

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN  
MADISON DIVISION

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1789 FOUNDATION, INC. d/b/a  
CITIZEN AG, *et al.*,

Plaintiff,

Case No.: 24-cv-755

v.

ELECTRONIC REGISTRATION  
INFORMATION CENTER, *et al.*,

Defendants.

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**OPPOSITION TO DEFENDANT ELECTRONIC REGISTRATION  
INFORMATION CENTER'S MOTION TO DISMISS**

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Plaintiffs 1789 Foundation, Inc. d/b/a Citizen AG ("Citizen AG") and Jennifer McKinney ("Ms. McKinney") (collectively, "Plaintiffs") submit this brief in opposition to Defendant Electronic Registration Information Center's ("Defendant" or "ERIC") Motion to Dismiss. (ECF No. 21).

Dated: January 13, 2024.

Respectfully submitted,

/s/ Rachel Dreher

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## **INTRODUCTION**

This case involves a deliberate scheme led by David J. Becker and the Electronic Registration Information Center (“ERIC”) to unlawfully obtain, use, and disclose sensitive personal information from driving records in violation of the Driver’s Privacy Protection Act (“DPPA”). ERIC, under the pretense of improving voter roll accuracy, instead exploits its access to state DMV databases to collect and share personal information for impermissible purposes, including partisan voter outreach. Plaintiff Jennifer McKinney, a Wisconsin voter, was directly harmed when ERIC unlawfully accessed her DMV records and disclosed her data without consent, violating her fundamental right to privacy. This injury is especially egregious because Wisconsin terminated its relationship with ERIC in 2016, and no subsequent contract authorized ERIC to obtain or use Wisconsin residents’ personal information.

In sum, ERIC knowingly disclosed this sensitive data to the Center for Election Innovation and Research (“CEIR”), a nonprofit also founded by Becker, which misused the information for partisan purposes such as targeted voter outreach campaigns in a partisan manner. Contrary to its stated mission, ERIC decreases voter roll accuracy by adding ineligible voters while prohibiting the use of citizenship data necessary to maintain accurate voter rolls.

This lawsuit seeks to hold ERIC accountable for its ongoing violations of federal law and to redress the harm caused to Ms. McKinney and others whose privacy rights have been similarly infringed.

### **FACTUAL BACKGROUND**

This case arises from a deliberate and coordinated scheme, orchestrated by David J. Becker and through the Electronic Registration Information Center (“ERIC”), to obtain, use, and disclose sensitive personal information from driving records, in blatant violation of the Driver’s Privacy Protection Act (“DPPA”). (Complt. ¶¶ 45, 46) Under the guise of improving voter roll accuracy, ERIC uses its membership agreements to gain access to state DMV databases and the personal information of millions of Americans for impermissible purposes, including partisan voter outreach. (*Id.* ¶¶ 49, 54-56, 67-69). This conduct has directly harmed Plaintiff Jennifer McKinney, whose sensitive personal information was unlawfully obtained, used, and disclosed without her consent, violating her fundamental right to privacy. (*Id.* ¶¶ 45-46).

Ms. McKinney, a Citizen AG member and registered Wisconsin voter who holds a valid and active Wisconsin driver’s license, had her personal information from driving records (hereinafter “data”) unlawfully obtained by ERIC and used for impermissible purposes. (*Id.* ¶¶ 165-66). Ms. McKinney’s fundamental right to privacy was further violated and infringed upon when ERIC disclosed her data for purposes outside the scope of permissible uses under the DPPA. (*Id.* ¶¶ 174-75). This injury is particularly egregious given that ERIC does not have a contractual agreement with Wisconsin authorizing it to obtain, use, or disclose any such data. (*Id.* ¶¶ 154).

ERIC’s lack of a contractual relationship with Wisconsin is a cornerstone of this case. In 2016, Wisconsin formally ended its membership with ERIC when the Wisconsin Government Accountability Board (“GAB”), which had initially signed the state’s ERIC

membership agreement, was dissolved. (*Id.* ¶¶ 154). No subsequent contracts or amendments were executed between Wisconsin and ERIC. (*Id.* ¶¶ 157). Despite this, ERIC continued to access personal data from Ms. McKinney’s and other Wisconsin residents’ driving records without authorization and in direct contravention of the DPPA and its enumerated permissible purposes for such information’s use. (*Id.* ¶¶ 162-63).

Contrary to its stated mission of improving voter roll accuracy, ERIC fails to carry out the functions for which it sought and obtained its 501(c)(3) tax-exempt status, let alone does ERIC carry out any function of Wisconsin as a state or any of its state agencies. (*Id.* ¶¶ 67, 70). Plaintiffs’ Complaint includes compelling evidence and allegations that reveal ERIC’s activities actually decrease the accuracy of voter rolls—the antithesis of assisting the state “carry out” its function of maintaining accurate voter rolls. (*Id.* ¶¶ , ). For example, over a decade’s worth of data reveals that ERIC’s activities facilitate more than ten times the number of voters added to voter rolls than the number of ineligible voters ERIC identifies for removal. (*Id.* ¶ 94). Moreover, ERIC’s membership agreements prohibit states from transmitting citizenship information, effectively ensuring that noncitizens cannot be flagged or excluded from voter registration rolls. (*Id.* ¶ 97). This restriction directly undermines the accuracy of voter rolls and contradicts ERIC’s purported purpose. (*Id.*).

Adding to the unlawful conduct, Plaintiffs allege that ERIC is not authorized to disclose the personal information it collects to CEIR but knowingly does so anyway. (*Id.* ¶ 96 ). ERIC operates as a data-gathering entity, receiving personal information contained in DMV records from its member states, and as is the case here, even its non-member states like Wisconsin. (*Id.* ¶ 124). However, instead of safeguarding this data, ERIC transmits it to

CEIR, a separate nonprofit also founded by Becker, which uses the information for partisan purposes. This unauthorized data sharing violates the DPPA's strict prohibitions on disclosing personal information from driving records and demonstrates ERIC's disregard for well-established federal law. (*Id.* at 2-4).

The complaint also emphasizes the egregious nature of this scheme by detailing CEIR's subsequent misuse of the data. For example, in 2020, CEIR received \$70 million in funding from the Zuckerberg-Chan Foundation, which it distributed as "grants" to swing states and Democratic-leaning jurisdictions. (*Id.* ¶ 67). In addition to Wisconsin, states such as Michigan also experienced the impacts of ERIC's DPPA violations, as these funds were used for partisan activities, including targeted advertising and text message campaigns aimed at Democratic voters. (*Id.* ¶ 126). The data enabling these activities originated from DMV records unlawfully obtained and disclosed by ERIC. (*Id.* at 2-4).

In sum, the complaint alleges that ERIC, CEIR, and Becker orchestrated a wide-ranging scheme to exploit sensitive personal information for political purposes, all while misrepresenting their activities as nonpartisan efforts to improve voter registration systems. (*Id.*). Ms. McKinney's injury—the violations and infringements upon her fundamental right to privacy—is the direct and proximate result of ERIC's unlawful use and disclosure of her personal information. By knowingly disclosing sensitive data to CEIR for unauthorized purposes, ERIC has violated federal law, and continues to violate federal law through the present. (*Id.* ¶ 176). This lawsuit seeks to hold ERIC accountable and redress the irreparable harm Ms. McKinney has suffered as a direct and proximate result of ERIC's violations of the DPPA, as further expanded upon herein. (*Id.* ¶ 175).

### **STANDARD OF REVIEW**

In reviewing a motion to dismiss “[u]nder Rule 12(b)(1), ‘the district court must accept as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff’s favor,’ *Remijas v. Neiman Marcus Group, LLC*, 794 F.3d 688, 691 (7th Cir.2015) (quoting *Reid L. v. Ill. State Bd. of Educ.*, 358 F.3d 511, 515 (7th Cir.2004)), unless there is a factual dispute that impacts the analysis, *see Lee v. City of Chicago*, 330 F.3d 456, 468 (7th Cir.2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). In the case of a factual dispute, the plaintiff need only demonstrate by a preponderance of the evidence that subject matter jurisdiction exists. *See, e.g., Lee*, 330 F.3d at 468 (citing *Lujan*, 504 U.S. at 561); *Kathrein v. City of Evanston, Ill.*, 752 F.3d 680, 690 (7th Cir.2014) (citing *Lee*, 330 F.3d at 468, and *Lujan*, 504 U.S. at 561). In deciding a Rule 12(b)(1) motion to dismiss, the Court may look to evidence outside the pleadings. *See, e.g., Capitol Leasing*, 999 F.2d at 191 (quoting *Grafon*, 602 F.2d at 783); *United Phosphorus*, 322 F.3d at 946.

Unlike a Rule 12(b)(1) motion, a motion to dismiss under Rule 12(b)(6) requires the Court to accept as true all well-pleaded factual allegations contained in the plaintiff’s complaint and view all reasonable inferences in the light most favorable to the plaintiff. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1022 (7th Cir.1989); *Republic Steel Corp. v. Pennsylvania Eng'g Corp.*, 785 F.2d 174, 177 n. 2 (7th Cir.1986). A complaint that sets forth factual allegations adequate to establish the essential elements of his or her claim is not subject to dismissal. *See Benson*

*v. Cady*, 761 F.2d 335, 338 (7th Cir.1985); *Sutliff, Inc. v. Donovan Co., Inc.*, 727 F.2d 648, 654 (7th Cir.1984).

The Court's inquiry is generally limited to the factual allegations contained within the four corners of the complaint, *see, e.g., Hill v. Trustees of Indiana Univ.*, 537 F.2d 248, 251 (7th Cir.1976); however, “[i]f ... matters outside the pleading are presented to and not excluded by the court,” a Rule 12(b)(6) motion must be treated as a Rule 56 Motion for Summary Judgment. *See Capitol Leasing*, 999 F.2d at 191; *R.J.R. Services, Inc. v. Aetna Casualty and Sur. Co.*, 895 F.2d 279, 281 (7th Cir. 1989); *Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987).

Rule 56(c), in turn, deems summary judgment appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A genuine issue of fact exists where a reasonable jury could make a finding in favor of the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Santiago v. Lane*, 894 F.2d 218, 221 (7th Cir. 1990). An issue of fact is material when the dispute is “over facts that might affect the outcome of the suit under the governing law . . .”. *Anderson*, 477 U.S. at 248; *see also Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992); *Local 1545, United Mine Workers of Am. v. Inland Steel Coal Co.*, 876 F.2d 1288, 1293 (7th Cir. 1989). When present, the sole existence of a genuine issue of material fact “preclude[s] the entry of summary judgment.” *Anderson*, 477 U.S. at 248.

## ARGUMENT

### I. PLAINTIFFS HAVE ARTICLE III STANDING

To establish Article III standing, “a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180–81 (2000) (2000) (citing *Lujan*, 504 U.S. at 560–61). DOT contends that Plaintiffs have not alleged an injury-in-fact and therefore, no case exists. (Def.’s Mot. at 7).

An injury-in-fact is one that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” *Lujan*, 504 U.S. at 560. To be considered “concrete,” an injury must be “real, and not abstract,” meaning it “must actually exist.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). The Seventh Circuit has made clear that “concrete” does *not* mean “tangible.” *See, e.g., Persinger v. Southwest Credit Systems, L.P.*, 20 F.4th 1184 (2021). Of course, “[t]angible harms, like physical or monetary harms, ‘readily qualify as concrete injuries.’” *Id.* at 1190 (citing *TransUnion LLC v. Ramirez*, 594 U.S. 413, 414 (2021)). But “[i]ntangible harms may also be concrete, for example, ‘reputational harms, **disclosure of private information . . .** intrusion upon seclusion, and those **traditional harms specified by the Constitution itself.**” *Id.* (internal citations omitted) (emphasis added). In determining whether a harm is concrete, “history and tradition offer a meaningful guide.” *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 274 (2008).



### **A. Ms. McKinney has Sufficiently Alleged an Injury-in-Fact**

In her Complaint, Ms. McKinney alleges that, “as a Wisconsin voter, [she] has suffered concrete injuries . . . , in that she experienced an invasion of privacy due to the unauthorized access, use, and disclosure of her DMV data, which was used and continues to be used to infringe upon and violate her fundamental right to privacy . . . .” (Complt. ¶ 174). When applying the Supreme Court’s guidance to consider whether the right to privacy is rooted in our nation’s history and tradition, there are few, if any, more unequivocally established rights engrained in our society than that of the fundamental right to privacy.

Nearly half a century ago the Supreme Court made clear that one’s right to privacy “has its roots in the Constitution.” *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (holding the duty to avoid unwarranted disclosures of personal information is rooted in the Constitution). It is precisely this intangible harm—the invasion of one’s right to privacy—that Congress contemplated and intended to protect when it enacted the DPPA. *See Kehoe v. Fidelity Fed. Bank & Trust*, 421 F.3d 1209, 1210 (11th Cir. 2005) (holding Congress enacted the DPPA to (1) remedy “concerns about an increase in threats” that were made by persons “who could acquire personal information from state [departments of motor vehicles]” and “reduce or eliminate the common practice of selling personal information to businesses who engaged in direct marketing and solicitation.”); *see also Exhibit 1*, Declaration of Jennifer McKinney (explaining she received numerous unwanted mailings, e-mails, and text messages as a result of ERIC’s use and disclosure of her personal information from driving records).

ERIC relies on *Baysal* to support its position that Ms. McKinney has not alleged an injury-in-fact, but in doing so, ERIC fails to appreciate the distinction between the facts alleged in this case and those alleged by the *Baysal* plaintiffs. (Def.'s Mot. at 8-9 (citing *Baysal v. Midvale Indemnity Company*, No. 21-cv-394-wmc, 2022 WL 1155295, at \*1 (W.D. Wis. Apr. 19, 2022)). In *Baysal*, the “plaintiffs allege[d] plaintiffs the data breach resulted in an increased risk of fraud and identity theft.” *Id.* (citing order granting motion to dismiss at 2). In moving to dismiss this action, ERIC’s argument focuses on countering the *Baysal* plaintiffs’ allegations of an injury-in-fact that were deemed insufficient to establish Article III standing and ignores the salient factual allegations Ms. McKinney asserted in this case.

Specifically, ERIC argues that “[a] DPPA claim must allege concrete injury *beyond* the mere disclosure of data.” (Def.’s Mot. at 9 (citing *Baysal*, 78 F.4th at 979)). But Ms. McKinney *has* alleged a concrete injury beyond the mere disclosure of data—namely, that she “experienced an invasion of privacy due to the unauthorized access, use, and disclosure of her DMV data, which was used and continues to be used to infringe upon and violate her fundamental right to privacy . . . which is an irreparable harm.” *Id.* Ms. McKinney received unwanted mailing solicitations, e-mails, and text messages as recent as November 2, 2024. *See Exhibit 1*, McKinney Declaration. A plain reading of the Complaint and Ms. McKinney’s declaration<sup>1</sup> make this clear, and the aforesaid allegations sufficiently comport

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<sup>1</sup> The court may consider evidence outside the pleadings, including affidavits submitted by the parties to determine whether it has subject matter jurisdiction. *See Bazile v. Finance System of Green Bay, Inc.*, 983 F.3d 274 (2020).

with the Article III requirements and the legislative intent underlying the basis for which Congress enacted the DPPA.

It is not subject to reasonable dispute that DPPA creates a private right of action for any individual whose personal information is unlawfully disclosed. *See New Richmond News v. City of New Richmond*, 370 Wis.2d 75 (2016) (citing 18 U.S.C. § 2724(a)). Indeed, the text of 18 U.S.C. § 2724(a) itself leaves no ambiguity as to the meaning Congress intended the DPPA's statutory language to convey. Interpreting "the meaning of statutory language, plain or not, depends on context[;]" it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Smith v. Zachary*, 255 F.3d 446, 448 (7th Cir. 2001). *Smith* provides guidance as to the logic and process by which Courts are to interpret statutory language. Take, for example, the word "disclosure." In *Smith* the Seventh Circuit explained that the term "disclosure" is first used in subsection (a) [of the DPPA]", *id.*, and "[i]n that section, the statute forbids a state DMV from 'knowingly disclos[ing] or otherwise mak[ing] available to any person or entity' protected personal information. *Id.* Further, the Seventh Circuit held that Congress' decision to attach the terms "or otherwise make available" to the term "disclose" leaves little doubt about the breadth of the transactions Congress intended to regulate. *Id.*

Taking this logic and applying it to the word "any person" or "a person", it is not subject to reasonable dispute that Ms. McKinney falls within the plain meaning of the DPPA's language. *See* 18 U.S.C. § 2724(a) ("A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted

under this chapter shall be liable to the individual to whom the information pertains . . .”). Even more, Congress also included a provision that provides for liquidated damages in the amount of \$2,500.00 per violation. *See* 18 U.S.C. § 2724(b). These liquidated damages are intended to set a floor, not a ceiling of recovery that ceiling—that must be paid by “[a] person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter.”

Notably, ERIC has not challenged the fact that Plaintiff has sufficiently alleged facts that support a *prima facie* DPPA claim. Instead, ERIC’s argument focuses on the Article III standing requirement and its element that a plaintiff must allege an injury-in-fact in order to even bring a DPPA claim before this Court. But the United States Supreme Court has made clear that intangible harms—including disclosures of private information and traditional harms specified by the Constitution itself—can be concrete, and therefore, ERIC’s argument that Ms. McKinney has not alleged a concrete injury as required under Article III’s standing requirement must fail as a matter of law. *See Sprint Commc’ns Co.*, 554 U.S. at 274.

## II. PLAINTIFFS’ DPPA CLAIM IS WELL-PLED

“To satisfy the burden of pleading *prima facie* DPPA claim, a plaintiff must allege that [ERIC] (1) knowingly (2) obtained, disclosed, or used personal information, (3) from a motor vehicle record, (4) for a purpose not permitted.” *McDonough v. Anoka Cnty.*, 799 F.3d 931, 945 (8th Cir. 2015) (citing 18 U.S.C. § 2724(a)). Here, the only argument<sup>2</sup> ERIC

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<sup>2</sup> ERIC’s standing-related arguments are addressed in Sections I and II of this brief.

asserts in support of its position that Plaintiffs have failed to state a claim pertains to the fourth and final element—that is, whether Plaintiffs allege that ERIC knowingly obtained, disclosed, and/or used Ms. McKinney’s personal information contained in driving records for an impermissible purpose. (Def.’s Mot. at 17-18) (“ERIC *does* receive data<sup>3</sup> for permissible uses.”) (emphasis in original).

#### **A. Plaintiffs Allege ERIC Used the Data for Impermissible Purposes**

In their Complaint, Plaintiffs allege that ERIC, “knowingly used, obtained, and/or disclosed personal information that was sourced from motor vehicle records (i.e., the WisDOT DMV records) for a purpose other than the 14 enumerated permissible uses under the DPPA . . .”. (Complt. pgs. 2, 5; ¶¶ 121-29; 143-57; 161, 165-68). Plaintiffs specifically cite 18 U.S.C. § 2721(b), (*id.* ¶ 162) which “enumerates fourteen (14) permissible uses for personal information obtained from motor vehicle records . . .” and they also unambiguously allege that ERIC used the data for “voter outreach” and political targeting” as well as , and any election-related activities are not among these authorized uses.” (Complt. ¶ 162).

In moving to dismiss Plaintiffs’ claim under Rule 12(b)(6), ERIC lodges an argument not based upon the above-mentioned factual allegations Plaintiffs pled in their Complaint, but rather, a set of facts ERIC itself alleges. More specifically, ERIC argues that it used the personal information contained in driving records “for the purpose of maintaining the official [voter] registration list . . .” (Def.’s Mot. at 17-18), and such use is

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<sup>3</sup> Plaintiffs construe ERIC’s use of the term “data” to be synonymous with “personal information contained in driving records” and any use of the term “data” hereinafter shall be construed to mean “personal information contained in driving records.”

permissible because “the WisDOT disclosure to ERIC falls under the first allowable use of information protected by the DPPA: “For use by any government agency . . . in carrying out its functions, or any private person or entity acting on behalf of a Federal, State, or local agency in carrying out its functions.” (*Id.* at 17 (citing 18 U.S.C. § 2721(b)(1)) (internal quotations omitted). This argument is misguided for at least three reasons:

**First**, ERIC was not acting “on behalf of a Federal, State, or local agency in carrying out its functions” (*id.*) because ERIC’s contractual agreement with the State of Wisconsin expired with the only other party to the ERIC agreement—the Government Accountability Board (“GAB”)—was eliminated on June 29, 2016, which immediately terminated the only agreement ERIC had with the State to “carry out its functions.” (Complt. ¶¶ 143-57).

**Second**, even assuming *arguendo* (1) ERIC had any authorization to act on behalf of Wisconsin or a state agency to carry out state/agency functions, and (2) even if Plaintiffs were to adopt ERIC’s allegations that it used the data “for the purpose of maintaining the official [voter] registration list . . .” and maintaining voter registration lists is a “function” carried out by the state or a state agency, ERIC fairs no better because “maintaining the official registration list” requires increased accuracy of the list, and ERIC’s use of the data *decreased* the accuracy of Wisconsin’s official voter registration list.

And **third**, even if ERIC had authority to assist Wisconsin or any state agency in “maintaining the official registration list”, ERIC was not authorized to disclose the data to another third-party (e.g., Center for Election Innovation and Research), nor was ERIC authorized to use the data for “partisan voter outreach” and other “purpose(s) not permitted by the statute, including, without limitation, providing the information to other Secretaries

of States, targeting citizens unregistered to vote, targeting non-citizens who are not registered to vote, bloating voter rolls, adding non-citizens to voter rolls, and soliciting donations.” (*Id.* ¶¶ 161-69). Indeed, these are not “functions” carried out by Wisconsin or any of its agencies, as explained in greater detail below.

**i. ERIC has not had a contractual agreement with Wisconsin since 2016.**

ERIC has not had a contractual agreement authorizing it to act on behalf of Wisconsin or any state agency in “carrying out its functions” since 2016, yet Plaintiffs allege that Ms. McKinney’s DMV data “was used and continues to be used [to the present] to infringe upon and violate her fundamental right to privacy . . .”. (Compl. ¶¶ 146-57, 175-76).

It is well-established that “[t]he elements of a valid and enforceable contract are “offer, acceptance and consideration.” *Kap Holdings, LLC v. Mar-Cone Appliance Parts Co.*, 55 F.4<sup>th</sup> 517, 522 (7th Cir. 2022). In order to enter into a contract, however, “the parties mutually assent to definite and certain terms.” *Id.* Of course, a non-existent entity cannot mutually assent to the terms of an agreement entered into by another party and before the allegedly bound party (e.g., WEC) comes into its own existence. Indeed, it is fundamental contract law that a party must have legal capacity to enter into a contract, and whereas even real lives-in-being can lack capacity, logic necessarily dictates that a non-existent entity therefore cannot have capacity at all. *See Bank of Augusta v. Earle*, 38 U.S. 519 (1839) (holding corporations must have legal existence in order to enter into contracts); *see also Dexter v. Hall*, 82 U.S. 9 (1872).

In some circumstances, individuals acting on behalf of a future entity (often called "promoters") will enter into contracts in anticipation of the entity's formation; however, these "pre-incorporation contracts" are not legally binding on the non-existent entity unless and until the future entity formally adopts the contract after its formation. *See Hinkley v. Sagemiller*, 191 Wis. 512 (1926); *Meyers v. Wells*, 252 Wis. 352 (1948); *Buffington v. Bardon*, 80 Wis. 635 (1891). This is expressly the scenario at issue in this case.

GAB and ERIC entered into an agreement on May 16, 2016. (Complt. ¶ 146). GAB and ERIC were the only two parties that entered into the ERIC membership agreement. (*Id.* at 4-5). It was not until June 30, 2016—a day after GAB was eliminated—that the Wisconsin legislature created WEC. (*Id.*). In executing the agreement, Kevin Kennedy signed on behalf of GAB, and at best, as a promoter of WEC. But this does not bind WEC, as unambiguously made clear in *Conway v. Marachowsky*, 262 Wis. 540 (1952). Citing *Pratt v. Oshkosh Match Co.*, 89 Wis. 406, 409-10, the *Conway* court held:

It is true a corporation is not responsible for acts performed, or contracts entered into, before it came into existence, by promoters or other persons assuming to bind the company in advance. A corporation may, however, make itself responsible for such acts and contracts **by subsequently adopting them.**

*Id.* at 553-54 (citing 1 Mor.Priv.Corp. § 547; Mechem, Ag. § 75; *Pratt*, 89 Wis. at 409-10) (emphasis added).

For more than 90 years it has been well-established that pre-incorporation contracts are unenforceable unless the entity, once formed, ratifies it, takes overt action to adopt or incorporate itself, or otherwise enters into a subsequent agreement (e.g., a novation)



substituting itself as a party to the contract.<sup>4</sup> See *Cargill, Inc. v. Boag Cold Storage Warehouse, Inc.*, 71 F.2d 545 (1934) (holding entity that was nonexistent at the time the contract was entered into could not be bound by the agreement).

Absent WEC executing the agreement after its formation and prior to the elimination of GAB, ERIC cannot as a matter of law be bound to any terms of an agreement made prior to ERIC's existence unless adopted after WEC came into existence. But because the contract terminated the moment GAB was eliminated (e.g., prior to WEC's existence), WEC never even had an opportunity to adopt the terms or otherwise avail itself of the obligations set forth under the agreement as no contract existed at the time WEC was formed. Accordingly, ERIC's argument that a valid contract authorized its use of personal information contained in driving records for a permissible purpose must fail as a matter of law, as no valid contract exists between ERIC or any Wisconsin entity.

**ii. Voter rolls are not maintained when accuracy is *decreased*.**

Even if ERIC were authorized by contract or any other means to assist in carrying out state or state agency functions, doing so necessarily requires that it “carry out” those functions—not masquerade as if it were doing so.

ERIC contends that it used the personal information from driving records “for the purpose of maintaining the official [voter] registration list . . .”. (Def.'s Mot. at 17-18). Naturally, of course, maintaining the official registration list would require ERIC to assist the state or its agencies in *increasing* the registration list's accuracy, which ERIC does not

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<sup>4</sup> This assumes *arguendo* the contract still existed at the time WEC came into existence; however, because GAB was eliminated on June 29, 2016—one day before WEC was created on June 30, 2016—there was no contract WEC could have adopted.

do. Plaintiffs Complaint makes clear that ERIC “does *not* improve accuracy of America’s voter rolls, nor does it increase access to voter registration for eligible citizens.” (Complt. ¶ 134) (emphasis in original). Plaintiffs explain that even “ERIC’s own statistics show that it adds about ten times (10x) the number of voters to voter rolls than the number of ineligible voters it removes” and “adding voters to voter rolls is not even part of ERIC’s mission or the purpose upon which the IRS granted ERIC its tax-exempt status.” (*Id.* ¶ 120).

It is not enough to simply assert that it is a “function” of Wisconsin or any state agency to “maintain the official registration list” absent the implicit understanding that “maintain[ing]” the voter rolls means to do so accurately; otherwise, the state function ERIC purports to be carrying out (and therefore making its use of the data permissible) is undefined, too vague, and lacks enough specificity to ascertain whether “maintain[ing] the official registration list” is, in fact, a function of a state agency ERIC is assisting. As such, and because Plaintiffs have alleged facts and included evidentiary support in their Complaint to corroborate their allegations that ERIC *decreases* voter roll accuracy, it cannot be said nor held that ERIC is, in fact, assisting the state or its agencies “carry out” any legitimate and real function.

**iii. ERIC used the data for functions impermissible under the DPPA and made unauthorized disclosures of the data to other third-parties.**

Even assuming *arguendo* ERIC was authorized to assist the state or its agencies in carrying out its voter list maintenance duties, **and** even if *ERIC actually had assisted the*

*state or its agencies in carrying out its duties*—which it has not—ERIC is nevertheless unable to evade liability under the DPPA.

Plaintiffs allege that ERIC “knowingly . . . disclosed personal information that was sourced from motor vehicle records” to the CEIR. (Complt. at 3; ¶ 121-28). Their Complaint contains specific detail as to how ERIC discloses the data to CEIR, Plaintiffs provide evidence of ERIC’s “EBU General Timeline” that discusses the disclosure and use of the personal information contained in driving records, and incorporates emails discussing the transmittal and dissemination of data to and from both ERIC and CEIR, as well as the use of the data for solicitations and mailings—none of which fall within the scope and purview of any enumerated purpose for which the DPPA authorizes use of the data at issue. (*Id.*).

Even more, Plaintiffs also allege that ERIC “used the personal information for one or more purpose(s) not permitted by the statute, including, without limitation, providing the information to other Secretaries of States, providing the personal information to the CEIR targeting citizens unregistered to vote, targeting non-citizens who are not registered to vote, bloating voter rolls, adding non-citizens to voter rolls, and soliciting donations.” (*Id.* ¶ 169). None of these purposes are permitted under the DPPA, and there is no argument that ERIC’s disclosure of the personal information to CEIR is lawful or otherwise authorized. As such, it is not subject to reasonable dispute that Plaintiffs’ allegations, on their face, satisfy the well-pleaded complaint rule’s *de minimis* notice pleading obligations, let alone when these allegations are accompanied by evidentiary support.

### **CONCLUSION**

For these reasons, the Court must deny ERIC's motion to dismiss under Rule 12(b)(1) and Rule 12(b)(6) in its entirety.

Dated: January 13, 2025.

Respectfully submitted,

/s/ Rachel Dreher

Rachel Dreher

CITIZEN AG

111 NE 1<sup>st</sup> St, 8<sup>th</sup> Floor

Miami, FL 33132

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*Counsel for Plaintiffs*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 13, 2025, a true copy of the foregoing was filed and served via the Court's CM/ECF and/or NextGen electronic filing system upon all parties and counsel of record.

/s/ Rachel Dreher  
Rachel Dreher

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**EXHIBIT 1**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN  
MADISON DIVISION

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1789 FOUNDATION, INC. d/b/a  
CITIZEN AG, *et al.*,

Plaintiff,

Case No.: 24-cv-755

v.

ELECTRONIC REGISTRATION  
INFORMATION CENTER, *et al.*,

Defendants.

**DECLARATION OF  
JENNIFER MCKINNEY**

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**I, JENNIFER MCKINNEY, hereby declare as follows:**

1. I am an adult resident of LaCrosse County, Wisconsin and I am competent to render this declaration. I am a Plaintiff in the above-captioned action, and I submit this declaration in support of my opposition to the Electronic Registration Information Center's ("ERIC") motion to dismiss. (ECF No. 21).

2. I am providing this affidavit based on my own personal knowledge and if called as a witness, I could and would testify competently as to all statements included in this Declaration.

3. I am a registered voter and valid driver's license holder in the State of Wisconsin. I have maintained a valid and active driver's license issued by the State of Wisconsin for more than ten (10) years.

4. In order to obtain my driver's license, I was required to provide personal information to the Wisconsin Department of Transportation ("WisDOT") and its Department of Motor Vehicles ("DMV").

5. The specific information I was required to provide the WisDOT DMV includes, without limitation, my legal name, home address, social security number, phone number, personal photograph, date of birth, and my vehicle registration information (e.g. VIN, make, model, and year).

6. At the time I provided this information to the WisDOT DMV, I trusted that it would maintain my personal information in its driving records and not disclose it or otherwise allow third-parties to obtain or use my personal information.

7. I did not give WisDOT or its DMV consent to disclose my personal information to any third-parties, such as the Electronic Registration Information Center.

8. Despite this, I learned that WisDOT and/or its DMV disclosed my personal information to ERIC without my consent after I received numerous unwanted mailings, e-mails, and text messages.

9. Specifically, I received dozens of unwanted mailings, e-mails, and text messages prior to the 2024 election, up to and including as recent as November 2, 2024. See Attachments 1-3.

10. Each of the text messages depicted in Attachments 1-3 are true and accurate copies of the text messages I received directly and proximately because ERIC knowingly obtained, used, and/or disclosed the personal information contained in my driving records.



11. These solicitations not only violate my fundamental right to privacy, but also directly and proximately were caused by, and the result of, ERIC's use of my personal information contained in driving records, or alternatively, because of ERIC's disclosure of my personal information contained in driving records to unauthorized third-parties without my consent.

12. These solicitations did not come from WisDOT or the Department of Motor Vehicles, nor did I sign up to receive any of the aforesaid unwanted solicitations and communications. However, because each of the aforesaid solicitations constitute partisan voter targeting, voter outreach, and/or voter solicitation and contain my personal information provided exclusively to WisDot and/or its Department of Motor Vehicles, and because ERIC purportedly assists Wisconsin in maintaining its voter rolls, no other entity could have obtained my personal information, nor would any other entity have been responsible for sending these unwanted solicitations in violation of my fundamental right to privacy but-for ERIC knowingly obtaining, using, and/or disclosing the personal information contained in my driving records.

I swear and affirm under the penalty of perjury that all testimony provided herein is true, accurate, and correct to the best of my knowledge, information, and belief.

Dated: January 13, 2025



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Jennifer McKinney  
*Plaintiff*



**VERIFICATION**

I, Jennifer McKinney, am over the age of 18, and hereby swear or affirm that the statements contained in this declaration are true and correct to the best of my information, knowledge, and belief, and if called upon to testify as to their truthfulness, I could and would do so competently.

Dated: 01/13/2025



*Signature*

State of Florida County of Broward

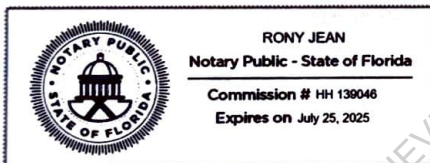
On 01/13/2025, before me, RONY JEAN, the foregoing instrument was  
*Date* *Print Notary Public Name*

subscribed and sworn (or affirmed) before me by: Jennifer McKinney, who is

☐ Personally known to me – OR –

☐ Proved to me on the basis of the oath of \_\_\_\_\_ – OR –  
*Name of Credible Witness*

☒ Proved to me on the basis of satisfactory evidence: DRIVER LICENSE  
*Type of ID Presented*



Notarized remotely online using communication technology via Proton

**WITNESS my hand and official seal,**

Notary Public Signature: Rony Jean

Notary Commission Number: HH 139046

Notary Commission Expires: 07/25/2025

Seal of Notary Public

**ATTACHMENT 1**

...

20%

**+1 (262) 214-9511 >**

Text Message • SMS  
Sat, Oct 5 at 1:42 PM

Hi Jennifer, I'm Dan, with Civic Data. It looks like you may not be registered to vote at your current address. We sent you a registration form to mail back (for free) that will get you set up to vote in Wisconsin. The form must be postmarked by 10/16. Did you get the form yet? Stop2Quit

Thu, Oct 10 at 9:29 AM

Hi Israel, I'm Lo, with Civic Data. It looks like you may not be registered to vote at your current address. You can register until October 16th using your Wisconsin driver's license or state ID at <https://myvote.wi.gov/en-us/Register-To-Vote> Will you register to vote? Stop2Quit

**ATTACHMENT 2**

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20% 

**+1 (262) 256-0643 >**

Text Message • SMS  
Wed, Oct 30 at 3:46 PM

Hi Jennifer. Election day is less than a week out and early voting is happening NOW in La Crosse, you can visit [wisdems.org/vote](https://wisdems.org/vote) to find the best location & time near you. Stop to quit. This election is going to be close - can we count on you to vote early for Kamala Harris, Tammy Baldwin, and Wisconsin Democrats up and down the ticket by tomorrow?

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**ATTACHMENT 3**

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100% 19% 

**+1 (948) 333-0151 >**

Text Message • SMS  
Sun, Oct 27 at 12:58 PM

Hi Howe! It's NOT too late to REGISTER & VOTE for Democrats like TAMMY BALDWIN for Senate, who will fight for affordable housing, healthcare, and college! Register & vote now thru 11/1 at your municipal clerk's office: [ft6.us/Wlclerk](https://ft6.us/Wlclerk) OR on Election Day 11/5 at polls: [ft6.us/Wlpoll](https://ft6.us/Wlpoll) stop2end

Sat, Nov 2 at 2:17 PM

Hi Howe! In WI we need affordable healthcare, housing & college, & tax cuts for the middle class. But MAGA Republicans only want to help the super-rich! FIGHT BACK! Register & vote for Democrats like Senator TAMMY BALDWIN at your polling place on Election Day, 11/5: [ft6.us/Wlpoll](https://ft6.us/Wlpoll) stop2end