

FILED
10-14-2024
Clerk of Circuit Court
Waukesha County
2024CV001353

STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY
BRANCH 8

ARDIS CERNY, et al.,

Petitioners,

v.

Case No. 24-CV-1353

WISCONSIN ELECTIONS COMMISSION, et al.,

Respondents.

RESPONDENTS' BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

This Court should dismiss the amended petition, (Doc. 49), for failure to state a claim upon which relief can be granted. Wis. Stat. §§ 802.06(2)(a)6. and 783.01. None of Petitioners' claims are viable.

First, Petitioners cannot meet the mandamus requirements for claim one. There is no clear legal right or plain and positive duty for Respondents to share and match data in their respective databases to remove non-citizens from the statewide voter registration list. The registration list does not contain citizenship data and is not required to. Further, Petitioners lack standing and have not pled facts to show substantial damage or any injury to them on this claim.

Second, Petitioners' claim two is not justiciable and should be dismissed. This claim is a rehash of their flawed theory for mandamus relief, and they do not show a legally protectible interest amounting to a viable claim for relief.

Third, Petitioners' claim three improperly would rely on "involuntary petitioners" and should be dismissed. That effort is not a proper use of the involuntary-plaintiff procedures, but rather an effort to conscript legislative committees to bring independent claims separate from Petitioners' claims.

Lastly, Petitioners' claim for common-law certiorari is not viable, either. They allege that the Wisconsin Elections Commission (WEC or the "Commission") incorrectly returned Ardis Cerny's Wis. Stat. § 5.06 administrative complaint filed with and *against* the Commission without a merits decision. If Cerny wanted to appeal the Commission's action, the proper procedure was judicial review under Wis. Stat. § 5.06(8), not certiorari. Even if Cerny could still seek review, the Commission reached the right result because of an obvious conflict of interest that would arise in addressing a claim filed against itself.

BACKGROUND

This case is about whether Respondents are required by law to take certain actions to remove certain voters from the rolls or prevent them from registering.

I. Only United States citizens may legally vote in Wisconsin.

Article III, § 1 of the Wisconsin Constitution provides that "[e]very United States citizen age 18 or older who is a resident of an election district in this state is a qualified elector of that district." Wisconsin Stat. § 6.02(1) mirrors that language, providing that "[e]very U.S. citizen age 18 or older who has resided in an election district or ward for 28 consecutive days before any election where the citizen offers to vote is an eligible elector."

II. As required by federal law, Wisconsin created and maintains a statewide electronic voter registration list.

The federal Help America Vote Act of 2002 requires “each State, acting through the chief State election official” to “implement, in a uniform and nondiscriminatory manner, a single, uniform, official, centralized, interactive computerized statewide voter registration list defined, maintained, and administered at the State level that contains the name and registration information of every legally registered voter in the State.” 42 U.S.C. § 15483(a)(1)(A).

Wisconsin created and maintains a statewide electronic voter registration list, which is also known as WisVote. Wisconsin Stat. § 5.05(15) provides that the Commission “is responsible for the design and maintenance of the official registration list under s. 6.36.” Under Wis. Stat. § 6.36(1)(a), “[t]he commission shall compile and maintain electronically an official registration list.” The “[r]egistration list” means “the list of electors who are properly registered to vote.” Wis. Stat. § 5.02(17). These laws do not require the Commission to prevent non-U.S. citizens from appearing on the list or to remove non-U.S. citizens from the list.

The Commission “shall require all municipalities to use the list in every election and may require any municipality to adhere to procedures established by the commission for proper maintenance of the list.” Wis. Stat. § 5.05(15). “The list” under Wis. Stat. § 6.36(1)(a) “shall contain all of the following:”

1. The name and address of each registered elector in the state.
2. The elector’s date of birth.
3. The ward and aldermanic district of the elector, if any.
4. For each elector, a unique registration identification number assigned by the commission.

5. The number of a valid operator's license issued to the elector under ch. 343, if any, or the last 4 digits of the elector's social security account number, if any.
6. Any identification serial number issued to the elector under s. 6.47(3).
7. The date of any election in which the elector votes.
8. An indication of whether the elector is an overseas elector, as defined in s. 6.24(1).
9. Any information relating to the elector that appears on the current list transmitted to the commission by the department of corrections under s. 301.03(20m).
10. An indication of any accommodation required under s. 5.25(4)(a) to permit voting by the elector.
11. An indication of the method by which the elector's registration form was received.
12. An indication of whether the elector was required under s. 6.34 to provide proof of residence and, if so, the type of identifying document submitted as proof of residence, the name of the entity or institution that issued the identifying document, and, if the identifying document included a number that applies only to the individual holding that document, up to the last 4 digits of that number. If the number on the identifying document submitted by the elector had 6 or fewer digits, the list under this paragraph may not contain more than the last 2 digits of that number.
13. A separate column indicating the date on which an elector applied to vote by in-person absentee ballot.
14. Separate columns indicating the date on which the clerk mailed an absentee ballot to an elector and the date on which the elector returned the absentee ballot.
15. A separate column indicating the polling location associated with each elector's address and ward or aldermanic district, if any.
16. A separate column indicating the mailing address for the municipal clerk associated with each polling location identified under subd. 15.

Wis. Stat. § 6.36(1)(a)1.–16. “The list under par. (a) may contain such other information as may be determined by the commission to facilitate administration of elector registration requirements.” Wis. Stat. § 6.36(1)(am). Wisconsin Stat. § 6.36(1)(a) contains no requirement to include information about U.S. citizenship.

III. Voter registration is governed by Wisconsin law.

With limited exceptions, every elector is required to register before voting in an election. Registration occurs in person at a polling place or clerk's office, or by mail using a form prescribed by the Commission, form EL-131, or electronically through the MyVote Wisconsin website, <http://myvote.wi.gov>. Wis. Stat. § 6.30(1), (4), (5).

Petitioners filed form EL-131 as an exhibit to their amended petition, (Doc. 50), and this Court can take judicial notice of it. The form requires an applicant to confirm that he is a U.S. citizen by checking a box:

Please complete leg
Additional instruction

Wisconsin Voter Registration Application

<p>Qualifications</p> <p>please check each box if <u>YOU</u>:</p>	<p>1</p> <p>If you cannot check every box, do NOT complete this form</p> <p><input type="checkbox"/> Are a citizen of the United States</p> <p><input type="checkbox"/> Have resided at the address provided below for at least 28 consecutive days prior to the election and do not currently intend to move</p>
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(Doc. 50:1.) It also requires an applicant's signature: "By signing below, I hereby certify that, to the best of my knowledge, **I am a qualified elector . . .**" (Doc. 50:1.) And it warns of the consequences for false statements: "I also certify that I am not otherwise disqualified from voting and that all statements on this form are true and correct. If I have provided false information, I may be subject to fine or imprisonment under State and Federal laws." (Doc. 50:1.) Below the applicant's signature, the form states: "Falsification of information on this form is punishable under Wisconsin law as a Class I felony." (Doc. 50:1.)

Consistent with that warning, the law provides serious penalties for those who attempt to register to vote based upon false information. Under Wis. Stat. § 12.13(1)(b), a person may not "[f]alsely procure[] registration or makes false

statements to the municipal clerk, board of election commissioners or any other election official whether or not under oath.” A person who violates this law is guilty of a class I felony. Wis. Stat. § 12.60(1)(a). Under Wis. Stat. § 12.13(3)(g), no person may “[f]alsify any statement relating to voter registration under chs. 5 to 12.” A person who violates this law “may be fined not more than \$1,000, or imprisoned not more than 6 months or both. Wis. Stat. § 12.60(1)(b).

Wisconsin Stat. § 6.34 requires most registrants to submit documentation or information establishing proof of the elector’s residence, Wis. Stat. § 6.34(2) and (3), but there is no corresponding requirement for documentation of citizenship.

Wisconsin Stat. §§ 6.32 and 6.325 address verification and disqualification of voter registrations. Wisconsin Stat. § 6.32(1) provides that “[u]pon receipt of a registration form that is submitted by mail under s. 6.30(4) or by electronic application under s. 6.30(5), the commission or municipal clerk shall examine the form for sufficiency.” “If the form is insufficient to accomplish registration or the commission or clerk knows or has reliable information that the proposed elector is not qualified, the commission or clerk shall notify the proposed elector within 5 days, if possible, and request that the elector appear at the clerk’s office or another registration location to complete a proper registration or substantiate the information presented.” Wis. Stat. § 6.32(2).

In contrast, “[i]f the form is sufficient to accomplish registration and the commission or clerk has no reliable information to indicate that the proposed elector is not qualified, the commission or clerk shall enter the elector’s name on the

registration list and transmit a 1st class letter or postcard to the registrant, specifying the elector's ward or aldermanic district, or both, if any, and polling place." Wis. Stat. § 6.32(4).

The law addresses when a person may be disqualified from voting due to improper registration. "No person may be disqualified as an elector unless the municipal clerk, board of election commissioners or a challenging elector under s. 6.48 demonstrates beyond a reasonable doubt that the person does not qualify as an elector or is not properly registered." Wis. Stat. § 6.325. "If it appears that the challenged elector is registered at a residence in this state other than the one where the elector now resides, the municipal clerk or board of election commissioners shall, before permitting the elector to vote, require the elector to properly register and shall notify the municipal clerk or board of election commissioners at the former residence." *Id.* "The municipal clerk or board of election commissioners may require naturalized applicants to show their naturalization certificates." *Id.*

IV. For electronic registration, the Commission's MyVote system matches specific information the Commission keeps with specific information the Department of Transportation keeps.

For applicants who register to vote electronically using MyVote, certain information in their applications is instantly cross-checked with information in the Department of Transportation (DOT) driver license and ID databases. Under Wis. Stat. § 6.34(2m), that cross-check allows the system to verify the voter's address without a need to provide proof of residence:

An elector who registers by electronic application under s. 6.30(5) is not required to provide proof of residence under sub. (2) if, at the time of

registration, the elector provides the number of a current and valid operator's license issued under ch. 343, or the number of a current and valid identification card issued under s. 343.50, together with the elector's name and date of birth and [WEC] is able to verify the information specified under sub. (3)(b) using the system maintained under sub. (4).

Wis. Stat. § 6.34(2m).

The information the Commission cross-checks relates to proof of residence, and is obtained pursuant to an agreement with the Secretary of DOT: the Commission “shall maintain a system that electronically verifies, on an instant basis, information specified under sub. (3)(b) from the information submitted in lieu of proof of residence under sub. (2m), using the information maintained by the department of transportation pursuant to the commission's agreement with the secretary of transportation under s. 85.61(1).” Wis. Stat. § 6.34(4).

Wisconsin Stat. § 85.61(1), in turn, requires the DOT Secretary and Commission Administrator 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 the operating record file database under ch. 343 and vehicle registration records under ch. 341 to the extent required to enable” DOT's Secretary and the Commission's Administrator “to verify the accuracy of the information provided for the purpose of voter registration.” That requirement matches only information on the registration list under Wis. Stat. § 6.36(1) and information specified in Wis. Stat. § 6.34(2m) with DOT information in the operating record file database under Wis. Stat. ch. 343 and vehicle registration records under Wis. Stat. ch. 341.

In turn, Wis. Stat. § 5.056, entitled “[m]atching program with secretary of transportation,” simply mirrors the requirement in Wis. Stat. § 85.61. It requires the Commission Administrator to enter into an agreement with DOT’s Secretary under Wis. Stat. § 85.61(1) “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 maintained by the department of transportation.” Wis. Stat. § 5.056.

All of this process relates only to an elector who registers by electronic application, not to all registrants. Wis. Stat. § 6.34(2m) (referring to “[a]n elector who registers by electronic application under s. 6.30(5)”).

V. Cerny filed an administrative complaint with the Commission under Wis. Stat. § 5.06, which it returned to her on August 8, 2024.

On July 27, 2024, Cerny filed a complaint under Wis. Stat. § 5.06 with and against the Commission, the six Wisconsin Elections Commissioners, and the Commission Administrator. (Doc. 56; *see also* Doc. 49 ¶¶ 18, 39.) The complaint raised challenges to the Commission’s actions Cerny believes result in non-citizens appearing on the registration list the Commission maintains. (Doc. 56:3–15.)

Rather than address the merits of Cerny’s complaint, the Commission sent her a letter on August 8, 2024, “disposing of this complaint without consideration” because “a complaint against the Commission, against Commissioners in their official capacities, or against Commission staff, warrants an ethical recusal by the body.” (Doc. 57:1; *see also* Doc. 49 ¶ 39.) The Commission relied on the lead opinion and

Justice Hagedorn's concurrence in *Teigen v. WEC*, 2022 WI 64, 403 Wis. 2d 607, 976 N.W.2d 519, *overruled in part on other grounds by Priorities USA v. WEC*, 2024 WI 32, 412 Wis. 2d 594, 8 N.W.3d 429. (Doc. 57:1.)

VI. Petitioners seek mandamus, declaratory and injunctive relief, and certiorari.

On September 30, 2024, Petitioners filed the amended verified petition seeking mandamus, declaratory relief, and common-law certiorari. (Doc. 49.) They also filed a motion for temporary relief or a preliminary injunction the same day with a supporting brief. (Doc. 62; 63.) This Court ordered a response deadline to the amended pleading, briefing, and set a motion hearing for October 17. (Doc. 47.)

MOTION TO DISMISS LEGAL STANDARD

“Wisconsin Stat. § 802.02(1) sets the requirements for a complaint if it is to withstand a motion to dismiss for failure to state a claim.” *Data Key Partners v. Permira Advisers, LLC*, 2014 WI 86, ¶ 20, 356 Wis. 2d 665, 849 N.W.2d 693. Wisconsin Stat. § 802.02(1) and (1)(a) requires that a pleading “shall contain,” among other things, “[a] short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.”

“[T]o satisfy Wis. Stat. § 802.02(1)(a), a complaint must plead facts, which if true, would entitle the plaintiff to relief.” *Data Key Partners*, 356 Wis. 2d 665, ¶ 21. To withstand a motion to dismiss, “[p]laintiffs must allege facts that plausibly suggest they are entitled to relief.” *Id.* ¶ 31. In determining the sufficiency of a complaint, a court will “assume the facts set forth in the complaint are true and consider only the

facts set forth therein.” *Peterson v. Volkswagen of Am., Inc.*, 2005 WI 61, ¶ 15, 281 Wis. 2d 39, 697 N.W.2d 61. The court does not accept legal conclusions as true. *Data Key Partners*, 356 Wis. 2d 665, ¶ 19.

Petitioners attach a number of documents to the amended petition and refer to those documents throughout it. (Doc. 49–61.) “When a document is attached to the complaint and made part thereof, it must be considered a part of the pleading, and may be resorted to in determining the sufficiency of the pleadings.” *Peterson*, 281 Wis. 2d 39, ¶ 15 (citation omitted). “Any document so attached prevails over inconsistent averments in the complaint.” *Id.*

ARGUMENT

The amended petition does not “plead facts, which if true, would entitle [Petitioners] to relief.” *Data Key Partners*, 356 Wis. 2d 665, ¶ 21. The petition does not state a viable claim because it does not meet the requirements for a writ of mandamus, declaratory and injunctive relief, or common-law certiorari.

I. Petitioners fail to state a viable claim for mandamus.

Petitioners’ first claim fails to state a viable claim for mandamus under three of its prongs. Most basically, the laws they rely upon do not require the things they say they do. Petitioners allege that Wis. Stat. §§ 85.61(1) and 5.056 require the Commission and DOT to enter into and carry out an agreement to match registration list data and DOT data to determine whether non-citizens are on the registration list and should be removed. But the statutory registration list contains no citizenship data. That means that Petitioners have no right and Respondents have no plain duty.

In addition, Petitioners fail to show substantial injury or damage.

- A. Mandamus is an extraordinary legal remedy, requiring a clear and specific legal right, a positive and plain duty, substantial damage absent a writ, and the absence of any other adequate legal remedy.**

A writ of “[m]andamus 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.” *State ex rel. Zignego v. WEC*, 2021 WI 32, ¶ 38, 396 Wis. 2d 391, 957 N.W.2d 208 (citation omitted). The “party seeking mandamus must also show that the duty sought to be enforced is positive and plain; that substantial damage will result if the duty is not performed; and that no other adequate remedy at law exists.” *Id.* (citation omitted). “It is an abuse of discretion to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion.” *LESB v. Vill. of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89 (1981) (citation omitted).

- B. Petitioners cannot meet the requirements for mandamus, so this Court should dismiss their claim.**

Here, the amended petition does not meet the mandamus requirements under *Zignego*. Petitioners demonstrate no clear legal right, no plain duty, and cannot show substantial damage.

- 1. The amended petition does not establish a clear legal right to require Respondents to engage in “matching” of citizenship information.**

Petitioners fail to establish a clear, specific legal right to require WEC and DOT to match citizenship information contained in DOT records against WEC registrant records to verify that citizenship certifications provided by registration

applicants in their EL-131 and online forms are accurate, (Doc. 49 ¶ 87), or for the Commission to “approve or reject a voter registration application” based on citizenship data from DOT (Doc. 49 ¶ 90). Simply put, the laws upon which Petitioners rely do not require Respondents to do the things Petitioners say.

Petitioners claim that Wis. Stat. §§ 5.056 and 85.61(1) require this sharing because citizenship information is “personally identifiable information” and the agencies must share “personally identifiable information.” (Doc. 49 ¶ 84.) This theory relies on two incorrect premises.

First, the statutes require sharing of types of information on a statutory list, not a general concept of “personally identifiable information.” Neither statute mentions citizenship information. Wisconsin Stat. § 85.61(1) requires “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).” Wisconsin Stat. § 5.056 requires an agreement between DOT and the Commission to match only the data “on” the Wis. Stat. § 6.36(1) registration list and the information specified in Wis. Stat. § 6.34(2m).

The referred-to list under Wis. Stat. § 6.36(1) does not include citizenship information. Wis. Stat. § 6.36(1)(a)1.–16. And Wis. Stat. § 6.34(2m) requires an electronic registrant to provide only “the number of a current and valid operator’s license issued under ch. 343, or the number of a current and valid identification card issued under s. 343.50,” plus “the elector’s name and date of birth.” Citizenship information is not part of this information.

Second, even if “personally identifiable information” were a relevant term in the election statutes, Petitioners also do not show that it would include citizenship information. They point to a comment in *Luft v. Evers*, that “[c]itizenship is ‘personally identifiable information.’” (Doc. 49 ¶ 86 (quoting *Luft v. Evers*, 963 F.3d 665, 675 (7th Cir. 2020)).) But that case is irrelevant: *Luft* was construing “personally identifiable information” under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g. 963 F.3d at 675. It had nothing to do with the statutes at issue here.

Further, DOT must keep driver license and ID card information confidential under federal and state law. The Driver’s Privacy Protection Act (DPPA) prohibits a state DMV from releasing or using personal information it obtains in connection with a motor vehicle record unless an exception applies. *See* 18 U.S.C. § 2721(a)(1). One such exception is for “use by any government agency . . . in carrying out its functions.” 18 U.S.C. § 2721(b)(1). State law does not require the Commission to cross-reference DOT’s citizenship data against the voter registration list, and thus this is not a qualifying agency function authorizing the release of confidential data.

Under state law, DOT is prohibited from sharing ID card applicant data except in limited circumstances that are not present here. Wisconsin Stat. § 343.50(8) prohibits DOT from disclosing any record or other information concerning or relating to an applicant or identification card holder, unless specifically delineated. As relevant here, one such exception is that DOT “may, upon request,” provide this confidential data to the Commission “for the *sole* purpose of allowing the chief election

officer to comply with the terms of” the Commission’s agreement with the Electronic Registration Information Center, Inc. (“ERIC”) under Wis. Stat. § 343.50(8)(c)3. The ERIC agreement exception has no applicability here because it does not require the sharing of citizenship information. Indeed, the agreement provides: “Under no circumstances shall the Member 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.” (Doc. 61:13.)

In sum, the statutes Petitioners rely on do not include the components they desire, and so they cannot meet the first mandamus factor.

2. Petitioners cannot show that Respondents have a positive and plain duty to engage in “matching” of citizenship information.

Second, none of the laws on which Petitioners rely establish a “positive and plain” duty, *Zignego*, 396 Wis. 2d 391, ¶ 38 (citation omitted), for Respondents to engage in “matching” of their databases to remove non-citizens from the voter registration list. As discussed above, neither agency has any such statutory duty.

Zignego rejected the notion that “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—whether the Commission is statutorily assigned the responsibility or not.” 396 Wis. 2d 391, ¶ 39 n.17. It rejected this argument as a “remarkable expansion of the Commission’s powers and responsibilities,” because it “bears no resemblance to our election administration laws that give the Commission more limited duties.” *Id.*

Petitioners allege that, under Wis. Stat. § 5.01(1) and (3)(a), the laws the Commission administers “shall be construed to give effect to the will of the electors,” meaning that the “person receiving the greatest number of legal votes for the office shall be declared elected.” (Doc. 49 ¶ 169.) This allegedly gives rise to a “positive and plain dut[y]” “to accomplish that controlling purpose.” (Doc. 49 ¶ 170.) The general language in Wis. Stat. § 5.01(1) and (3)(a) creates no duty as to citizenship-data matching. Petitioners cannot meet the second mandamus requirement.

3. Petitioners cannot show substantial damage as electors or taxpayers.

Third, Petitioners cannot show “substantial damage will result if the duty is not performed” for purposes of mandamus relief. *Zignego*, 396 Wis. 2d 391, ¶ 38 (citation omitted). They lack standing to assert their claims and are therefore not threatened with substantial damage or injury to them as electors or taxpayers.

a. Petitioners cannot show substantial damage based on speculative theories of illegal voter registration.

Petitioners’ theory of damage is based on speculation about non-citizens registering to vote, potentially causing their votes to be diluted. (See Doc. 49 ¶¶ 166, 171.) They speculate that “there are over 10,000 active voters and over 15,000 total voters in the WisVote list who are unlawfully registered.” (Doc. 49 ¶ 175.)

This kind of speculative “vote dilution” theory does not even supply the minimal injury in fact necessary for standing. And a writ of mandamus is an extraordinary remedy that requires more than a trifling injury; it requires “substantial damage.” *Zignego*, 396 Wis. 2d 391, ¶ 38 (citation omitted). Petitioners cannot meet that standard.

b. Petitioners lacks standing as electors to seek mandamus relief.

Petitioners' first theory of injury relies on their status as electors whose votes could be "impair[ed] or cancel[ed] by unlawful ballots cast by non-citizens or other unqualified voters." (Doc. 49 ¶¶ 1, 2, 16.) Petitioners lack standing based on these allegations.

To establish standing, a petitioner must meet a two-step test: she must demonstrate (1) an injury in fact (2) to an interest which the law recognizes or seeks to regulate or protect. *Friends of Black River Forest v. Kohler Co.*, 2022 WI 52, ¶¶ 18, 23, 402 Wis. 2d 587, 977 N.W.2d 342. To meet the "injury" requirement, a petitioner must have "suffered 'some threatened or actual injury resulting from the putatively illegal action.'" *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 308, 290 N.W.2d 321 (1980) (citation omitted). This requires the petitioner to show a "personal stake in the outcome of the controversy." *Id.* at 308–09 (citation omitted). Abstract, hypothetical, and conjectural injury "is not enough." *Fox v. DHSS*, 112 Wis. 2d 514, 525, 334 N.W.2d 532 (1983) (citation omitted).

Courts have agreed that vote-dilution theories like Petitioners' here are a generalized grievance that is insufficient to show standing. *Feehan v. WEC*, 506 F. Supp. 3d 596, 608–09 (E.D. Wis. 2020) (collecting cases); *see also Wis. Voters All. v. Pence*, 514 F. Supp. 3d 117, 120 (D.D.C. 2021); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 712 (D. Ariz. 2020).

Feehan, for example, involved a challenge to the results of the 2020 presidential election. 506 F. Supp. 3d at 609. The court held that the plaintiffs’ alleged injuries were the same “that any Wisconsin voter suffers if the Wisconsin election process were [conducted as unlawfully] as the plaintiff alleges.” *Id.* This type of harm is not the type of “particularized, concrete injury sufficient to confer standing.” *Id.*

No Wisconsin appellate court has endorsed the vote-dilution theory of standing, and general principles of standing in Wisconsin law cut against it. *See First Nat’l. Bank*, 95 Wis. 2d at 308–09; *see Rise, Inc. v. WEC*, No. 2022AP1838, 2023 WL 4399022, ¶ 27 (Wis. Ct. App. July 7, 2023) (unpublished; authored; cited under Wis. Stat. § (Rule) 809.23(3)) (expressing doubt that “vote dilution” theory could “amount to an actual, concrete injury that gives [plaintiffs] a justiciable stake” in a case).

The fractured decision in *Teigen* does not support Petitioners’ standing. A three-justice plurality would have endorsed a voter-dilution theory, *Teigen*, 403 Wis. 2d 607, ¶¶ 14–36, but the concurring justice and other three-justice plurality disagreed. *Id.* ¶ 32 (Hagedorn, J., concurring), ¶ 167 (noting that plurality’s standing “analysis is unpersuasive and does not garner the support of four members of [the supreme] court”) (Hagedorn, J., concurring); *id.* ¶¶ 210–15 (Bradley, A.W., J., dissenting). Four justices thus rejected the voter-dilution theory of standing there.

Petitioners lack any such injury as electors, and their vote-dilution theory fails.

c. Petitioners lacks standing as taxpayers to seek mandamus relief.

Petitioners also allege injury or damages as taxpayers, (Doc. 49 ¶¶ 1, 2), alleging “unlawful expenditure of public funds,” (Doc. 49 ¶ 26). Petitioners lack standing as taxpayers.

Taxpayers can have a legal right “to contest governmental actions leading to an illegal expenditure of taxpayer funds.” *Fabick v. Evers*, 2021 WI 28, ¶ 10, 396 Wis. 2d 231, 956 N.W.2d 856. But to establish taxpayer standing, “the taxpayer must allege and prove a direct and personal pecuniary loss, a damage to himself different in character from the damage sustained by the general public.” *City of Appleton v. Town of Menasha*, 142 Wis. 2d 870, 877, 419 N.W.2d 249 (1988).

This means that there must be an actual expenditure of tax dollars resulting from the government action the taxpayer plaintiff wishes to challenge. *Fabick*, 396 Wis. 2d 231, ¶ 11 (expenditure on the deployment of the National Guard gave a taxpayer standing to challenge the Governor’s emergency declaration). And “[t]he taxpayer must have sustained, or will sustain, some pecuniary loss before he or she has standing.” *Vill. of Slinger v. City of Hartford*, 2002 WI App 187, ¶ 9, 256 Wis. 2d 859, 650 N.W.2d 81. Taxpayer standing cannot rest on the fact that government staff have devoted some time and attention to the challenged policy. *Teigen*, 403 Wis. 2d 607, ¶ 163 (Hagedorn, J., concurring). Otherwise, “any taxpayer could challenge almost any government action,” which “would practically eliminate standing as a consideration in most challenges to government action.” *Id.*

Petitioners here cannot show a “direct and personal pecuniary loss” that is “different in character from the [alleged] damage[s] sustained by” all electors. *City of Appleton*, 142 Wis. 2d at 877. They allege generically that “Respondents are expending significant amounts of state tax moneys [sic] to maintain the WisVote List and administer state statutes in unlawfully [sic].” (Doc. 49 ¶ 161.) But they allege no extra expenditure relating to the “illegal” act or any pecuniary loss of their own.

Because Petitioners have no standing to assert their claim as either electors or taxpayers, they cannot meet the third mandamus factor under *Zignego*, and their mandamus claim should be dismissed.

II. Petitioners’ second claim fails to state a viable claim for declaratory and injunctive relief, as it is based on the same incorrect legal theories as their mandamus claim.

Petitioners’ claim two for declaratory and injunctive relief also fails. While brought under Wis. Stat. § 806.04, it raises the same claims on the merits as their mandamus cause of action—based on their mistaken theories about Wis. Stat. §§ 5.056 and 85.61(1). (Doc. 49 ¶¶ 180–86.)

As far as Respondents can discern, the only difference between Petitioners’ first and second claims is their assertion that Wis. Stat. § 85.61(1) must be construed in conjunction with 52 U.S.C. § 21083(a)(5)(B)(i). (Doc. 49 ¶¶ 184–86.) But that federal statute makes no difference. It states only that

The chief State election official and the official responsible for the State motor vehicle authority of a State shall 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). It says nothing about matching citizenship data. It provides a federal requirement for the agreement that Wis. Stat. §§ 5.056 and 85.61(1) implement, but it includes no substantive requirement about the data that must be shared. Petitioners second claim fails as a matter of law.

In terms of their request for declaratory and injunctive relief, Petitioners do not allege a legally protectible interest, failing justiciability factor three under Wis. Stat. § 806.04. “A court must be presented with a justiciable controversy before it may exercise its jurisdiction over a claim for declaratory judgment.” *Olson v. Town of Cottage Grove*, 2008 WI 51, ¶ 28, 309 Wis. 2d 365, 749 N.W.2d 211. To be justiciable, “[t]he party seeking declaratory relief must have a legal interest in the controversy—that is to say, a legally protectible interest.” *Milwaukee Dist. Council 48 v. Milwaukee Cnty.*, 2001 WI 65, ¶ 37, 244 Wis. 2d 333, 627 N.W.2d 866 (citation omitted); *see also Fabick*, 396 Wis. 2d 231, ¶ 9 (same).

Here, for the same reason that they lack standing to bring claim one, Petitioners lack standing for claim two. The claim should be dismissed on this basis.

III. Petitioners’ third claim fails to state a viable claim for declaratory relief because it involves only involuntary parties who did not bring this suit.

Petitioners’ claim three is meant to enforce Wis. Stat. § 13.45(7), which requires state agencies to provide documents to legislators and legislative committees. (Doc. 49 ¶¶ 187–92.) This statute creates no rights for Petitioners. In an effort to create a claim under this statute, Petitioners involuntarily implead members

of two legislative committees and the committees themselves. That is not a proper use of the joinder statute. The claim should be dismissed.

A. Petitioners have no standing to bring claims about agency compliance with Wis. Stat. § 13.45(7).

Petitioners do not even assert that they meet the standing requirements for their claim under Wis. Stat. § 13.45(7). They allege that two legislative committees and their legislator members are named “as involuntary plaintiffs to obtain construction of their inherent and statutory authority pursuant to § 13.45(7).” (Doc. 49 ¶ 188.) Wisconsin Stat. § 13.45(7) requires state agencies to “assist legislative committees in the completion of their tasks,” including providing “legislative committees with ready access to any books, records or other information relating to such tasks.” Petitioners allege that DOT failed to provide the would-be legislator petitioners with “citizenship information held by DOT.” (Doc. 49 ¶ 189 (citing Doc. 52; 54; 58 (letters)).)

In denying access to the requested information, the DOT Secretary relied on Wis. Stat. § 345.50(8), the DPPA, and the state’s agreement with ERIC to explain that the requested citizenship information cannot be provided to the legislators. (Doc. 59:2.) DOT’s letter to the committee chairs explained that DOT and the Commission’s “matching program described in Wis. Stat. ss. 5.056 and 85.61,” “is statutorily limited to the personally identifiable information on the official registration list (s. 6.36(1)),” a list that does not include citizenship information. (Doc. 59:1–2; *see also* Doc. 53:1 (Legislative Council memo explaining 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”).)

Petitioners do not have standing to bring this claim. They are not legislators and do not even assert any particularized injury, or assert that the relevant statute gives them a personal stake in the controversy.

B. Petitioners cannot manufacture a claim under Wis. Stat. § 13.45(7) by naming “involuntary petitioners” and conscripting them to bring the claim.

Petitioners cannot avoid their lack of justiciable interest by naming involuntary legislative petitioners and creating the claim for them. The joinder statute’s purpose is to fully adjudicate existing claims, not bring new claims that the existing petitioners could not.

1. Joinder standard

Wisconsin Stat. § 803.03 allows joinder if one of two circumstances are present: (1) if in the person’s absence complete relief cannot be accorded among those already parties; or (2) if “[t]he person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person’s absence may” either “1. As a practical matter impair or impede the person’s ability to protect that interest” or “2. Leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his or her claimed interest.” Wis. Stat. § 803.03(1)(b), (b)1., 2.

2. Claim three seeks a declaration of *legislators'* rights, not *Petitioners'* rights.

Petitioners inappropriately attempt to conscript legislators to bring a claim that has nothing to do with Petitioners' claim. That is not a proper use of joinder, and the claim must be dismissed.

For Petitioners' first and second claims, Petitioners offer no reason why they need the involuntary petitioners for complete relief to be granted in the case. Their case is about whether state law requires DOT and the Commission to engage in the matching of certain data as part of voter registration. It has nothing to do with legislators' authority under Wis. Stat. § 13.45(7) to gather information from state agencies for legislative purposes. And for the third claim, Petitioners cannot use joinder to avoid their lack of any cognizable interest in the claim.

Essentially, Petitioners seek to force Wisconsin legislators to bring a claim under Wis. Stat. § 13.47(5) that is separate from Petitioners' own case. If the joinder statute permitted such antics, citizens could be haled into court to bring lawsuits because others thought it was a good idea. That is not what joinder is for.

IV. Claim four fails to state a viable claim for certiorari.

Claim four, which seeks to challenge the Commission's return of Cerny's administrative complaint without ruling upon its merits, (Doc. 49 ¶¶ 18, 38, 39, 193–97; Doc. 56; 57), must be dismissed. Cerny failed to utilize her exclusive remedy for judicial review; even if she were not too late, the Commission's decision was correct.

A. Cerny did not bring a timely petition for judicial review.

An elector can bring a claim before the Commission under Wis. Stat. § 5.06(1). If the elector is aggrieved by the Commission's order, she may appeal under Wis. Stat. § 5.06(8): "[a]ny . . . complainant who is aggrieved by an order issued under sub. (6) may appeal the decision of the commission 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." For such appeals, Wis. Stat. § 5.06(9) provides that a "court shall summarily hear and determine all contested issues of law and shall affirm, reverse or modify the determination of the commission, according due weight to the experience, technical competence and specialized knowledge of the commission, pursuant to the applicable standards for review of agency decisions under s. 227.57."

"[W]here a statute relating to an administrative agency provides a direct method of judicial review of agency action, such method of review is generally regarded as exclusive, especially where the statutory remedy is plain, speedy, and adequate." *Kegonsa Joint Sanitary Dist. v. City of Stoughton*, 87 Wis. 2d 131, 145, 274 N.W.2d 598 (1979). Cerny did not seek Wis. Stat. § 5.06(8) review within 30 days of the Commission's August 8 decision. (Doc. 49 ¶¶ 18, 193–97; Doc. 56; 57.) She can no longer do so, as the time has passed, and cannot avoid that failure via certiorari.

B. The Commission's decision was correct.

Even if Cerny could still seek judicial review, the Commission's decision was correct. The Commission properly determined that it should not rule on a complaint filed *with* and *against* the Commission, its Commissioners, and its administrator. (Doc. 57:1.) The lead opinion in *Teigen* stated that "it would be nonsensical to have

WEC adjudicate a claim against itself under Wis. Stat. § 5.06(1).” 403 Wis. 2d 607, ¶ 33 (lead op. of Bradley, R.G., J.); (Doc. 57:1). And Justice Hagedorn explained that “the better reading is that the § 5.06 complaint process does not apply to complaints against acts of WEC as a body.” 403 Wis. 2d 607, ¶ 169 (Hagedorn, J., concurring); (Doc. 57:1). Returning Cerny’s complaint without a merits decision was proper.

CONCLUSION

This Court should dismiss the amended petition in its entirety.

Dated this 14th day of October 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed Respondents' Brief in Support of Motion to Dismiss with the clerk of court using the Wisconsin Circuit Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 14th day of October 2024.

Electronically signed by:

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