UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

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

Plaintiffs,

v.

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

Defendants.

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

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

Citizen AG and Jennifer McKinney have no factual or legal basis to pursue this lawsuit, and this is abundantly clear in their brief responding to the Electronic Registration Information Center's (ERIC's) motion to dismiss. The Court should grant ERIC's motion and dismiss this suit with prejudice.[1]

ARGUMENT

Plaintiffs do not have standing to pursue their claims against ERIC, and as a result, this Court lacks jurisdiction to hear this suit. Independently, their Complaint fails to state a claim upon which relief can be granted. Plaintiffs' brief (Dkt. 30) cites no facts or law that can defeat ERIC's motion to dismiss.

[1] The Plaintiffs have voluntarily dismissed two of ERIC's prior co-defendants, both of which had also filed motions to dismiss: the Wisconsin Department of Transportation and the Center for Election Innovation and Research. *See* Dkt. 26, 27.

I. Plaintiffs lack standing.

Neither Plaintiff has standing to sue ERIC under the Driver's Privacy Protection Act (DPPA).

A. Citizen AG concedes it has no standing.

Citizen AG has conceded that it lacks organizational standing. Citizen AG failed to address ERIC's standing challenge. (Dkt. 30, failing to rebut Dkt. 21 at 12–14). "[A] party generally forfeits an argument or issue not raised in response to a motion to dismiss[.]" *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 825 (7th Cir. 2015); *see also Griffin v. UW Sys. Bd. of Regents*, No. 19-CV-277-BBC, 2020 WL 65026, at *1 (W.D. Wis. Jan. 7, 2020). Relatedly, Plaintiffs also fail to rebut the argument that they have no cause of action under the DPPA (see section II.A, *infra*)—although this is technically not a standing argument, it leads to the same outcome: Citizen AG may not participate in this case.

For the sake of completeness, however, ERIC acknowledges that Citizen AG has not formally exited the litigation and its opposition brief, read very generously, may still attempt to assert associational standing via Jennifer McKinney. It is notable that, although she submitted a declaration in support of the Plaintiffs' brief—improperly, as explained below—McKinney did not aver that she is a member of Citizen AG. (Dkt. 29 at 22–24.) Her counsel says that she is a member, however, and for purposes of this motion ERIC assumes she is, too. (Dkt. 30 at 3.) Because McKinney also lacks standing, this does not help Citizen AG, which also lacks associational standing. (*See* Dkt. 21 at 14–15.)

B. Jennifer McKinney also lacks standing, and her declaration cannot and does not fix this.

In an effort to keep this lawsuit alive, Plaintiffs submitted a declaration by Jennifer McKinney, but this declaration does not demonstrate she has standing. First, it was improperly submitted, and the Court should not consider it. This leaves the Court to consider only the well-pled allegations in the Complaint, which are insufficient to

establish standing. Second, even if the Court *did* consider the declaration, it would not establish McKinney's standing.

1. In a facial challenge to standing, the Court considers the pleadings alone, and those do not establish McKinney's standing.

Plaintiffs misunderstand the rules under which district courts can consider evidence outside the pleadings at the motion to dismiss stage. When a defendant raises a *facial* challenge to standing, as ERIC does here, the court confines its review to the pleadings, and "must accept all well-pleaded factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015); *see also Apex Digital, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 444 (7th Cir. 2009) ("In the context of facial challenges… the court does not look beyond the allegations in the complaint, which are taken as true for purposes of the motion."); *Bazile v. Finance System of Green Bay*, 983 F.3d 274, 279 (7th Cir. 2020). Only when a *defendant* raises a *factual* challenge, "testing the existence of jurisdictional facts underlying the allegations," may a court "consider and weigh evidence outside the pleadings to determine whether it has power to adjudicate the action." *Bazile*, 983 F.3d at 279; *see also Grafon Corp. v. Hausermann*, 602 F.2d 781, 783 (7th Cir. 1979) ("But the district court is not bound to accept as true the allegations of the complaint which tend to establish jurisdiction *where a party properly raises a factual question* concerning the jurisdiction of the district court to proceed with the action" (emphasis added)); *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 946 (7th Cir. 2003) ("[I]f the complaint is formally sufficient but the contention is that there is *in fact* no subject matter jurisdiction, the movant may use affidavits and other material to support the motion.") (emphasis in original), *overruled on other grounds by Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). In other words, the defendant, not the plaintiff, determines whether to raise a facial or factual challenge to the plaintiff's standing; the plaintiff

cannot introduce new facts to rebut a facial challenge.[2] This Court should therefore disregard McKinney's declaration.

This leaves McKinney to rest on the facts alleged in her Complaint, which do not establish standing. McKinney has abandoned her arguments asserting injury to her right to vote and now focuses entirely on the allegation that she has suffered an injury to her privacy interest. (Dkt. 30 at 9–12.) She acknowledges that under *Baysal v. Midvale Indem. Co.*, she must allege some concrete injury beyond the disclosure of her data. (Dkt. 30 at 10); 78 F.4th 976, 979 (7th Cir. 2023). Plaintiffs accuse ERIC of ignoring "the salient factual allegations Ms. McKinney asserted in this case" regarding harm she experienced, in favor of rebutting the *Baysal* plaintiffs' allegations about harm. (Dkt. 30 at 10.) What Plaintiffs fail to understand is that the *Baysal* plaintiffs raised *more* detailed allegations of harm than McKinney, yet *still* did not plead standing. (Dkt. 21 at 9–10.) McKinney's idea of a "concrete injury" is her formulaic allegation 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." (Dkt. 30 at 10, quoting without citation Dkt. 1, ¶174.)

As ERIC previously explained, this formulaic allegation does not establish a concrete injury. (Dkt. 21 at 8–10.) "[T]he *Twombly–Iqbal* facial plausibility requirement for pleading a claim is incorporated into the standard for pleading subject matter jurisdiction." *Silha*, 807 F.3d at 174. This means that McKinney needed to plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Her conclusory statements do not meet this standard. (Dkt. 21 at 8–9.) ERIC does not dispute that "DPPA creates a private right of action for any individual whose personal

[2] Confusingly, Plaintiffs also recite the legal standard for motions for summary judgment in their opposition brief. (Dkt. 30 at 7.) However, they do not go on to argue for summary judgment. ERIC has filed a bread-and-butter Motion to Dismiss based on 1) lack of subject matter jurisdiction and 2) failure to state a claim. (Dkt. 21.) This case is not in a summary judgment posture.

information is unlawfully disclosed." (Dkt. 30 at 11–12.) But having a statutory right of action does not automatically confer standing. *Baysal*, 78 F.4th at 979. McKinney lacks standing, and her suit should be dismissed on this basis alone.

2. The Declaration does not establish McKinney's standing.

McKinney's declaration, should the Court choose to consider it, does not establish standing any more than the Complaint does.[3] McKinney alleges that she "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." (Dkt. 29 at 23.) Assuming *arguendo* that receipt of these messages constitutes a harm, McKinney also needed to establish that ERIC caused the harm and that a favorable decision by this Court would redress it. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560–61 (1992). Her declaration does not establish these key elements of causation and redressability.

McKinney alleges that she received these communications "directly and proximately because ERIC knowingly obtained, used, and/or disclosed the personal information contained in my driving records." (Dkt. 29 at 23.) However, her Declaration contains no foundation to support this bare, conclusory allegation. She avers that the communications did not come from the Wisconsin Department of Transportation (WisDOT) or the Department of Motor Vehicles, and that no other entity but ERIC could have obtained her personal information or used it to send her "unwanted solicitations." (Dkt. 29 at 24.) This assertion is laughable. McKinney's "submission boils down to an assertion that there might be a connection" between ERIC and the text messages she received. *Baysal*, 78 F.4th at 978. "Guesswork of that kind is not enough, however; the injury must be traceable to the asserted wrong and likely rather than speculative." *Id.*

[3] ERIC acknowledges that the clerk's office has twice marked McKinney's declaration "disregard," and understands this is because declarations and affidavits must be submitted as separate docket entries. *See* U.S. District Court for the Western District of Wisconsin Electronic Filing Procedures § V.C. At the time this Reply Brief was finalized, the declaration had not been re-filed as a separate docket entry, so ERIC cites to the first filed version.

McKinney offers only guesswork and pleads no facts that connect her "injury" to the "asserted wrong." Individual addresses and telephone numbers are readily available through myriad sources, and Wisconsinites are no strangers to political texts. The Court can take judicial notice that voter records are open to public inspection. *Fosnight v. Jones*, 41 F.4th 916, 922 (7th Cir. 2022) ("It's well established that judges may take judicial notice of matters of public record when ruling on a motion to dismiss" (citation omitted)). WEC maintains a website where any member of the public can, for a fee, request and obtain records that include "a voter's name, address, and any contact information they provided with their registration," and nothing in Chapters 5–12 of the Wisconsin statutes prohibits this. *FAQ Page*, Wisconsin Elections Commission Badger Voters, https://badgervoters.wi.gov/faq (last accessed January 21, 2025). More broadly, the Court can also take judicial notice of the ubiquity of unwanted calls and text messages; *see, e.g.*, *National Do Not Call Registry FAQs*, Federal Trade Commission, https://consumer.ftc.gov/articles/national-do-not-call-registry-faqs (Sep. 2023).

McKinney has provided no basis for her belief that the communications she received can be traced back to ERIC. Indeed, half of the text messages McKinney attached to her Declaration are not even addressed to her. (Dkt. 29 at 26–28.) Entities or individuals that addressed her as "Israel" and "Howe" lacked access to even her most basic personal information: her name. It is not plausible that such communications came from somebody with access to her driver's record.

Again, a theory is not the same as a plausible, well-pled claim, and McKinney alleges nothing more than a theory. She has not alleged any concrete harm caused by ERIC, and she has no standing to bring this lawsuit. Because Citizen AG's only possible claim to standing is through McKinney, this leaves no Plaintiff able to pursue this litigation. This Court lacks subject matter jurisdiction, so this lawsuit must be dismissed.

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

Not only do Plaintiffs fail to clear the standing hurdle, but their Complaint must also be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). Rather than engage meaningfully with ERIC's arguments, Plaintiffs continue to promote a baseless (indeed, frivolous) contract law argument and rely on conclusory allegations of wrongdoing. These arguments cannot save their Complaint.

A. Citizen AG concedes that it cannot bring a claim under the DPPA.

Plaintiffs do not respond to ERIC's argument that Citizen AG has no cause of action under the DPPA, effectively conceding the point. (Dkt. 30, failing to rebut Dkt. 21 at 16–17.) Any argument to the contrary is forfeited, see *Firestone Fin. Corp.*, 796 F.3d at 825, and Citizen AG must be dismissed as a plaintiff.

B. Plaintiffs' contract law argument is wrong, and WisDOT's transfer of data to ERIC did not violate the DPPA.

In support of their claim that ERIC's receipt of data from WisDOT violated the DPPA, Plaintiffs principally contend that ERIC has no contract with the Wisconsin Elections Commission (WEC). This argument, which Plaintiffs characterize as "a cornerstone" of their case, is without merit. (Dkt. 30 at 3.)

Plaintiffs do not even acknowledge the 2015 statute that created WEC, which expressly provides that all Government Accountability Board (GAB) contracts would transfer to WEC. (Dkt. 30, failing to rebut Dkt. 21 at 19–20.) Nor do Plaintiffs acknowledge the separate statute—which took effect in March 2016 and remains in effect today—that specifically *requires* Wisconsin to be a member of ERIC. (*See* Dkt. 21 at 17–18 (citing Wis. Stat. § 6.36(ae)(1) (enacted as 2015 Wisconsin Act 261, § 55).) This statute was enacted after the Legislature passed a law dissolving GAB and creating WEC, emphasizing legislative intent for WEC to assume the obligations of ERIC membership. Plaintiffs ignore all this, which alone should be fatal to their claim.

Plaintiffs instead press on with a common-law principle that does not apply here—but would support ERIC's position if it did. Plaintiffs claim that WEC's contract

with ERIC is invalid because when Kevin Kennedy signed it as Director of GAB, he had no authority to bind WEC, a future entity, to perform. (Dkt. 30 at 15–17.) This argument is based on cases about corporate contracts, specifically those made prior to incorporation, but GAB and WEC are not corporations—they are agencies of the State of Wisconsin. Wis. Stat. § 5.05; 2015 Wis. Act. 118. This is not a case about "promoters" making promises on behalf of a not-yet-existing corporate entity. Rather, in the contract at issue in this case, Wisconsin's elections agency contracted with ERIC for services to help maintain the voter registration list, and the Wisconsin Legislature carefully legislated to ensure this contract would survive the restructuring of the elections agency.[4]

As a foundational principle, "contract formation is governed by state law." *Janiga v. Questar Cap. Corp.*, 615 F.3d 735, 742 (7th Cir. 2010). Here, Wisconsin statutory law expressly provided, and continues to provide, that the contract between ERIC and Wisconsin's elections agency remained in effect after WEC replaced GAB. This answers the question of the contract's validity, and the Court can ignore Plaintiffs' common law arguments and precedents, which do not apply here.

Even if the pre-incorporation cases applied, however, they would support the existence of a contract under the facts pled in the Complaint. An entity can, by its actions, adopt a contract made by its promoters—as the case law cited by Plaintiffs makes clear: "The failure to formally accept or adopt the contract by formal action of the board of directors does not mean its adoption cannot be implied from conduct and circumstances following its incorporation. If the corporation accepts the benefits of a contract made on its behalf by its promoters this amounts to an adoption and it must

[4] According to Plaintiffs' brief, WEC also could not take over the GAB contract with ERIC because when GAB ceased to exist, WEC did not yet exist, so the contract evaporated. (Dkt. 30 at 17.) Plaintiffs now assert, for the first time, that GAB dissolved on June 29, 2016, a day before WEC came into existence. (*Id.*) Because this argument contradicts both the Complaint (Dkt. 1 at 4) and the legislative act that created WEC, 2015 Wisconsin Act 118 § 268, the Court can safely reject it.

accept the contract and its burdens as well as its benefits." *Conway v. Marachowsky*, 262 Wis. 540, 542, 55 N.W.2d 909 (quoting *Meyers v. Wells*, 252 Wis. 352, 355, 31 N.W.2d 512 (1948)). Plaintiffs' Complaint affirmatively alleges that, following June 30, 2016, Wisconsin and ERIC continued to perform their obligations under the contract: WisDOT has shared data with ERIC and WEC has paid membership dues, as contemplated by the contract, and ERIC has put that data to use. (Dkt. 1 at 4–5; ¶¶124, 154–157.) This constitutes acceptance of the contract.

Indeed, as ERIC previously showed, under Wisconsin common law, this conduct would be sufficient to form a legally binding agreement *even without* the written contract executed in May 2016. (Dkt. 21 at 20 (citing *Theuerkauf v. Sutton*, 102 Wis. 2d 176, 184, 306 N.W.2d 651, 657 (1981)). Plaintiffs do not respond to ERIC's argument that a written contract is not necessary for every permissible disclosure of data. (Dkt. 30, failing to rebut Dkt. 21 at 20.) Plaintiffs have forfeited any response to that argument as well.

In Plaintiffs' own words, "ERIC's lack of a contractual relationship with Wisconsin is a cornerstone of this case." (Dkt. 30 at 3.) On the face of the pleadings and the applicable laws, ERIC and WEC plainly do have a contractual relationship. Plaintiffs' "cornerstone" is hollow, and their case should be dismissed.

C. Plaintiffs double down on their conclusory allegations that fail to allege an impermissible use of DPPA data, in either the exchange between WisDOT and ERIC, or between ERIC and CEIR.

Plaintiffs have still not alleged that ERIC impermissibly used DPPA data, either in carrying out its contract with WEC or in allegedly sharing data with CEIR. Their arguments to the contrary rely on a misunderstanding of the meaning of permissible use, and on conclusory allegations that do not meet the pleading standards.

First, Plaintiffs present a novel, baseless theory that if state government functions are not carried out "well" (in Plaintiffs' opinion), that is equivalent to their not being carried out at all. (Dkt. 30 at 17–18.) This section of Plaintiffs' brief cites no legal

authority and makes no logical sense. Plaintiffs tacitly concede that maintaining the voter registration list is a government function but contend that ERIC is only "acting on behalf of a [] State [] agency in carrying out [that] function[]," 18 U.S.C. § 2721(b)(1), if the accuracy of the list increases. (*Id.*) Plaintiffs appear to define "accuracy" as a net reduction in the total number of registered voters; they assume that if ERIC's efforts result in more voters being registered than are removed from the list, this means the list is becoming less accurate. (Dkt. 1 at ¶120; Dkt. 30 at 18.) This opinion has no basis in law or in well-pled fact. Importantly, as ERIC previously pointed out, registering voters is plainly a government function within the scope of 18 U.S.C. § 2721(b)—even if Plaintiffs do not like it.[5] (Dkt. 21 at 18 (citing statutes).)

Moreover, the DPPA contains no requirement that government agencies or entities acting on their behalf do a "good job" putting data to permissible use. 18 U.S.C. § 2721(b). Such a requirement would be near-impossible to enforce and would open government agencies, and those acting on their behalf, to a world of spurious litigation in which any party unhappy with an agency's performance could sue for misuse of driver's license data. Who would decide whether the agency, or an entity acting on its behalf, is doing its job well enough to constitute a permissible use of data? There are no rules or standards for reaching such a determination, and it is not part of the statutory language defining and regulating "permissible use." *See* 18 U.S.C. § 2721(b). In sum, even if one assumes the truth of Plaintiffs' statistical assertions about ERIC's effect on voter lists, they do not state a DPPA violation.

Second, Plaintiffs' argument that ERIC puts DPPA data to impermissible use—which overlaps with their argument that ERIC performs what would be a permissible function so poorly that it is impermissible—is not based on well-pled facts. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (2009) (citing

[5] Puzzlingly, Plaintiffs continue to insist that voter-registration "is not even part of ERIC's mission." (Dkt. 30 at 18 (citing Dkt 1 ¶ 120). ERIC has already shown that this assertion is contradicted by the very public filing on which Plaintiffs' Complaint relies. (Dkt. 21 at 4 & n.2.)

Twombly, 550 U.S. at 557). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Crucially, "a complaint [does not] suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citing *Twombly*, 550 U.S. at 557). Plaintiffs simply have not pled the required factual content to survive a motion to dismiss, and nothing in the opposition brief changes this.

As discussed above and in ERIC's opening brief, Plaintiffs do not plead any specific facts within the statute of limitations. For their allegations regarding ERIC's transfers of data to CEIR, their opposition brief again points to an email from September 2020, which is clearly *outside* the statute of limitations. (Dkt. 30 at 19; Dkt. 21 at 21.) Plaintiffs do not respond to ERIC's argument that they have not adequately alleged that ERIC disclosed data to CEIR at any time within the statute of limitations. (Dkt. 21 at 21.) Any such argument is forfeited.

All other allegations in the Complaint are vague, formulaic, conclusory, disconnected from Wisconsin, and not entitled to the presumption of truth, as ERIC has already argued. (Dkt. 21 at 16–19, 21–22.) Plaintiffs point to "specific detail" in paragraphs 121–128 of their Complaint, but aside from making time-barred allegations about the September 2020 email, those paragraphs level only sweeping, general accusations at CEIR and ERIC with no connection to Wisconsin. (Dkt. 30 at 19.)

Plaintiffs also attempt to rely on paragraph 169, which reads:

> Knowing that the personal information was sourced from motor vehicle records, ERIC then 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.

(Dkt. 1 ¶ 169.) Nothing in this paragraph warrants serious consideration. The Complaint includes no allegations that ERIC transmits Wisconsin driver's license records to any secretaries of state, leaving only the conclusory, not well-pled allegation

in paragraph 169.[6] Moreover, assuming *arguendo* that the Complaint did include such allegations, it would not state a DPPA violation. States' cooperative sharing of data, through ERIC, for the purpose of better maintaining voter registration lists, carries out a government function as permitted under 18 U.S.C. § 2721(b)(1). The argument about "targeting non-citizens" is not only conclusory, devoid of specificity, and not well-pled, but also based on a willful and malicious misreading of ERIC's membership agreement, as ERIC has previously explained. (Dkt. 21 at 18 n. 9.) Plaintiffs offer no specifics about when, where, or how ERIC has worked with WisDOT to add citizens to voter rolls—and even if they did, adding eligible citizens to voter rolls is a legitimate government function. *See generally,* Wisconsin Statutes Ch. 6, subchapter II, "Registration"; *see also* 52 U.S.C. § 20501(b). And the Complaint makes no concrete allegations about ERIC "soliciting donations" in Wisconsin or anywhere. Rather, Plaintiffs fixate on CEIR's alleged receipt of a donation from the Priscilla Chan and Mark Zuckerberg Foundation in September 2020 and redistribution of those funds—which, in any event, fall outside the statute of limitations for this case. (Dkt. 1, ¶¶67–76.)

Plaintiffs have nothing but "naked assertions" of wrongdoing in this case, and those cannot open the federal courthouse door. *Iqbal*, 556 U.S. at 678. The Court should dismiss their Complaint.

CONCLUSION

For the reasons argued above and in ERIC's Brief in Support of Motion to Dismiss, the Court should GRANT ERIC's Motion to Dismiss.

Respectfully Submitted this 23rd day of January, 2025.

[6] Citizen AG's complaint does make passing reference to the Michigan Secretary of State (Dkt. 1 at 3, ¶¶84–85, 112, 115 n. 24), the Alabama Secretary of State (Dkt. 1, ¶50 n. 15), and the Colorado Deputy Secretary of State (Dkt. 1 at ¶¶139–49), none of whom have anything to do with ERIC's agreement with Wisconsin.

PINES BACH LLP

Electronically signed by Elizabeth M. Pierson
Christa O. Westerberg, SBN 1040530
Elizabeth M. Pierson, SBN 1115866
122 West Washington Ave., Suite 900
Madison, WI 53703
(608) 251-0101 (telephone)
(608) 251-2883 (facsimile)
cwesterberg@pinesbach.com
epierson@pinesbach.com

HANGLEY ARONCHICK SEGAL PUDLIN & SCHILLER

Robert A. Wiygul
One Logan Square, 27th Floor
Philadelphia, PA 19103
(215) 568-6200 (telephone)
(215) 568-0300 (facsimile)
rwiygul@hangley.com

Attorneys for Defendant
Electronic Registration Information Center