STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 10

STATE OF WISCONSIN
EX REL. ARDIS CERNY,

STATE OF WISCONSIN
EX REL ANNETTE KUGLITSCH,

Petitioners,

and

ASSEMBLY COMMITTEE ON, CAMPAIGNS AND ELECTIONS, REP. SCOTT KRUG, REP. DAVE MAXEY, REP. DAVID MURPHY, REP. DONNA ROZAR, REP. PAUL TITTL, REP. RON TUSLER, REP. LEE SNODGRASS, REP. LISA SUBECK, and REP. CLINTON ANDERSON, in their official capacities as Wisconsin State Assemblymen and Assemblywomen,

SENATE COMMITTEE ON SHARED REVENUE, ELECTIONS AND CONSUMER PROTECTION,

SEN. DAN KNODL, SEN. DAN FEYEN, SEN. ROBERT QUINN, SEN. MARK SPREITZER, SEN. JEFF SMITH, in their official capacities as Wisconsin State Senators,

Involuntary Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION,

ANN S. JACOBS, DON M. MILLIS, CARRIE RIEPL, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, in their official capacities as Commissioners,

Case No. 2024CV1353
Case Code: 30952

Hon. Michael P. Maxwell

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MEAGAN WOLFE, in her official capacity as Administrator of the Wisconsin Elections Commission,

WISCONSIN DEPARTMENT OF TRANSPORTATION,

and

KRISTINA BOARDMAN, in her official capacity as Secretary of the Wisconsin Department of Transportation,

Respondents.

PROPOSED INTERVENORS' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Proposed Intervenors Forward Latino and Voces de la Frontera file this reply in support of their proposed motion to dismiss, Dkt. 39 ("Mot."), in accordance with the Court's scheduling order, Dkt. 47. That motion, however, addressed the original Petition, Dkt. 10, which Petitioner Cerney filed on August 16, 2024. On September 30, Petitioners filed an Amended Petition, Dkt. 49, with substantially altered and expanded allegations. Under Wisconsin Supreme Court precedent, that Amended Petition "supersedes or supplants the prior complaint," and "becomes the only live, operative complaint in the case." *Holman v. Fam. Health Plan*, 227 Wis. 2d 478, 484 ¶ 12, 596 N.W.2d 358 (1999); *see also Schweiger v. Loewi & Co.*, 65 Wis. 2d 56, 58, 221 N.W.2d 882 (1974) (holding that in reviewing the overruling of a demurrer, "[i]t is not necessary . . . to consider the original complaint because it is supplanted by the amended complaint").

Proposed Intervenors therefore respectfully suggest that their proposed motion to dismiss the original Petition is now moot, and Proposed Intervenors intend to file a new motion to dismiss that addresses the Amended Petition on October 14, in accordance with the deadline for responding to the Amended Petition in the Court's scheduling order, Dkt. 47. To the extent that the Court addresses Proposed Intervenors' existing proposed motion to dismiss on the merits despite the subsequent filing of the Amended Petition, however, the Court should grant the motion and dismiss the case. Petitioners lack standing, and their claims fail as a matter of law because Wisconsin law simply does not require the citizenship matching that Petitioners ask the Court to impose.

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ARGUMENT

I. Petitioners lack standing.

The general rule in this state is that "to have standing to sue, a party must have a personal stake in the outcome of the controversy," and "must show that they suffered or were threatened with an injury to an interest that is legally protectable." *Marx v. Morris*, 2019 WI 34, ¶ 35, 386

Wis. 2d 122, 925 N.W.2d 112 (quoting *Krier v. Vilione*, 2009 WI 45, ¶ 20, 317 Wis. 2d 288, 766 N.W.2d 517). Petitioners show no such threatened injury; they raise precisely the type of "generalized grievance[] about the administration of a governmental agency" that is the proper subject for the political branches, not the courts. *Cornwell Pers. Assocs., Ltd. v. Dep't of Indus., Labor & Hum. Rels.*, 92 Wis. 2d 53, 62, 284 N.W.2d 706 (Ct. App. 1979) (cleaned up). The motion to dismiss for lack of standing should be granted.[1]

A. Petitioners do not have standing as voters.

Petitioners lack standing as voters because they do not allege that the challenged actions have made it harder for them to vote, nor even that illegal votes have been or will be cast in Wisconsin by others because of the lack of citizenship matching under Wisconsin law. *See* Mot. at 8–9, Dkt. 39. Petitioners' only response is an inapposite discussion of the Wisconsin Supreme Court's decision in *Clarke v. Wisconsin Elections Commission*, 2023 WI 70, 995 N.W.2d 779. But the portion of *Clarke* on which Petitioners rely related not to standing but to the Supreme Court's original jurisdiction. *See id.* at 780–81. With respect to standing, the Supreme Court later held only that the *Governor* had standing, and said nothing whatsoever about voters' standing. *Clarke v. Wis. Elections Comm'n*, 2023 WI 79, ¶ 38, 410 Wis. 2d 1, 998 N.W.2d 370, *reconsideration denied* (Jan. 11, 2024). *Clarke* therefore does nothing to support Petitioners' standing as voters in this case.

No other Supreme Court decision supports Petitioners' standing as voters, either, in the absence of any allegation that the challenged conduct makes it harder for Petitioners themselves to vote. A majority of the justices in *Teigen v. Wisconsin Elections Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, rejected the argument that a voter had standing to sue based on

[1] Petitioner Kuglitsch was added in the Amended Complaint, but the arguments regarding standing apply to both individual petitioners.

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claims that the Commission's actions would allow unlawful votes to be counted. *See id.* ¶ 167 (Hagedorn, J., concurring) (recognizing argument "is unpersuasive and does not garner the support of four members of this court"). And in *McConkey v. Van Hollen*, 2010 WI 57, ¶ 17, 326 Wis. 2d 1, 783 N.W.2d 855, the Supreme Court was "troubled by the broad general voter standing articulated by the circuit court," and reached the merits only because the case had already been fully litigated to the Supreme Court—a factor obviously absent here. And even if voters could, under some circumstances, have standing to challenge actions that they contend result in the casting of unlawful votes, Petitioners here do not even make that allegation, because they do not allege that any non-citizens actually have cast votes in Wisconsin elections as a result of the challenged list maintenance procedures. *See* Mot. at 8–9, Dkt. 39.

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B. Petitioners do not have standing under Section 5.06(1).

Petitioners also lack standing under Section 5.06(1), because this is a not a proceeding under that provision. Six justices in *Teigen* rejected the theory that Section 5.06(1) conveys standing to voters in lawsuits, like this one, against the Wisconsin Elections Commission. *See* 2022 WI 64, ¶¶ 32–35 (plurality op.) ("If § 5.06 does not apply to the Wisconsin voters' complaint against WEC, then how could it confer standing?"); *id.* ¶¶ 210–15 (Walsh Bradley, J., dissenting) (finding no standing under any theory). And although Petitioner Cerney, unlike the *Teigen* Plaintiffs, did file an administrative complaint with WEC on July 29, 2024, this lawsuit was filed too late to qualify as an appeal from WEC's August 8, 2024 denial of that administrative complaint. Under Section 5.06(8), an appeal must be filed "to circuit court for the county where the official conducts business or the complainant resides *no later than 30 days after issuance of the order*." (Emphasis added.) Petitioner Cerny filed her initial petition on September 16, nine days too late.

Because Petitioner Cerney did not comply with Section 5.06's timing requirements, Section 5.06 cannot convey standing for her to sue.[2]

C. Petitioners do not have standing under Section 5.061.

Petitioners attempt to invoke Section 5.061, a separate administrative complaint procedure specifically governing alleged violations of the federal Help America Vote Act ("HAVA"), but again there is no basis upon which that statute gives Petitioners standing for the present suit. Section 5.061 permits anyone alleging a HAVA violation to "file a written, verified complaint with the commission." Neither Petitioner has filed such a complaint: Petitioner Kuglitsch has not filed any administrative complaint at all, and Petitioner Cerny's July 29 complaint was filed under Section 5.06 and did not seek relief for HAVA violations. *See* Compl. Ex. G, Dkt. 18. Furthermore, a complaint filed under Section 5.061 is to be "treated as a contested case under ch. 227," and Section 227.53 requires a petition for judicial review to be "served and filed within 30 days after the service of the decision of the agency." Thus, even if Petitioner Cerney's Complaint were treated as one under Section 5.061 applied, judicial review would be time barred, as she filed this lawsuit on September 16, more than 30 days after WEC's August 8 denial of her complaint.

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D. Petitioners do not have taxpayer standing.

Finally, Petitioners lack taxpayer standing because they do not identify any unauthorized or impermissible expenditures. Their only answer is to argue that their "entire pleading alleges that WEC and DOT are operating in violation of law." Pet'rs' Br. Opposing Mot. to Dismiss at 10 ("Opp'n"), Dkt. 82. But the question for taxpayer standing is not simply whether the taxpayer alleges a violation of law; instead, a taxpayer must allege that "taxpayers as a class have sustained, or will sustain, some pecuniary loss." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*,

[2] Petitioner Kuglitsch did not file a Section 5.06 complaint at all.

15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961). As noted in the motion to dismiss, Petitioners do not claim that the Commission is spending any money that it may not lawfully spend; instead, they want the Commission to spend *more* taxpayer money in order to implement additional procedures. Mot. at 7–8, Dkt. 39. Petitioners provide no support whatsoever for the proposition that a demand to spend *more* taxpayer funds somehow confers taxpayer standing.[3]

II. Petitioners are not entitled to a writ of mandamus.

Petitioners also fail to state a claim entitling them to mandamus. A writ of mandamus "is an extraordinary legal remedy, available only to parties that can show that the writ is based on a clear, specific legal right which is free from substantial doubt." *Lake Bluff Hous. Partners v. City of S. Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995) (cleaned up). To obtain the writ, "four prerequisites must be satisfied: (1) a clear legal right; (2) a positive and plain duty; (3) substantial damages; and (4) no other adequate remedy at law." *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 643 N.W.2d 72 (cleaned up). Proposed Intervenors' motion to dismiss explained why each of those requirements is not satisfied and Petitioners offer little response. Mot. at 9–17, Dkt. 39. Petitioners say nothing about substantial damages or other adequate remedies, but merely cite without explanation to their Amended Petition, Opp'n at 14, Dkt. 82 (citing Dkt. 49 ¶ 162), and Petitioners do not respond to most of the arguments Proposed Intervenors made with respect to the first two elements, either.

In particular, Petitioners have no answer to Proposed Intervenors' argument that Wisconsin law specifically defines the sixteen categories of information that must be matched between voter registration lists and motor vehicle records, and citizenship is not among the categories. Mot. at

[3] Petitioners also argue that they have standing "under common law certiorari" and on behalf of the legislators that they have involuntarily joined to their Amended Petition. Opp'n at 9–10, Dkt. 82. Because those claims are new ones that are entirely absent from the original Petition, Proposed Intervenors do not address them here, and will do so in their response to the Amended Petition.

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10, Dkt. 39 (citing Wis. Stat. §§ 5.056, 6.36, 85.61(1)). Petitioners instead pivot to rely on a provision of *federal* law that was nowhere cited in their original Petition, 52 U.S.C. § 21083(a).

Just like the provisions of Wisconsin law on which Petitioners rely, however, 52 U.S.C. § 21083(a) has been in force for more than two decades and has never been held, by any court anywhere in the country, to require the citizenship matching that Petitioners seek to impose. The federal law provision, too, says nothing about verifying voters' citizenship. *See id.* Like the Wisconsin Statutes, it requires only matching of "information in the database of the statewide voter registration system." *Id.* § 21083(a)(5)(B)(i). And as Proposed Intervenors explained in their motion, Section 6.36(1)(a) specifies exactly what "information" the statewide voter registration system in this state contains, and it does not include citizenship status. Nothing in HAVA requires a different result; HAVA expressly leaves "the methods of complying with the requirements of this subchapter . . . to the discretion of the State." 52 U.S.C. § 21085. Petitioners' new citation of federal law therefore does nothing to make up for their failure to identify any provision of Wisconsin law actually requiring the citizenship matching they demand.

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CONCLUSION

For the foregoing reasons, the Court should deny the proposed motion to dismiss as moot in light of the Amended Petition, but if the Court reaches the merits of the motion, it should grant it.

Dated: October 9, 2024

Electronically signed by Diane M. Welsh

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