's licenses. Ignoring Federal Rule of Civil Procedure 8, which requires "a short and plain statement of the claim showing that the pleader is entitled to relief," Plaintiffs spend 178 paragraphs and several additional pages outlining the defendants' alleged misconduct, not just in Wisconsin, but nationwide.

But Plaintiffs have at least two serious problems. First, they both lack standing. Thus, this Court lacks subject matter jurisdiction to hear this case. Second, Plaintiffs have failed to state a claim upon which relief can be granted. Despite its length, the Complaint simply does not allege facts sufficient to establish that ERIC or its co-defendants[1] violated the Driver's Privacy Protection Act—the sole cause of action alleged here. For these reasons, this lawsuit must be dismissed under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

FACTUAL BACKGROUND

Most of the Complaint consists of legal argument and conclusory allegations that are not entitled to the presumption of truth, as will be argued below. ERIC here summarizes those factual allegations that are arguably well-pled and pertinent to the claim against ERIC. ERIC does not concede the

[1] The Wisconsin Department of Transportation and CEIR have filed their own motions to dismiss. Dkt. 10, 14. According to CEIR's brief in support of its motion, defendant David Becker has not yet been served, but the arguments CEIR makes would apply equally to Mr. Becker, who is CEIR's executive director. Dkt. 11 at 1, n.1.

accuracy of these allegations but accepts them as true for purposes of this motion.

As to the parties and to standing, the Complaint alleges as follows. Plaintiffs are the 1789 Foundation, d/b/a Citizen AG, and Jennifer McKinney, an individual Wisconsin voter. Dkt. 1, ¶¶4–5, 13. Citizen AG is a Florida non-profit organization that describes itself as "[d]edicated to educating Americans about their rights and to advocating, protecting, and preserving American civil liberties and constitutional rights through an array of means that include, without limitation, public records requests and litigation." *Id.* ¶4. Citizen AG has individual members who support it through financial contributions. *Id.* ¶5. These members have recently "become increasingly concerned about the state of the nation's voter registration rolls, including whether state and local officials are complying with the DPPA and how their personal information is being used." *Id.* ¶6. Because of these concerns, Citizen AG began monitoring "state and local election officials' compliance with the DPPA," including through public records requests. *Id.* ¶10. These efforts have cost Citizen AG "substantial resources, including staff time." *Id.* ¶12. Jennifer McKinney is a registered Wisconsin voter who lives in La Crosse County. *Id.* ¶13.

Defendant ERIC is a 501(c)(3) organization. *Id.* ¶18. On its 2021 federal Form 990, ERIC refers to itself as "a membership organization consisting of state election officials working together to improve the accuracy of state voter registration lists and educate eligible citizens on how to register to vote." Dec. of Counsel, Exh. A, ERIC Fiscal Year 2021 Form 990, ERIC: Corporate Transparency, https://ericstates.org/corporate-transparency/.[2] Defendant CEIR

[2] Plaintiffs quote only part of the mission statement from the Form 990, cutting it off at "lists" (Dkt. 1, ¶18), but the Court can consider the full and accurate mission statement under the "incorporation-by-reference doctrine," which "provides that if a plaintiff mentions a document in his complaint, the defendant may then submit the document to the court without converting defendant's 12(b)(6) motion to a motion for summary judgment." *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012).

is also a 501(c)(3) organization. On its 2012 federal Form 990, CEIR refers to its mission as "to support state election officials in enhancing the accuracy of voter registration lists." *Id.* ¶19. Defendant David Becker is the founder of both ERIC and CEIR, and currently Executive Director of CEIR. *Id.* ¶20. He is a non-voting board member of ERIC. *Id.* ¶58.

And as to the merits, the Complaint's few well-pled allegations state as follows. On September 4, 2020, Jenny Lovell, at that time CEIR's former research manager, sent a group of state election officials an email that referred to the transfer of certain data files between ERIC and CEIR concerning "eligible but unregistered voters." *Id.* ¶¶123–24.

On May 17, 2016, the Wisconsin Government Accountability Board (GAB) entered into a Membership Agreement with ERIC (the "Agreement"). *Id.* ¶146; Dkt. 1-6 at 1. The purpose of the Agreement was to help Wisconsin "reduce the costs and increase the accuracies and efficiencies associated with Wisconsin's use of voter registration systems." Dkt. 1, ¶146; Dkt. 1-6 at 1. Under the Agreement, the GAB agreed to pay ERIC annual dues for ERIC's services. Dkt. 1, ¶146; Dkt. 1-6 at 1. The Agreement contained a section titled "Privacy; Use of Data" in which both GAB and ERIC agreed to "use their best efforts to prevent the unauthorized use or transmission of any private or protected Member Data; Additional Member data; and data included in reports provided by ERIC ("ERIC Data") … in its possession." Dkt. 1-6 at 3, § 4(a). GAB also committed to complying with all local, state, and federal laws when transmitting data to ERIC. *Id.* And the privacy section explicitly tied the use of ERIC's data to a government function: "The Member shall not use or transmit any ERIC Data for any purpose other than the administration of elections under state or federal law." *Id.*

On the signature page for the Agreement, Kevin J. Kennedy signed on behalf of "Wisconsin Government Accountability Board/Wisconsin Elections Commission." Dkt. 1-6 at 8. At the bottom of the page, beneath the signatures of both Kennedy and ERIC Board Chair Angie Rogers, is this text: "Note: Effective

June 30, 2016 the Wisconsin Government Accountability Board becomes the Wisconsin Elections Commission." *Id.*

APPLICABLE LEGAL STANDARDS

I. Standing, FRCP 12(b)(1)

Under Federal Rule of Civil Procedure 12(b)(1), a complaint must be dismissed if it fails to adequately allege subject matter jurisdiction. Plaintiffs must establish standing because under our Constitution, federal courts have jurisdiction to hear only "cases" and "controversies." U.S. Const. Art. III, section 2; *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

To establish standing, a plaintiff must establish that she, he, or it has (1) suffered an "injury in fact" that was (2) caused by the defendant, which (3) a favorable decision by the court will likely redress. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted). An "injury in fact" is defined as "an invasion of a legally protected interest which is (a) concrete and particularized … and (b) actual or imminent, not conjectural or hypothetical." *Id.* (cleaned up). To count as a particularized injury, an alleged injury "must be personal, individual, and distinct, not general and undifferentiated." *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 640 (7th Cir. 2024) (citations omitted).

An organization has standing to sue on its own behalf for injuries it has sustained provided it can establish the three elements of injury, causation, and redressability. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 393–94 (2024).

An association has standing to sue on behalf of its members if:

> (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit.

Sierra Club v. Franklin Cty. Power of Ill., LLC, 546 F.3d 918, 924 (7th Cir. 2008) (citing *Friends of the Earth, Inc. v. Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 181, (2000)). Under the third prong, individual participation "is not normally necessary when an association seeks prospective or injunctive relief for its members, but … would be required in an action for damages to an association's members." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996).

A defendant who alleges that a complaint fails to raise allegations that would establish standing is making a "facial challenge" to subject matter jurisdiction. "In reviewing a facial challenge, the court must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015) (citation omitted); *see also Lujan*, 504 U.S. at 561.

II. Failure to state a claim, FRCP 12(b)(6).

Under Federal Rule of Civil Procedure 12(b)(6), a cause of action must be dismissed when the complaint fails to state a claim upon which relief can be granted. To survive a motion to dismiss under Rule 12(b)(6), the complaint must (1) assert a plausible claim; and (2) set forth sufficient factual allegations to support the claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007)). This means that "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (citing *Twombly*, 550 U.S. at 570).

A claim has facial plausibility when the plaintiff pleads enough factual content to allow the court to draw "the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "The 'factual allegations must be enough to raise a right to relief above the speculative level.'" *McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011) (quoting *Twombly*, 550 U.S. at 570). "[L]egal conclusions and conclusory allegations merely reciting the

elements of the claim are not entitled to [the] presumption of truth." *Id.*; *see also Jackson v. Bank of Am. Corp.*, 711 F.3d 788, 794 (7th Cir. 2013) (court need not credit legal conclusions couched as factual allegations). In other words, facts, not legal boilerplate, are needed to sustain a claim. *Iqbal*, 556 U.S. at 678.

ARGUMENT

Plaintiffs' Complaint is deficient in at least two key respects. First, Plaintiffs have failed to allege facts demonstrating they have standing to bring this action. This Court thus does not have subject matter jurisdiction over the action. Second, the Complaint fails to state a claim upon which relief can be granted. For these reasons, the Complaint should be dismissed.

I. Plaintiffs lack standing, meaning this Court lacks subject matter jurisdiction.

Citizen AG does not have standing as an organization or an association, and Jennifer McKinney lacks standing as an individual. Because Citizen AG may claim standing for itself based on McKinney's alleged standing, ERIC addresses McKinney's case first.

A. Jennifer McKinney lacks standing.

Jennifer McKinney lacks standing, failing to meet that crucial first requirement: establishing an injury in fact. McKinney has alleged no "concrete and particularized" injury as required by *Lujan*. 504 U.S. at 560. She appears to be asserting two different injuries: one to privacy, and one to her "fundamental right to vote." Both theories of standing fail, and ERIC addresses each in turn.

First, McKinney's claim of a harm to her privacy injury fails because the Complaint does not explain *how* her privacy has been invaded, or *what* concrete injuries she has experienced as a result. It only states that she "has suffered concrete injuries as a direct result of Defendants' unlawful conduct, in that she experienced an invasion of privacy due to the unauthorized access, use, and disclosure of her DMV data, which was used and continues to be used to infringe

upon and violate her fundamental right to privacy…." Dkt. 1, ¶174. Such "conclusory allegations merely reciting the elements of the claim are not entitled to [the] presumption of truth." *McCauley*, 671 F.3d at 616. These are exactly the kind of "naked assertions devoid of further factual enhancement" that cannot survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (cleaned up).

A DPPA claim must allege concrete injury *beyond* the mere disclosure of data. *Baysal v. Midvale Indem. Co.*, 78 F.4th 976, 979 (7th Cir. 2023); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."). In *Baysal*, the Seventh Circuit held that plaintiffs failed to allege a harm sufficient to support standing, in the process rejecting significantly more detailed allegations in support of standing than those raised by Citizen AG and McKinny. The *Baysal* plaintiffs alleged, for example, that they spent time and money monitoring their credit reports for potential future harm—but the district court noted, and the Seventh Circuit affirmed, that there was no "objectively reasonable risk of harm" to justify their actions. *Baysal v. Midvale Indem. Co.*, No. 21-CV-394-WMC, 2022 WL 1155295, at *3 (W.D. Wis. Apr. 19, 2022, Conley, J.), *aff'd*, 78 F.4th 976, 977–78 (7th Cir. 2023), *reh'g denied*, No. 22-1892, 2023 WL 6144390 (7th Cir. Sept. 20, 2023). Although the defendants had inadvertently made plaintiffs' driver's license information available to the general public via an auto-fill function on their websites, the specific disclosed information was not of the kind that could "facilitate credit-related frauds." *Baysal*, 78 F.4th at 977–78. The *Baysal* plaintiffs also alleged that the disclosure of their data caused them "worry and anxiety," but "worry and anxiety are not the kind of concrete injury essential to standing." *Id.* at 977.

McKinney, meanwhile, has failed to allege any specific harms at all—not even anxiety or signing up for credit monitoring—in contrast to the *Baysal* plaintiffs. At best, the Complaint alleges that the unauthorized use of certain protected information "increase[ed] the risk of identity theft, privacy invasion, and unauthorized political targeting." Dkt. 1, ¶165. Risk of future harm is not

harm. *Ewing v. MED-1 Sols., LLC*, 24 F.4th 1146, 1152 (7th Cir. 2022). And as the Seventh Circuit explained in *Baysal*, the mere alleged disclosure of information in violation of the DPPA cannot be considered inherently harmful in a way that establishes standing, as it has no analog in historical or common-law torts. *Baysal*, 78 F.4th at 979–80.

Second, McKinney's claim that she has suffered an injury to her "fundamental right to vote" is doomed twice over. First, again, she has failed to allege with particularity *how* her right to vote has been harmed. Although the complaint gestures vaguely at "vote dilution," there is no allegation that *McKinney's* vote has been or could be diluted, or how this would occur. *See, e.g.*, Dkt. 1, ¶¶7, 175.[3] Even if this Court were to infer from the Complaint that McKinney intended to allege "vote dilution," (*i.e.*, to allege that the weight of McKinney's ostensibly valid vote is somehow diminished by the alleged counting of invalid votes cast by others), such an allegation does not create standing. The Seventh Circuit, like numerous other federal courts, has expressly rejected this "vote-dilution" theory of standing. As the Seventh Circuit has explained, this theory cannot clear the standing bar because "[the plaintiffs'] votes would be diluted in the same way that every other vote cast … would be diluted. Thus, to the extent Plaintiffs would suffer any injury, it would be in a generalized manner and not 'personal and individual' to Plaintiffs, as the Supreme Court requires." *Bost v. Illinois State Bd. of Elections*, 114 F.4th 634, 640 (7th Cir. 2024) (quoting *Spokeo*, 578 U.S. at 339).[4] Like the plaintiffs in *Bost*,

[3] The declaration of Eric Scharfenberger attached to the Complaint goes into some detail about what he believes "vote dilution" is and how it can work. Dkt. 1-7 at 2, ¶¶7–9. However, this declaration does not specifically allege that the *defendants* in this action have caused "vote dilution."

[4] *Accord, e.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 356-58 (3d Cir. 2020), *vacated on mootness grounds sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-3747, 2021 WL 1662742, at *6-11 (D. Colo. Apr. 28, 2021) (collecting cases), *aff'd*, No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022); *Bower v. Ducey*, 506 F. Supp. 3d

McKinney alleges no injury personal to herself, only a generalized one that does not grant her access to federal court.

Read generously, the Complaint may hint that Ms. McKinney is "concerned about the state of the nation's voter registration rolls," but such a generalized grievance regarding government policy is equally inadequate as a basis for standing. Dkt. 1, ¶¶6–7. The Seventh Circuit explained this clearly in *Bost*: "[A]t its core, Plaintiffs' complaint is that Illinois is disobeying federal election law. But an injury to an individual's right to have the government follow the law, without more, is a generalized grievance that cannot support standing 'no matter how sincere.'" *Bost*, 114 F.4th at 640 (citing *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013)). Put differently, even if McKinney has "sincere legal, moral, ideological, and policy objections" to the Defendants' alleged actions, such objections "do not establish a justiciable case or controversy in federal court." *All. for Hippocratic Med.*, 602 U.S. at 396.[5]

McKinney also tries to assert standing under Wisconsin Statute Section 5.06, but this does not work. Dkt. 1, ¶16. First and foremost, Article III standing is a matter of federal law, not state law. *See, e.g., Protect Our Parks, Inc. v. Chicago Park Dist.*, 971 F.3d 722, 731–32 (7th Cir. 2020). Even if McKinney had standing under Section 5.06, that would not give her Article III standing in this case. Moreover, this action on its face has nothing to do with Section 5.06, which allows an elector who believes an election official has acted or failed to act in violation of election law to file a complaint with the Wisconsin Elections

699, 711-13 (D. Ariz. 2020); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 607-09 (E.D. Wis. 2020).

[5] Citizen AG's disjointed allegations about events in Michigan Colorado, and elsewhere show it is heedless of an earlier admonishment by the U.S. Supreme Court: that plaintiffs' belief that the government may have violated the law "does not provide a special license to roam the country in search of governmental wrongdoing and to reveal their discoveries in federal court." *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 (1982).

Commission (WEC). Wis. Stat. § 5.06(1). And a WEC decision on a Section 5.06 complaint is eventually subject to judicial review in *state court*, not federal court. *See* Wis. Stat. § 5.06(8). McKinney has sued the wrong parties in the wrong jurisdiction if she wanted to invoke Section 5.06.

To the extent McKinney seeks to allege taxpayer standing, this, too, fails. Dkt. 1, ¶16. McKinney's taxpayer standing argument cannot help her in federal court: "It has long been established … that the payment of taxes is generally not enough to establish standing to challenge an action taken by the Federal Government." *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 593 (2007). The Complaint does not allege facts that would bring it within the "narrow exception to the general rule against taxpayer standing," which permits a specific type of Establishment Clause claim against the federal government. *Id.* Taxpayer standing is a nonstarter here.[6]

Jennifer McKinney has not established the standing that would give this Court subject matter jurisdiction to hear this case.

B. Citizen AG lacks standing.

It is unclear from the face of the Complaint whether Citizen AG intended to plead facts establishing standing as an organization, as an association filing suit on behalf of its members, or both. Regardless, it has failed.

[6] McKinney invokes her taxpayer status to give herself standing under Section 5.06. Dkt. 1, ¶16. It is not only irrelevant, but highly doubtful whether taxpayer standing supports a Section 5.06 claim in Wisconsin circuit court. *See Teigen v. Wisconsin Elections Comm'n,* 2022 WI 64, ¶163, 403 Wis. 2d 607, 976 N.W.2d 519 (Hagedorn, J., concurring) (noting that taxpayer status did not confer standing to challenge a WEC action based on WEC's expenditure on staff salaries and distribution of an allegedly unlawful memo, with footnote collecting cases setting higher bar for taxpayer standing); *reconsid. denied*, 2022 WI 104, ¶ 163, 997 N.W.2d 401, and *reconsid. denied,* 2024 WI 4, ¶ 163, 5 N.W.3d 610, and *overruled on other grounds by Priorities USA v. Wisconsin Elections Comm'n,* 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429.

1. Citizen AG lacks organizational standing.

Citizen AG has not cleared the first hurdle to establish Article III standing: it has alleged no injury to itself as an organization.

Citizen AG seeks a foothold for standing in its own decision as an organization to expend "substantial resources" on investigating and researching the possibility that state and local election officials were violating the DPPA (Dkt. 1, ¶¶10–12, 173), but such actions do not create standing. The U.S. Supreme Court foreclosed this argument earlier this year: "[A]n organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. *An organization cannot manufacture its own standing in that way*." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 394 (2024) (emphasis added). Just like the plaintiffs in *FDA v. Alliance for Hippocratic Medicine*, Citizen AG cannot manufacture standing by choosing to spend money to chase its suspicions. *See also* Dec. of Counsel, Exh. B, *1789 Foundation Incorporated et al. v. Adrian Fontes*, No. CV-24-02987-PHX-SPL Dkt. 17, Order at 8–10 (D. Ariz., Nov. 1, 2024) (finding the injuries Citizen AG alleged, which were identical to those in this case, were insufficient to establish standing to pursue claims under the National Voter Registration Act in light of *Alliance for Hippocratic Medicine*).

Moreover, on the face of its own Complaint, Citizen AG is not "diverting" resources to investigate potential DPPA violations, but rather carrying out its core mission. That mission includes "advocating, protecting, and preserving American civil liberties and constitutional rights through an array of means that include, without limitation, public records requests and litigation." Dkt. 1, ¶4. Citizen AG's only allegation of activity in Wisconsin is that it submitted an open records request, an activity contemplated in its mission. Dkt. 1, ¶144. This kind of resource use does not confer standing. *Cf. Common Cause Indiana v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (collecting cases where voter-advocacy organizations

"demonstrated the necessary injury in fact in the form of the *unwanted demands* on their resources" (emphasis added)).[7].

Citizen AG also attempts to assert standing under Wisconsin Statute § 227.40, to no avail. Dkt. 1, ¶17. Again: establishing standing to proceed in *state* court would not help Citizen AG establish Article III standing to proceed in *this* Court. *See, e.g., Protect Our Parks*, 971 F.3d at 731–32. Chapter 227 provides for judicial review of Wisconsin agency decisions in state courts exclusively. Wis. Stat. § 227.40(1). And even if Citizen AG *were* proceeding in state court, invoking Wisconsin's administrative procedure statute would make no sense, as Citizen AG has not alleged that the Wisconsin Department of Transportation promulgated an invalid rule or took any other action that would be subject to judicial review under section 227.40.

As an organization, Citizen AG has not alleged facts that would give it standing to pursue this action in federal court.

2. Citizen AG lacks associational standing

Nor has Citizen AG alleged associational standing, because it has not alleged that it has a member with standing to bring this suit or brought in such a member to participate in this action. *Sierra Club v. Franklin Cty. Power of Ill., LLC*, 546 F.3d 918, 924 (7th Cir. 2008). "At the pleading stage, [a plaintiff] need not establish associational standing at a level sufficient for summary judgment; it must, however, provide some way of showing that at least one individual member has standing to sue on their own." *Prairie Rivers Network v. Dynegy Midwest Generation*, LLC, 2 F.4th 1002, 1010 (7th Cir. 2021). For the sake of argument, ERIC assumes that Jennifer McKinney is a member of Citizen AG.[8] As

[7] In any case, Citizen AG does not allege the records request was denied, and even if it did, that denial would have to be pursued in state court. *See* Wis. Stat. § 19.37.

[8] Nowhere does the Complaint directly allege that Ms. McKinney is a member of Citizen AG. In the unnumbered paragraphs of the introduction, however, it does refer to "Citizen AG members such as Ms. McKinney." Dkt. 1 at 2.

discussed above, she does not have standing to bring this action. Because McKinney is the only individual person named in the Complaint, Citizen AG has failed to allege that it has any member with standing to bring this action.

Citizen AG additionally fails to establish associational standing because it would need an individual member with standing to participate in the lawsuit, and it has not accomplished this. The third requirement of associational standing is that "neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit." *Franklin Cty. Power*, 546 F.3d at 924. Only an individual can sue under the DPPA, which creates a cause of action for "the individual to whom the [improperly disclosed] information pertains." 18 U.S.C. § 2724(a). 18 U.S.C. § 2724(a). An organization cannot bring a DPPA lawsuit on its members' behalf, because the members' participation is indispensable. Citizen AG thus cannot clear this additional required element for associational standing.

Plaintiffs have failed to allege standing, and their suit can and should be dismissed on this basis alone.

II. Plaintiffs fail to state a claim upon which relief can be granted.

Plaintiffs also fail to state a claim upon which relief can be granted under the DPPA. As an initial matter, Citizen AG faces a statutory bar to bringing this suit. As to substance, generously read, the Complaint alleges two distinct DPPA theories implicating ERIC: one when WisDOT disclosed information to ERIC, and another when ERIC disclosed information to CEIR. Dkt. 1, ¶¶155, 156, 161. Plaintiffs fail to state a claim as to either.

A. Liability under the DPPA

"To establish a DPPA violation, Drivers must prove that the Defendants 1) knowingly 2) obtained, disclosed, or used personal information, 3) from a motor vehicle record, 4) for a purpose not permitted." *McDonough v. Anoka Cnty.*, 799 F.3d 931, 945 (8th Cir. 2015) (citing 18 U.S.C. § 2724(a)). It is the plaintiff, not the defendant, who must allege and eventually establish that information was

obtained for an improper purpose, as an element of the DPPA claim. *See Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King & Stevens, P.A.*, 525 F.3d 1107, 1110-14 (11th Cir. 2008) (holding that the plaintiff bears the burden to establish improper use in a DPPA case); *McDonough v. Anoka Cnty.*, 799 F.3d 931, 945 (8th Cir. 2015) (assuming same); *see also Graczyk v. W. Pub. Co.*, 660 F.3d 275, 279 (7th Cir. 2011) ("What is apparent from considering the DPPA as a whole is that it is concerned with the ultimate use or uses to which personal information contained in motor vehicle records is put.").

Before addressing Plaintiffs' theories, it is worth noting again the global deficiencies of the Complaint. Most paragraphs in the Complaint are irrelevant to its single cause of action, disconnected from Wisconsin, vague and inflammatory rather than concrete—or all three. The Complaint does not follow Rule 8(a)(2)'s instruction to provide the court with "a short and plain statement of the claim showing that the pleader is entitled to relief," let alone the binding interpretations of that rule found in *Twombly* and *Iqbal*. And the Complaint's few allegations that actually pertain to the DPPA are "bare assertions" that "amount to nothing more than a 'formulaic recitation of the elements'" of the DPPA claim and are thus "conclusory and not entitled to be assumed true." *Iqbal*, 556 U.S. at 681 (quoting and citing *Twombly*, 550 U.S., at 554–55 and 551). As described in more detail below, these flaws, among others, are fatal to the Complaint.

B. Citizen AG has no cause of action under the DPPA.

Citizen AG faces a statutory bar to bringing this suit. The DPPA only creates a cause of action for "the individual to whom the [improperly disclosed] information pertains." 18 U.S.C. § 2724(a). Citizen AG is not an individual, but a non-profit organization, which as an entity does not have a driver's license number or other personal identifying information. Although a statutory reference to a "person" can sometimes refer to a corporation or other entity, the same is not true for an "individual," which is understood to be a "natural

person." *Frey v. Coleman,* 903 F.3d 671, 678-79 (7th Cir. 2018) (citing *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 454 (2012)). Thus, Citizen AG lacks statutory standing to sue. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128–132 and n. 4 (2014) (analyzing whether litigant "falls within the class of plaintiffs whom Congress has authorized to sue" under a particular statute, and referring to this as a "statutory standing" analysis.") Because Citizen AG is not an individual, it cannot bring claims under the DPPA.

C. WisDOT's disclosure of data to ERIC did not violate the DPPA.

Plaintiffs fail to allege a key element of their DPPA claim regarding WisDOT's disclosure to ERIC: that the disclosure was for an impermissible use. *See* 18 U.S.C. § 2724(a); *Thomas,* 525 F.3d at 1112. The Complaint addresses this element in a conclusory manner:

> 162. The DPPA enumerates fourteen (14) permissible uses for personal information obtained from motor vehicle records, which include government use for safety, theft, and emissions control, and civil litigation. *See* 18 U.S.C. § 2721(b). Voter outreach, political targeting, and any election-related activities are not among these authorized uses.
>
> 163. Defendants' use of Wisconsin DMV data for voter registration and outreach activities is not authorized by any of the permissible uses specified in the statute.

These, and similar statements in the Complaint's preamble (Dkt. 1 at 3), are exactly the kinds of conclusory statements that do not qualify for the presumption of truth. This is especially so because *other* facts in the complaint show that ERIC *does* receive data for permissible uses.

Specifically, the WisDOT disclosure to ERIC falls under the *first* allowable use of information protected by the DPPA: "For use by any government agency… in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions." 18 U.S.C. § 2721(b)(1). Wisconsin transmits data to ERIC "for the purpose of maintaining

the official registration list under [Wis. Stat. § 6.37]," as mandated by the statute that requires Wisconsin to be a part of ERIC. Wis. Stat. § 6.36(ae)(1). The WEC-ERIC contract attached to the Complaint, and cited in paragraph 146, confirms that one of its core purposes is "to reduce the costs and increase the accuracies and efficiencies associated with [states'] use of voter registration systems." Dkt. 1-6 at 1. The contract further explicitly avers that both ERIC and WEC will follow applicable state and federal privacy laws. Dkt. 1-6 at 14–15. Plaintiffs themselves allege that WisDOT data is used to help encourage people to register to vote. Dkt. 1, ¶¶92, 121–24, 130. Although Plaintiffs may not *like* voter registration (*see* Dkt. 1, ¶¶130, 162–63), they cannot plausibly argue that voter registration and maintenance of the registration list are not government functions. *See generally*, Wisconsin Statutes Ch. 6, subchapter II, "Registration"; *see also* 52 U.S.C. § 20501(b) (purposes of the National Voter Registration Act include "increas[ing] the number of eligible citizens who register to vote in elections for Federal office" and "ensur[ing] that accurate and current voter registration rolls are maintained"). ERIC's use of the data is thus permissible and compliant with the DPPA.

Plaintiffs' other allegations that even remotely pertain to improper use of motor vehicle data are disconnected from Wisconsin, not well-pled, or both. For example, Plaintiffs allege (outrageously) that ERIC seeks to somehow help states register non-citizens to vote but make no allegations that this is occurring or has ever occurred in Wisconsin. Dkt. 1, ¶¶97–103.[9] Plaintiffs also spill considerable

[9] Plaintiffs' argument is also based on a willful and malicious misreading of ERIC's membership agreement, which states that member states shall not "transmit an individual's record where the record contains documentation or other information indicating that the individual is a non-citizen of the United States." Dkt. 1, ¶97. This clause clearly prohibits states from sharing the information of non-citizens with an organization whose purpose is to facilitate voter registration, because non-citizens cannot vote. Citizen AG fantasizes that the clause requires states to intentionally transmit the data of noncitizens, hiding proof of their immigration status—a counterfactual reading that the Court need not accept as true. Dkt. 1, ¶100.

ink complaining about automatic voter registration in Michigan, without offering any hint as to how this policy relates to their DPPA claims here, in Wisconsin, in this case. Dkt. 1, ¶¶109–18. Events in Colorado are likewise entirely disconnected from this case. Dkt. 1, ¶¶139–42. A few paragraphs allege election bribery in Wisconsin, but the allegation is not only conclusory, it is wholly disconnected from the DPPA claim actually raised in the Complaint. Dkt. 1, ¶¶88–89.[10]

Finally, Plaintiffs allege that ERIC and WEC do not have a valid contract, and this means Wisconsin's disclosures to ERIC were unlawful—an argument without basis in fact or law and contradicted by the Complaint itself. The gist of the argument is that Wisconsin first joined ERIC when the Government Accountability Board (GAB) still existed, and once WEC replaced GAB, the contract GAB and ERIC executed was no longer valid. Dkt. 1, ¶¶146–153.

But the Wisconsin Legislature foreclosed this argument when it created WEC, by providing that all of GAB's contracts would be transferred to WEC:

> All contracts entered into by the government accountability board that are in effect on the effective date of this subsection shall remain in effect and are transferred to the elections commission and the ethics commission. … The elections commission and the ethics commission shall carry out all contractual obligations under each contract until the contract is modified or rescinded by that commission to the extent allowed under the contract.

[10] To support their allegation of election bribery, Plaintiffs cite "investigative" work done by Michael Gableman during his time with the Assembly Office of Special Counsel. In litigation arising from Gableman's investigations, a Dane County Circuit Court noted: "We have absolutely found out from this case there was absolutely no evidence of election fraud." Scott Bauer, *Judge: Wisconsin probe found 'absolutely no' election fraud*, Associated Press (July 28, 2022), https://apnews.com/article/2022-midterm-elections-wisconsin-lawsuits-presidential-16d90c311d35d28b9b5a4024e6fb880c. The Wisconsin Office of Lawyer Regulation recently filed a 10-count disciplinary complaint against Gableman for ethical violations he allegedly committed as Special Counsel. Rich Kremer, *Court regulators call for sanctions against Michael Gableman for election investigation*, WPR (Nov. 20, 2024), https://www.wpr.org/news/court-regulators-sanctions-michael-gableman-election-investigation.

2015 Wisconsin Act 118, § 266(5). The contract was not invalidated when WEC replaced GAB. In addition, the signature page of the contract unambiguously reflects all parties' understanding that GAB was about to become WEC. Kevin Kennedy signed for "Wisconsin Government Accountability Board/Wisconsin Elections Commission," and the final lines of the page read: "Note: Effective June 30, 2016 the Wisconsin Government Accountability Board becomes the Wisconsin Elections Commission." Dkt. 1-6 at 8. If the statute was not enough, this information on the signature page surely shows that "ERIC provided GAB written consent to assign its rights and interests to another party or entity," as Plaintiffs believe was necessary for the contract to remain in effect. Dkt. 1, ¶151.

Moreover, even if Plaintiffs successfully pled the lack of a written contract, this would not establish a claim under the DPPA. It is doubtless wise to have such a contract, and Wisconsin law requires it. But the DPPA does not *require* a contract to be in place for every permissible disclosure of protected data. *See generally,* 18 U.S.C. § 2721. The mere lack of a contract would not establish a plausible claim that ERIC was not acting on Wisconsin's behalf. Indeed, on the contrary, based on the course of dealing described elsewhere in the Complaint, the reasonable inference is that ERIC was acting on Wisconsin's behalf pursuant to some form of agreement. *See, e.g., Theuerkauf v. Sutton*, 102 Wis. 2d 176, 184, 306 N.W.2d 651, 657 (1981) ("The essence of an implied in fact contract is that it arises from an agreement circumstantially proved."). However, even on the face of the Complaint and associated documents, such a contract did exist.

Plaintiffs have failed to state a claim under the DPPA as to the exchange of information between the Wisconsin DOT and WEC.

D. ERIC's alleged disclosure of data to CEIR did not violate the DPPA.

The Complaint fails to adequately allege that ERIC disclosed data to CEIR at any time within the statute of limitations.[11] Even if it did, Plaintiffs would still fail to state a claim.

The statute of limitations for DPPA claims is four years. *See* 28 U.S.C. § 1658. The Complaint makes only one specific allegation that ERIC shared data with CEIR, grounded in a September 4, 2020 email that it says pertained to "personal information from driving records obtained from" states including Wisconsin. Dkt. 1, ¶124. The statute of limitations ran out on that claim nearly two months before the Complaint was filed. In addition, the Complaint explicitly alleges that ERIC and CEIR have been violating the DPPA since 2016, reaching far past the limitations period. Dkt. 1, ¶161. The Complaint makes no other legally sufficient allegations about ERIC transferring data to CEIR. Its other allegations about such transfers are conclusory, formulaic recitations of the elements of a DPPA claim and not entitled to the presumption of truth. *Iqbal*, 556 U.S. at 681 (quoting and citing *Twombly*, 550 U.S., at 554–55 and 551); *see, e.g.* Dkt. 1, ¶¶121, 155, 161, 169, 176.

But even if the Court *were* to take those conclusory allegations as true, they would nevertheless fail to state a claim because again, Plaintiffs fail to allege an impermissible use of data. As Plaintiffs allege, CEIR's "stated mission and tax-exempt purpose is to support state election officials in enhancing the accuracy of voter registration lists." Dkt. 1, ¶19. Helping government agencies carry out their functions is, as discussed above, a permissible use under the DPPA. 18 USC § 2721(b)(1). And the Complaint simply does not adequately plead that ERIC or CEIR was putting protected data to impermissible use. "A claim has facial

[11] ERIC does not concede the truthfulness of any of the allegations in the Complaint but raises only facial challenges to the sufficiency of the pleading. If the Court rules in favor of CEIR in its factual challenge to subject matter jurisdiction, finding that ERIC did not share Wisconsin data with CEIR, the record will at that point support dismissing any claim against ERIC for sharing data with CEIR. *See* Dkt. 10, 11.

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Plaintiffs have a theory—and *only* a theory—that ERIC and CEIR collaborate to create mailing lists of eligible and unregistered voters and that CEIR then uses this list to contact those individuals and "push[] for them to register as voters…." Dkt. 1, ¶121. But the Complaint is devoid of any allegation that McKinney, or anyone else, has ever actually *received* a communication from CEIR. Nor does the September 2020 email it quotes support the allegation that CEIR contacts voters. *Id.* ¶124.[12] The Court need not and should not indulge Plaintiffs' attempt to build castles in the air.

Plaintiffs have failed to state a claim upon which relief could be granted under the DPPA.

CONCLUSION

For the reasons discussed above, the Complaint in this matter should be DISMISSED.

Respectfully Submitted this 23rd day of December, 2024.

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[12] If anything, the quoted email, with its reference to "the treatment group and the control group" (Dkt. 1, ¶124), supports a plausible inference that the data was being used for "research activities," which are also permissible under the DPPA. *See* 18 U.S.C. § 2721(b)(5).

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