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

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' MOTION TO DISMISS PETITIONERS' AMENDED PETITION

INTRODUCTION

Petitioners Ardis Cerny and Annette Kuglitsch ("Petitioners") ask the Court to order unprecedented disruptions to Wisconsin election law just weeks before voting begins, based on statutes enacted more than 20 years ago that have never been understood to do what Petitioners say they require. Petitioners' basic contention—that voter registration records must be compared to citizenship information in Department of Transportation records—is fundamentally flawed, because no Wisconsin law requires such comparisons. For good reason: Department of Transportation records are not a reliable source of citizenship status. At best, their citizenship status information reflects an individual's status at the time they first interacted with the Department of Transportation. They are not generally updated to reflect when Wisconsinites become naturalized citizens, as thousands do every year. Thus, requiring election officials to begin matching voter registration records to this information—and purging voters based on such

matching—would threaten countless numbers of naturalized citizens with disenfranchisement, based on out-of-date records. And this is before the Court even considers the timing of Petitioners' demand, which comes at the eleventh hour in a major election cycle, demanding that the Wisconsin Elections Commission and Department of Transportation somehow immediately create a new matching process to purge voters and reject new registrations based on fundamentally unreliable data. Granting this relief would throw Wisconsin election administration into chaos just as voting starts. And all to address a non-existent problem, as Petitioners make no allegations and point to no evidence that would support the finding that Wisconsin has ever experienced a meaningful problem of non-citizen voting.

The Court should dismiss the Amended Petition. At the outset, Petitioners have no standing because they do not suffer any cognizable harm from the lack of citizenship-data matching about which they complain. Their allegations have no effect on their own ability to vote, and they do not allege any other concrete injury, either. Petitioners also fail to state a claim on the merits. Wisconsin law requires new registrants to certify certain information, such as name, date, age, residence, and citizenship status. Wis. Stat. § 6.33(1). Once voters are registered, Wisconsin law specifies sixteen enumerated fields of information that must be included in the registration list. *See* Wis. Stat. § 6.36(1)(a). Citizenship status is not included among these fields, *id.*, because everyone on the list already has certified that they are a U.S. citizen. Wisconsin law requires matching voter records to Department of Transportation records only with respect to driver's license numbers, names, dates of birth, and the fields that are included in the registration list, which again do not include citizenship. *See* Wis. Stat. § 85.61(1) (citing Wis. Stat. §§ 6.34(2m), 6.36(1)). There is therefore no legal authority, much less a legal requirement, for the Commission to purge voter registration records based on Department of Transportation citizenship information. Nor would

such a process be reliable, as the Department of Transportation's citizenship information is frequently inaccurate and out of date. Petitioners' other claims—brought on behalf of involuntary petitioners and relying on common law certiorari—fail for the same reasons, and for the additional reason that neither type of claim is appropriate in this context.

The Amended Petition should be dismissed.

BACKGROUND

I. Wisconsin election law protects against non-citizen voting.

Wisconsin has many checks in place to ensure that only citizens vote. Wisconsin requires voters to attest that they are a citizen when registering to vote. All voters must register in Wisconsin "before voting in any election." Wis. Stat. § 6.27. By statute, the Wisconsin Elections Commission is required to "design the [registration] form to obtain from each elector information as to . . . citizenship," along with other biographical information. Wis. Stat. § 6.33(1). Both online and on Wisconsin's mail-in voter registration application, citizenship is the first question, and registrants are instructed not to complete the application if they are unable to attest that they are a U.S. citizen. Am. Pet., Exs. A & B, Dkt. 50, 51. Voters must also certify that the information on the application is accurate, and they are reminded on the form that any false information may subject them to fines, imprisonment, or both. *See* Dkt. 50, 51.

Noncitizens who register to vote or vote face criminal liability under Wisconsin law, Wis. Stat. § 12.13(1)(a), and under federal law, 18 U.S.C. § 611. They would also render themselves permanently "inadmissible" under federal immigration law, 8 U.S.C. § 1182(a)(6)(C)(ii), (10)(D), which can lead to deportation and will prevent them from ever renewing a visa, becoming a naturalized citizen, or returning to the United States if they leave. These are extremely serious consequences, and Petitioners offer neither evidence nor allegations that any meaningful number of noncitizens have voted anywhere in the United States, much less in Wisconsin specifically. A

Heritage Foundation analysis has identified only 21 instances of noncitizens voting anywhere in the United States between 2003 and 2023.[1] Just *one* of those instances occurred in Wisconsin, in 2016, and the prosecutor concluded that the voter had not deliberately broken the law. *See Election Fraud Cases*.

II. The Department of Transportation does not have up-to-date, accurate citizenship data, particularly for naturalized citizens.

The Petition seeks to require that Wisconsin's voter rolls be compared with citizenship records from Wisconsin's Department of Transportation. The Transportation Department is not, however, the agency responsible for tracking immigration and citizenship status, and it therefore has only limited and often-outdated records on citizenship, which neither the Department nor Wisconsinites are under any obligation to keep up to date.

The Amended Petition focuses on Wisconsin's free voter identification card. But most Wisconsinites identify themselves to vote using a driver's license or non-driver identification card. And when Wisconsinites initially apply for driver's licenses or non-driver identification cards, they must provide—among much else—"valid documentary proof that the individual is a citizen or national of the United States or an alien lawfully admitted for permanent or temporary residence in the United States," or one of seven other enumerated immigration statuses. Wis. Stat. § 343.14(2)(es). Non-citizens who are *not* permanent residents receive cards that are identified on their face as "temporary" or "limited term," and they must then show updated documentation of their immigration status when they renew. *See* Wis. Stat. § 343.165(4)(c); *see also* Wis. Stat. §§ 343.03(3m), 343.50(3)(a). Lawful permanent residents, however, receive ordinary driver's licenses and identification cards and do not need to provide updated immigration documents when

[1] *See Election Fraud Cases*, Heritage Found., ("*Election Fraud Cases*") https://www.heritage.org/voterfraud/search?combine=citizenship&state=All&year=&case_type=All&fraud_type=24491&page=0 (last accessed October 10, 2024).

they renew them. *See* Wis. Stat. §§ 343.03(3m), 343.50(3)(a). And nothing requires newly naturalized citizens to tell the Department of Transportation that they have been naturalized. As a result, Wisconsinites who obtain driver's licenses when they are lawful permanent residents but who later become naturalized citizens may remain indicated as noncitizens in Department of Transportation records for years or decades after they become naturalized citizens.

III. Wisconsin law requires limited data sharing between DOT and WEC in compliance with federal law.

The Amended Petition relies on a set of statutes enacted in Wisconsin more than two decades ago to implement the federal Help America Vote Act (HAVA), 52 U.S.C. §§ 21081 *et seq.* HAVA requires new voter registrants to provide their driver's license number or the last four digits of their social security number when registering to vote. 52 U.S.C. § 21083(a)(5)(A)(i). For new voters who register by mail, HAVA further requires either that the number provided match "an existing State identification record bearing the same number, name and date of birth" or that the registrant provide photo identification or a copy of certain types of documents. 52 U.S.C. § 21083(b)(3)(A)–(B). To make this possible, HAVA requires state election officials and state motor vehicle officials to "enter into an agreement to match information in the database of the statewide voter registration system with information in the database of the motor vehicle authority to the extent required to enable each such official to verify the accuracy of the information provided on applications for voter registration." 52 U.S.C. § 21083(a)(5)(B)(i). Beyond that, however, HAVA leaves the scope of required verification to state law: "The State shall determine whether the information provided by an individual is sufficient to meet the requirements of this subparagraph, in accordance with State law." 52 U.S.C. § 21083(a)(5)(A)(iii).

Wisconsin implemented HAVA in laws first enacted in 2003. Consistent with HAVA, Wisconsin law requires new registrants to provide "the number of a current and valid operator's

license issued to the elector under ch. 343 or the last 4 digits of the elector's social security account number." Wis. Stat. § 6.33(1). Wisconsin law goes further than HAVA by requiring proof of residence consistent with the HAVA identification requirements for *all* registrants, whether they register electronically, by mail, or in person. Wis. Stat. § 6.34(2), (3). But consistent with HAVA, Wisconsin law exempts electronic registrants from that requirement if they provide a driver's license number "together with the elector's name and date of birth and the commission is able to verify the information" in Department of Transportation records. Wis. Stat. § 6.34(2m), (4). To that end, like HAVA, Wisconsin law requires a data-sharing agreement between the Department of Transportation and the Wisconsin Elections Commission. Wis. Stat. §§ 5.056, 85.61(1).

IV. Petitioners' lawsuit seeks to impose an unprecedented verification regime just weeks before voting starts.

Petitioner Cerny brought this lawsuit on August 16, less than three months before election day and barely one month before municipal clerks mailed absentee ballots to voters on September 19. On September 30, after absentee voting began, Cerny filed an amended petition together with new petitioner Annette Kuglitsch. *See generally* Dkt. 49. The Amended Petition named certain Wisconsin state legislators as well as two legislative committees as "involuntary petitioners." *Id.* ¶¶ 3–6.

Petitioners seek to compel the Commission to adopt a brand-new system to compare the existing voter registration list and all new voter registrations with the Department of Transportation's often-inaccurate citizenship data, and to remove and prevent from voting—on the eve of the election—any registrants who are indicated as non-citizens in the Department of Transportation's records. *See* Am. Pet. at 29–30, Dkt. 49. If successful, the lawsuit would bring electoral chaos and harm voters across Wisconsin whose citizenship information is not up-to-date in the Department of Transportation's records but who are U.S. citizens eligible to vote.

ARGUMENT

I. Petitioners lack standing.

"[T]o 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 fail to satisfy this standard because they allege no specific injury at all, stating only that "Respondents are in default of their duties under law alleged herein to protect against violation of Petitioners' voting rights and the rights of other eligible electors who are legally qualified and registered and vote in Wisconsin state and federal elections." Am. Pet. ¶ 13, Dkt. 49. But alleging that an agency is violating the law is not the same thing as showing injury, and Petitioners plead no facts to show how Respondents' actions cause them individual harm: not as taxpayers, and not as voters.

A. Petitioners do not have taxpayer standing.

Petitioners lack taxpayer standing because they do not allege that any Respondent has illegally expended state funds. To establish taxpayer standing, "it must be alleged that the complaining taxpayer and taxpayers as a class have sustained, or will sustain, some pecuniary loss." *S.D. Realty Co. v. Sewerage Comm'n of City of Milwaukee*, 15 Wis. 2d 15, 21–22, 112 N.W.2d 177 (1961); *see also Fabick v. Evers*, 2021 WI 28, ¶ 11, 396 Wis. 2d 231, 956 N.W.2d 856 (finding taxpayer standing based on an "expenditure of taxpayer funds" to deploy the National Guard). Petitioners assert that Respondents are "expending tax money in an unlawful manner," Am. Pet. ¶ 13, Dkt. 49, but Petitioners make no attempt to identify any unauthorized or impermissible expenditures. Petitioners do not even claim that any Respondent is spending money to do anything that they are not supposed to do—instead, they argue that Respondents are not doing *enough* and that they must establish new data-sharing systems, commence new

investigations, and provide new resources to municipal clerks. They therefore allege the exact opposite of pecuniary loss: they want Respondents to spend *more* taxpayer money than they currently spend. A demand to spend *more* taxpayer funds does not give Petitioners taxpayer standing.

B. Petitioners do not have standing as voters.

Petitioners also do not have standing based on any injury to them as voters because they allege no such injury, just a bare alleged illegality. They allege only that Respondents' actions are "in default of their duties under law . . . to protect against violation of Petitioners' voting rights" and not any actual, concrete impact on those rights. Am. Pet. ¶ 13, Dkt. 49. Petitioners nowhere even allege that illegal votes have been or will be cast in Wisconsin based on the alleged violations they assert. They make speculative allegations that a small percentage of registered voters may be non-citizens, based on an unjustified extrapolation from a small number of rejected voter identification applications. *Id.* ¶ 58. But Petitioners never even allege that any of those non-citizens have cast votes. *See id.*

Moreover, even if Petitioners did allege that other voters were casting unlawful votes, that would not involve a concrete and particularized injury to them, specifically, that would give them standing to sue. In *Teigen v. Wisconsin Election Commission*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, four justices rejected the argument that a voter had standing to sue based on claims that the Commission's actions were unlawful and 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"); *id.* ¶ 215 (Walsh Bradley, J., dissenting) (describing theory as "untethered to any limiting principle, which in effect renders the concept of standing merely illusory"). The basic problem is that Petitioners fail to demonstrate that they have any greater stake in this issue than any other Wisconsin voter, rendering their petition a "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). As the *Teigen* dissent appropriately recognized, allowing standing based on an argument that unlawful actions dilute an otherwise-unaffected voter's vote would extend the standing doctrine "beyond recognition" and threaten a "free-for-all" that "delineates no bounds whatsoever on who may challenge election laws." *Teigen*, 2022 WI 64, ¶¶ 210, 212 (Walsh Bradley, J., dissenting).

C. 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 Election Commission. *See Teigen*, 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 (Ann 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, WEC denied the complaint on August 8, 2024, and this lawsuit was filed too late to qualify as an appeal from that 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*." Wis. Stat. § 5.06(8) (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 requirements, it cannot convey standing for her to sue.[2]

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

D. 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 them standing for the present suit. Section 5.061 permits anyone alleging a HAVA violation to "file a written, verified complaint with the commission." Wis. Stat. § 5.061(1). 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 make any demands related to HAVA compliance. *See* Am. Pet. Ex. G, Dkt. 56. Section 5.061 cannot convey standing in a lawsuit that does not comply with that provision's requirements.

E. Petitioners do not have standing to invoke the rights of the "involuntary petitioners."

To make up for their own lack of standing, Petitioners also attempt to assert claims on behalf of two legislative committees and fourteen Wisconsin legislators, who Petitioners purport to join to this case as "Involuntary Petitioners." Petitioners have no standing or other legal authority to bring claims on behalf of the Involuntary Petitioners. Wisconsin law allows the joinder of involuntary plaintiffs as necessary parties in a narrow set of circumstances whether the original plaintiff has some legal right to assert claims on behalf of the involuntary plaintiffs based on principles of subrogation, derivation, or assignment. Wis. Stat. § 803.03(2). Petitioners have no analogous right to assert the rights of the Involuntary Petitioners, nor any basis for bringing claims on their behalf. Petitioners therefore have no standing to sue for alleged violations of the Involuntary Petitioners' rights—only the party whose legal rights have allegedly been violated may bring such a claim. *See*, *e.g.*, *Krier*, 2009 WI 45, ¶ 22 (holding that former shareholders lacked standing to enforce duty owed to corporation).

II. Petitioners fail to state a claim for a writ of mandamus.

Petitioners' first claim is for a writ of mandamus, but they do not meet the requirements for that extraordinary relief. 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). Petitioners' attempt to reshape Wisconsin election law to fit their preferences fails to satisfy any of these prerequisites. Petitioners identify neither a clear legal right nor a positive and plain duty; they do not identify any substantial damages; and they have other adequate remedies for by which they could request the fundamental change to Wisconsin election law that they seek in this case. Their Amended Petition falls far short of meeting the high standards required for a writ of mandamus to issue and should be denied.

A. Petitioners have no clear legal right and Respondents have no positive and plain duty.

Petitioners have no clear legal right to the actions they seek to compel, and Respondents have no positive and plain duty to undertake them. Wisconsin law expressly identifies what information the Commission and the Department of Transportation must share and match, and it does not provide for matching citizenship information. And the remaining actions Petitioners seeks—a purge of voters from registration lists, a requirement for documentary proof of citizenship as part of voter registration, and wide-ranging investigations—are actions that the Commission has no authority to undertake, much less an obligation.

1. Wisconsin law does not authorize or require matching voter registration lists to Department of Transportation citizenship information.

The core of Petitioners' legal theory is that the list-maintenance program the legislature established two decades ago to ensure compliance with HAVA secretly requires the Commission to purge voters from the rolls based on a comparison with citizenship information in Department of Transportation records. Petitioners are wrong.

Petitioners' argument relies on Section 85.61, which directs the Commission and the Department of Transportation to "enter into an agreement to match personally identifiable information on the official registration list maintained by the commission under s. 6.36(1) and the information specified in s. 6.34(2m) with personally identifiable information in" Department of Transportation records to "the extent required to enable the secretary of transportation and the administrator of the elections commission to verify the accuracy of the information provided for the purpose of voter registration." Wis. Stat. § 85.61(1); *see also* Wis. Stat. § 5.056 (similar). But these statutes specifically enumerate what information must be matched: that listed in Section 6.36(1) and in Section 6.34(2m). In turn, Section 6.36(1) specifies sixteen categories of information that the official registration list must contain, and Section 6.34(2m) refers to matching a voter's driver's license number, name, and date of birth. Neither of the cross-referenced provisions makes any reference to citizenship information. The federal-law provision that Petitioners cite, 52 U.S.C. § 21083(a)(5)(B)(i), is no different—it too requires matching only "information in the database of the statewide voter registration system," which in Wisconsin comprises the sixteen categories in Section 6.36(1). There is therefore no statutory requirement, or authority, for the Commission to compare the voter registration list with citizenship data maintained by the Department of Transportation.

Petitioners' argument that the reference to "personally identifiable information" in Sections 85.61(1) and 5.056 implicitly requires matching of citizenship data, too, is inconsistent with the plain text of those statutes, which define what must be shared by explicit cross-references to these other statutes that do not mention citizenship. It is also contrary to decades of practice under the relevant statutes, during which time they have never been interpreted as requiring the Department of Transportation to share citizenship data with the Commission. To the contrary, the documents attached to the Petition and Amended Petition show a cross-branch consensus that such sharing is not required: for example, a letter from the Chair of the Senate Committee on Shared Revenue, Elections, and Consumer Protection and the Chair of the Assembly Committee on Campaigns and Elections "humbly requests WISDOT and WEC to cooperatively share non-citizen information," Pet. Ex. C, but does not assert any legal requirement, and the return letter from the Department of Transportation confirms that "[c]urrent state law does not direct DOT to provide citizenship data to WEC, nor does it expressly authorize DOT to generate a list of non-citizens and transmit this to WEC," Am. Pet. at 1, Ex. D, Dkt. 53. It would be strange indeed if for two decades data sharing had been required, but the legislative and executive branches had somehow failed to realize it.[3]

[3] Petitioners' contrary argument relies on the Seventh Circuit's decision in *Luft v. Evers*, 963 F.3d 665 (7th Cir. 2020), but that case is inapposite. In *Luft*, the Seventh Circuit held that the Family Educational Rights and Privacy Act ("FERPA") "precludes the state from requiring educational agencies and institutions to include citizenship information on certified lists of students who reside in sponsored housing." 963 F.3d at 675. FERPA prohibits federal funding for "any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information . . .)" without written consent. 20 U.S.C. § 1232g(b)(1). The statute defines "education record" as "records, files, documents, and other materials . . . which contain information directly related to a student," *id.* § 1232g(a)(4)(A)(i), and its implementing regulations adopt a broad definition of "personally identifiable information" that includes "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates." 34 C.F.R. § 99.3(g). That FERPA's broad text prohibits releasing a student's name and citizenship status does nothing to suggest that Sections 85.61(1) and 5.056

Contrary to Petitioners' allegations, the Commission and the Department of Transportation are therefore under no obligation, and indeed have no authority, to purge the voter rolls based on citizenship information in Department of Transportation records. That is for good reason. Department of Transportation records are a terrible source of citizenship data and will frequently be inaccurate or out of date. Applicants for driver's licenses and identification cards must provide records demonstrating their lawful presence within the United States. Wis. Stat. § 343.14(2)(es). But for applicants who are lawful permanent residents, this is a one-time requirement: once they have shown their green card, they receive an ordinary eight-year license, and they need not show citizenship documentation again to renew. *See* Wis. Stat. § 343.165(4) (exempting renewals from documentation requirements except for limited-term cards issued under Wis. Stat. §§ 343.03(3m) and 343.50(3)(a), which are issued to temporary lawful residents but not lawful permanent residents). Thus, if a lawful permanent resident becomes a naturalized citizen, as thousands of Wisconsinites do every year, the Department of Transportation is unlikely ever to learn of it. The purge Petitioners seek would systematically remove such voters from the rolls.

2. Wisconsin law does not authorize the Commission to disqualify a registered voter based on citizenship status.

Petitioners' demand that the Court order the Commission to "de-activate" or remove the registration of anyone for whom Department of Transportation data does not verify U.S. citizenship fails for another reason, as well: the Commission has no authority to remove voters on that basis. By statute, the Commission can change a voter's registration status from "eligible" to "ineligible" under only two circumstances: upon notification that the voter has registered in

require matching citizenship data when they expressly refer only to matching other categories of information.

another state, Wis. Stat.§ 6.36(1)(d), or if the voter has not voted for four years and does not respond to a notice of suspension, Wis. Stat. § 6.50(2).

Every other basis for removing a voter from the registration list is available only to local election officials: the municipal clerk or board of election commissioners may designate a voter ineligible upon receipt of reliable information that the voter has changed their address if they do not respond to a notice sent to the registration address, Wis. Stat. § 6.50(3); if vital statistics reports indicate the voter is deceased, Wis. Stat. § 6.50(4); if the voter's address is at a building that has been condemned, Wis. Stat. § 6.50(5); upon request of the elector, Wis. Stat. § 6.50(6); or upon sworn challenge and determination that the voter is not qualified, Wis. Stat. § 6.48. The Wisconsin Supreme Court has confirmed that the Commission lacks the authority to remove voters for these reasons and that it cannot be compelled to do so through a writ of mandamus. *State ex rel. Zignego v. Wis. Elections Comm'n*, 2021 WI 32, ¶ 39, 396 Wis. 2d 391, 957 N.W.2d 208. In doing so, it rejected the argument that "the statutory duty of the Commission to create, maintain, and administer Wisconsin's voter registration list means the Commission is responsible to ensure every law related to that list is carried out," describing this argument as proposing "a rather remarkable expansion of the Commission's powers and responsibilities" that "bears no resemblance to our election administration laws." *Id.* ¶ 39 n.17.

Moreover, even local officials may disqualify challenged voters only upon "demonstrat[ion] beyond a reasonable doubt" that they are not qualified or are not properly registered. Wis. Stat. § 6.325. Department of Transportation records cannot establish beyond a reasonable doubt that an elector is not a U.S. citizen, because of the inherent inaccuracy involved in that data, as explained above. Moreover, Petitioners' request to the Court to order the Commission to "establish procedures such as those provided by DOT in IDPP to ensure due

process opportunity to establish citizenship," Am. Pet. at 30, Dkt. 49, simply highlights that the existing statutory scheme does not set out, much less mandate, such a process, making a writ of mandamus inappropriate.

3. Wisconsin law does not require documentary proof of citizenship to register.

Petitioners also ask the Court to order the Commission to impose a new requirement that new voter registrants provide *proof* of citizenship when registering, but there is no authority for that relief, either. Am. Pet. at 30, Dkt. 49. Wisconsin law enumerates exactly what information and records are required to register, including name, current and previous residence, birth date, age, citizenship status, and whether they have been convicted of a felony. Wis. Stat. § 6.33(1). Statutes also require that an applicant "shall provide an identifying document that establishes proof of residence." Wis. Stat. § 6.34(2). Nothing in Wisconsin law requires registrants to also provide a document proving their citizenship. The legislature knows how to require the submission of substantiating documents as part of voter and simply has not done so with respect to citizenship. In the absence of such legislation, there is no basis for the Court to order the Commission to impose a documentary proof of citizenship requirement.

4. WEC does not have a mandatory, nondiscretionary duty to conduct free-ranging investigations.

Finally, Petitioners' demand that the Commission must investigate "registration and inclusion of non-U.S. citizens or other unqualified registrants in the WisVote List" on an ongoing basis and conduct "ancillary" "legal actions" goes far beyond any mandatory duty imposed by statute. Am. Pet. at 29, Dkt. 49; *id.* ¶ 129. The Amended Petition quotes section 5.05(2m) as requiring that "[t]he commission shall investigate violations of laws administered by the commission," *id.* ¶ 121, but ignores that the statute specifies that "the commission may only initiate an investigation . . . based on a sworn complaint filed with the commission." Wis. Stat.

§ 5.05(2m). The statute also prohibits the Commission and any of its members or employees from filing a complaint for these purposes. *Id.* In the absence of a sworn complaint, the Commission lacks the authority to investigate the citizenship status of electors on the official registration list.

Moreover, even upon receipt of a sworn complaint, the Commission has considerable discretion in determining whether to conduct a full investigation, which again Petitioners ignore. If the Commission "reviews a complaint and fails to find that there is a reasonable suspicion that a violation" has occurred, it must dismiss the complaint without investigation. Wis. Stat. § 5.05(2m)(c)(4). Even if the Commission "believes that there is reasonable suspicion" that a violation has occurred, it is not required to investigate; instead, it "*may* by resolution authorize the commencement of an investigation," *id.* (emphasis added), which it may then terminate at any time, *id.* Under Wisconsin law, "[a]n act which requires the exercise of discretion does not present a clear legal duty and cannot be compelled through mandamus." *Nasser v. Miller*, 2010 WI App 142, ¶ 5, 329 Wis. 2d 724, 793 N.W.2d 209.

It makes no difference that the Commission properly refused to consider the complaint that Petitioner Cerny filed before bringing this case. Am. Pet., Ex. G. Dkt. 56. Petitioner Cerny framed that complaint as a complaint *against the Commission*, which the Commission concluded it lacked jurisdiction to hear. *See id.*; Am. Pet., Ex. H, Dkt. 57. But if what Petitioner Cerny wanted was an investigation of particular registrants who are allegedly ineligible to vote, Petitioner Cerny could and should have filed a sworn complaint against those registrants. That—and not this mandamus action in Circuit Court—is the appropriate statutory means of seeking an investigation by the Commission of alleged violations of Wisconsin election law. *See* Wis. Stat. § 5.05(2m).

B. Petitioners have not alleged "substantial damages or injury."

The lack of any legal basis for any of Petitioners' demands is sufficient reason to deny the petition for mandamus, but Petitioners further fail to allege that substantial damages or injury will

occur if the writ does not issue. "It is well established that one seeking a writ of mandamus must allege that he will be substantially damaged by the nonperformance of the Duty sought to be enforced." *Burns v. City of Madison*, 92 Wis. 2d 232, 244, 284 N.W.2d 631 (1979). Here, Petitioners allege that a writ of mandamus is necessary to prevent non-citizens from registering to vote. Petitioners do not allege any harm to themselves, however, or even allege that a meaningful number of votes have been or will be cast by ineligible voters. There are many protections against non-citizen voting, *supra* Section I, and Petitioners offer no allegations showing that they are insufficient to prevent the harm that they fear. It is therefore vanishingly unlikely that Petitioners will suffer any harm at all in the absence of the writ.

C. Petitioners have an adequate remedy at law.

Because Petitioners have no injury, the question of whether they have an adequate remedy of law is inapposite: there is no legal right to a remedy for no injury at all. But to the extent Petitioners' concern is that noncitizens are registered or voting, Wisconsin law provides a process for making individualized voter challenges, provided the challenger has a basis for doing so. Under section 6.48, "[a]ny registered elector" may "challenge the registration of any other registered elector" by submitting a sworn affidavit. Wis. Stat. § 6.48(1). The challenged elector thereafter has certain procedural rights, including notice of the challenge and appearance before a municipal clerk or the board of election commissioners, which may take sworn statements, analyze the facts, and determine whether the elector is qualified. *Id.* Notably, however, Petitioners fail to identify a single allegedly ineligible elector actually on the voter registration list. Should they have some actual basis to make these allegations, the voter challenge process provides Petitioners with a sufficient means of seeking relief to have them removed.

III. Petitioners fail to state a claim for declaratory relief regarding proof of citizenship and citizenship matching.

For the same reasons that Petitioners are not entitled to mandamus, they also fail to state a claim for declaratory relief regarding proof of citizenship and citizenship matching. To obtain declaratory relief, Petitioners must establish "(1) the existence of a justiciable controversy, meaning one in which a claim of right is asserted against one who has an interest is contesting it; (2) the controversy must be between parties whose interests are adverse to one another; (3) the party seeking declaratory relief must have a legally protectable interest in the controversy; and (4) the issue involved must be ripe for judicial determination." *Voters with Facts v. City of Eau Claire*, 2017 WI App 35, ¶ 15, 376 Wis. 2d 479, 899 N.W.2d 706, *aff'd on other grounds*, 2018 WI 63, ¶ 15, 382 Wis. 2d 1, 913 N.W.2d 131. "A party's standing to bring a declaratory judgment action is generally analyzed under the third factor." *Id.* In addition, "jurisdiction for a declaratory judgment will not ordinarily be entertained where another equally or more appropriate remedy is available." *Madison Gen. Hosp. Ass'n v. City of Madison*, 71 Wis. 2d 259, 266, 237 N.W.2d 750 (1976) (cleaned up).

As discussed above, Petitioners lack standing to bring this action, *see supra* Section I, and on the merits, the law does not require the Commission to take the steps that Petitioners ask the Court to declare are required. *See supra* Section II.A. The request for declaratory relief regarding proof of citizenship and citizenship matching should therefore be denied.

IV. Petitioners fail to state a claim for a violation of Section 13.45(7).

Petitioners argue that Respondents have violated Wisconsin legislators' rights to access to state information under Section 13.45(7). In addition to lacking any legal right to raise this issue, *supra* Section I.E., Petitioners' arguments are wrong on the merits. Petitioners argue, specifically, that the Commission and the Department of Transportation are refusing to provide driver

citizenship information. But their allegations affirmatively disprove those arguments. They make clear that the Department did not provide some of the information sought by the Legislature because it "does not have such a 'list'" as was requested, and that they offered to provide what information they could upon receipt of the appropriate form. Am. Pet. ¶ 37, Dkt. 49; Ex. E (June 29, 2024), Dkt. 54. Petitioners do not allege that such a form was ever submitted, nor do they allege any basis for doubting the Department's representation that the requested data did not exist. As for the ERIC Agreement, Plaintiffs misunderstand its role in the Department's analysis. As the letter attached to the Amended Complaint explains, Section 343.50(8)generally prohibits the Department from sharing identification card information, with an exception for sharing that is *required* by the ERIC Agreement. Am. Pet., Ex. J (Sept. 10, 2024), Dkt. 59; Wis. Stat. § 343.50(8). But as the letter explains, the ERIC Agreement does not require sharing citizenship information. Ex. J, Dkt. 59. The point is not that the ERIC Agreement itself precludes sharing this information with the Legislature, but rather that the statutory exception for sharing information as required by the ERIC Agreement does allow sharing of citizenship information. *See id.* Petitioners therefore fail to state a claim for a violation of Section 13.45(7).

V. Petitioners fail to state a common law certiorari claim.

Petitioners also seek review of the Commission's denial of Petitioner Cerney's administrative complaint via a common law writ of certiorari. Am. Pet. ¶¶ 193–97, Dkt. 49. This claim is foreclosed by the existence of an express statutory appeal process under Section 5.06: "[a]ny election official or complainant who is aggrieved by" the Commission's decision on a complaint under Section 5.06 "may appeal the decision to circuit court . . . no later than 30 days after issuance of the order." Wis. Stat § 5.06(8). Similarly, complaints about HAVA compliance under Section 5.061 similarly provides for judicial review. Wis. Stat. § 227.52. Petitioners are therefore wrong to assert that the relevant statutes "provide no express statutory method of review

of such a decision by WEC." Am. Pet. ¶ 195, Dkt. 49. There is such a method, although it is now time-barred. *See* Wis. Stat. §§ 5.06(8), 227.53; *Wis.'s Env't Decade, Inc. v. Pub. Serv. Comm'n*, 84 Wis. 2d 504, 518, 267 N.W.2d 609, 618 (1978) (finding 30-day "provision fixes a strict cutoff date for the filing of a petition for review"). Petitioners cannot rely on common law certiorari to rescue them from their failure to timely seek judicial review of an administrative decision.

CONCLUSION

For the forgoing reasons, the Court should dismiss the Amended Petition.

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Electronically signed by Diane M. Welsh
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