IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

1789 FOUNDATION, INC. d/b/a CITIZEN AG and JENNIFER McKINNEY,

Plaintiffs,

v. Case No.: 3:24-cv-00755

ELECTRONIC REGISTRATION INFORMATION CENTER, CENTER FOR ELECTION INNOVATION AND RESEARCH, DAVID J. BECKER, and WISCONSIN DEPARTMENT OF TRANSPORTATION,

Defendants.

DAVID BECKER'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

Ms. McKinney, like many Americans, does not like receiving election messages. But voter records are readily available to the public, including political groups. These communications, for better or worse, have become ubiquitous with public life.

Ms. McKinney's theory goes like this: she received election-related communications. Because she received them, she thinks someone must have gotten access to her driver's license records, as opposed to obtaining her contact information from some other public source. She points her finger at Defendants as the source of the problem. Plaintiffs' Complaint is dead on arrival because their allegations are not only entirely conclusory, but they also fail to allege a concrete harm, much less a harm that can be fairly traceable to the actions of Mr. Becker, or any actions Mr. Becker took in the state of Wisconsin that subject him to the Court's jurisdiction.

These deficiencies compel only one conclusion: this case must be dismissed.

ARGUMENT

I. Plaintiffs lack standing.

A. Citizen AG concedes it does not have standing.

Plaintiffs' response to Mr. Becker's motion to dismiss does not address Mr. Becker's standing challenge vis-à-vis Citizen AG. (Dkt. 43 at 18-24.) Plaintiffs have, therefore, conceded that Citizen AG lacks standing and, accordingly, this Court must dismiss Citizen AG's claims against Mr. Becker. *See Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 825 (7th Cir. 2015) ("[A] party generally forfeits an argument or issue not raised in response to a motion to dismiss[.]"); *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).

B. Ms. McKinney does not have standing.

1. Ms. McKinney concedes she does not have taxpayer standing

Plaintiffs' response fails to address Mr. Becker's argument that Ms. McKinney does not have taxpayer standing to bring her claim. (Dkt. 43 at 18-24.) Plaintiffs have therefore conceded this point as well. *Firestone*, 796 F.3d at 825.

2. Ms. McKinney has not alleged a cognizable injury that could confer standing under the DPPA.

Contrary to her assertions, Ms. McKinney has not alleged a cognizable injury that could confer standing under the DPPA. To establish Article III standing, a plaintiff must show

> (1) [they] ha[ve] 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 Env't Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Plaintiffs have the burden to establish standing. *Silha v. ACT, Inc.*, 807 F.3d 169, 173 (7th Cir. 2015).

Ms. McKinney's "injury"—a purported "invasion of privacy"[1] based on election-related communication[2] before a national presidential election—is not the type of concrete injury required to confer standing under the DPPA. The receipt of election-related communications is a common occurrence nationwide. *See, e.g.*, Why You Get So Many Political Campaign Texts—and What to Do About It, Time Magazine (July 3, 2024, 11:35 AM), https://time.com/6994868/political-campaign-texts-what-to-do/. While perhaps annoying, it is not the type of offensive intrusion necessary to establish a concrete harm.

a. "Invasion of privacy" is not a concrete harm for purposes of conferring standing and Plaintiffs have not distinguished *Baysal* on this point.

Whether tangible or intangible, "[a] 'concrete' injury must be '*de facto*'; that is, it must actually exist." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). The harm Ms. McKinney claims to have suffered—"an invasion of privacy"—is not a concrete harm as alleged. As Mr. Becker pointed out in his initial brief, Ms. McKinney's injuries are so generalized and speculative as to be nonexistent. And on this point, Plaintiffs' efforts to distinguish this Court's decision in *Baysal*

[1] Ms. McKinney accuses Mr. Becker of willfully failing to acknowledge her claimed injury of an "invasion of [her] privacy" by "conveniently" and "conspicuously" leaving it out of the Brief in Support of David Becker's Motion to Dismiss. (Dkt. 43 at 23.) That is nonsense. If Defendants did not sufficiently discern an aspect of Ms. McKinney's claimed injuries, it is because it was pled by obfuscation. Indeed, it was only in response to Mr. Becker's motion to dismiss that Plaintiffs alleged ***anything*** regarding Ms. McKinney having received "unwanted mailing solicitations, e-mails, and text messages," or her perceiving them as an "invasion of privacy." (*Compare* Dkt. 43 at 22, *with* Dkt. 1.) The closest Ms. McKinney came in her Complaint is one line: "This unauthorized use of HRI exacerbated the harm to Plaintiffs, increasing the risk of identity theft, privacy invasion, and unauthorized political targeting." (Dkt. 1 at 35, ¶165.)

Regardless, standing and jurisdictional issues are non-waivable. *Larkin v. Fin. Sys. of Green Bay*, 982 F.3d 1060, 1066 n.1 (7th Cir. 2020) ("Article III standing is jurisdictional and cannot be waived."); *Dancel v. Groupon, Inc.*, 940 F.3d 381, 385 (7th Cir. 2019) ("Subject-matter jurisdiction cannot be waived or forfeited[.]"); *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1399 (7th Cir. 1993) (noting that subject matter jurisdiction is "a restriction on federal power [that] cannot be waived"); *Bellwood v. Dwivedi*, 895 F.2d 1521, 1525 (7th Cir. 1990) ("There is a nonwaivable question of subject-matter jurisdiction: whether all the plaintiffs have standing under Article III . . . to maintain this suit.")

[2] Ms. McKinney claims to have received mailings as well as text messages. (Dkt. 43 at 21.) But she does not describe the mailings in the Complaint or attach examples to her declaration, making it impossible to address the allegation (or to plausibly tie the purported mailings in any way to Mr. Becker).

v. Midvale Indemnity Co., No. 21-CV-394-WMC, 2022 WL 1155295 (W.D. Wis. Apr. 19, 2022), fail.

In *Baysal*, the plaintiffs claimed that the defendants' disclosure of their driver's license numbers conferred standing. *Id.* at *10. They alleged the following consequences of defendants' disclosure: (a) a "risk of future identity theft and harm;" (b) "loss of time and expense . . . incurred to monitor their credit report for the threat of future harm;" and (c) "anxiety and emotional distress." *Id.* at *5-9. One plaintiff also alleged that a brokerage account was fraudulently opened in his name and an unauthorized purchase on his credit report, but "stop[ped] short of alleging in good faith that these instances [were] . . . traceable back to the disclosure of plaintiffs' driver's license numbers[.]" *Id.* at *8.

The Court deemed the injuries too "speculative" to confer standing under the DPPA. *Id.* at *5, 10. *Baysal* made clear that mere disclosure of information from driving records—in that case driver's license numbers—does not give rise to standing. *Id*. at *3. To establish standing, a plaintiff must show actual harm—not merely an assertion that one's privacy was invaded—as a result of a data breach. *Id*.

Here, Plaintiffs repeat the phrase "invasion of privacy" as the harm, arguing it is not "hypothetical," and ***is*** the "individualized, concrete, and particular" injury. (Dkt. 43 at 13.) But Plaintiffs' "invasion of privacy" is no more concrete and no less speculative than the harm alleged in *Baysal.* Indeed, Plaintiffs' alleged harm is ***more*** speculative and less concrete than that at issue in *Baysal* because Ms. McKinney's theory of standing, brought to its logical endpoint, would mean that any release of information is an injury under the DPPA. This is the very conclusion rejected in *Baysal.*

b. Ms. McKinney's purported injury cannot confer standing because it does not have a historical or common law analog.

For an injury-in-fact to be a "concrete harm," the harm must also have "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 424 (2021). The inquiry asks whether the plaintiff has "identified a close historical or common-law analogue for their asserted injury." *Id*. Here, Plaintiffs claim as an injury-in-fact "an invasion of privacy due to the unauthorized access, use, and disclosure of [Ms. McKinney's] DMV data." (Dkt. 43 at 12.) To support their invasion-of-privacy theory of harm, Plaintiffs submitted, for the first time via their response brief, a declaration from Ms. McKinney averring that she has "received unwanted mailing solicitations, emails, and text messages as recent as November 2, 2024." (*Id*. at 15).

In assessing whether an "invasion of privacy" is a concrete harm "traditionally recognized as providing a basis for lawsuits in American courts," the Seventh Circuit has stressed that "an 'invasion of privacy' is not a standalone tort; the term 'encompasse[s] four theories of wrongdoing: intrusion upon seclusion, appropriation of a person's name or likeness, publicity given to private life, and publicity placing a person in a false light.'" *Dinerstein v. Google, LLC*, 73 F.4th 502, 513 (7th Cir. 2023) (quoting *Pucillo v. Nat'l Credit Sys., Inc*., 66 F.4th 634, 639-40 (7th Cir. 2023)). "And because TransUnion requires us to nail down a particular common-law analogue," the Seventh Circuit further explained, "we must assess whether any of the recognized privacy torts is sufficiently analogous to [the Plaintiff]'s asserted injury. If not, no concrete harm. 'No concrete harm, no standing.'" *Id*. (quoting *TransUnion*, 594 U.S. at 441).

Plaintiffs' invasion-of-privacy allegations could conceivably fit into only one category: the "intrusion upon seclusion" brand of invasion-of-privacy harms. But Ms. McKinney's allegations—receiving unwanted mailing solicitations, emails, and text messages—fall well short

of an intrusion "upon [her] solitude or seclusion . . . or h[er] private affairs or concerns' . . . that 'would be highly offensive to a reasonable person.'" *Persinger v. Sw. Credit Sys., L.P.*, 20 F.4th 1184, 1192 (7th Cir. 2021) (quoting Restatement (Second) of Torts § 652B (Am. L. Inst. 1977)).

Ms. McKinney's claims that she has "received numerous unwanted mailings, e-mails, and text messages as a result of the use and disclosure of her personal information from driving records" are a far cry from having your private and personal mail sorted through or the contents of your bank account examined. *Id.* ("For example, an intrusion upon seclusion may be committed 'by opening [a person's] private and personal mail, searching his safe or his wallet, [or] examining his private bank account." (quoting Restatement (Second) of Torts, § 652B cmt. b)). Ms. McKinney's invasion-of-privacy allegations simply do not rise to the level of a concrete harm necessary to establish standing.

Plaintiffs' reliance on *TransUnion* is misplaced. The Supreme Court in *TransUnion* found that erroneous reports labeling some plaintiffs as "potential terrorist[s]" were sufficiently close to "the harm from a false and defamatory statement." *TransUnion LLC*, 594 U.S. at 433. The Supreme Court agreed in that case that the alleged injury bore a "'close relationship' to a harm traditionally recognized as providing a basis for a lawsuit in American courts—namely, the reputational harm associated with the tort of defamation." *Id.* at 432. Here, Plaintiffs have not provided authority for their assertion that the consequences of the alleged "invasion of privacy" (*i.e.*, unsolicited political mailings and text messages) have a close relationship to harm traditionally recognized as providing a basis for a lawsuit in American courts.[3]

[3] Plaintiffs have not provided such authority because they cannot, and they tacitly concede that the real invasion of privacy they allege is the disclosure of DMV data that they assume (with no evidence) occurred. But they cannot rely on the allegations set out in their complaint, which allege only the disclosure of Ms. McKinney's data and not mailings or text messages Ms. McKinney allegedly received, because they know that *Baysal* forecloses that theory.

Nor could they. ***First***, political communication is plainly legitimate political activity protected by the First Amendment. *See McIntyre v. Ohio Elections Comm'n.*, 514 U.S. 334, 337 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (per curiam)) (finding campaigns have a First Amendment right to distribute campaign literature); *see also Wis. Right to Life, Inc. v. Barland*, 751 F.3d 804, 811 (7th Cir. 2014) ("[P]olitical speech is at the core of the First Amendment[.]") ***Second***, such communication is expressly permitted by the federal government. The Federal Communications Commission permits such election-related texts and calls, with some caveats, such as the recipient having the ability to withdraw consent for text messages. *See* Political Campaign Robocalls and Robotexts Rules, https://www.fcc.gov/rules-political -campaign-calls-and-texts (last updated Oct. 22, 2024). Similarly, the Federal Election Commission (FEC) recognizes mail communications as a legitimate type of political activity that is governed by FEC regulations. *See, e.g.*, Definition of Federal Election Activity (FEA), https://www.fec.gov/help-candidates-and-committees/making-disbursements-political-party/definition-federal-election-activity-fea/ (last accessed Feb. 19, 2025).

Wisconsin likewise implicitly recognizes that contacting voters is not an invasion of privacy that the state has an interest in preventing; voter registration information is public record, and any person may obtain a person's address and phone number, if available. *See* Wisconsin Elections Commission-Badger Voters FAQ, https://badgervoters.wi.gov/faq (last accessed Feb. 24, 2025) ("Badger Voters is a website established by the State of Wisconsin Elections Commission to provide a simple and automated way for the public to request voter data lists and candidate nomination papers.").

Plaintiffs' failure to allege concrete harm deprives this Court of subject matter jurisdiction, requiring dismissal.

3. Regardless, Ms. McKinney's injury is not fairly traceable to Mr. Becker.

Even if Ms. McKinney's alleged receipt of messages constituted a concrete harm for purposes of standing, the alleged harm is not fairly traceable to Mr. Becker. This is fatal to her claims.

Ms. McKinney submitted sample text messages as exhibits attached to her declaration.[4] (*See* Dkts. 45-1; 45-2.) Two of the text messages—addressed to "Jennifer" and to "Israel"—are from an organization called Civic Data and encourage Ms. McKinney to register to vote if she had not done so already. (Dkt. 45-1.) A third text message, addressed to "Jennifer," encouraged Ms. McKinney to register for early voting and to vote for candidates for the Democratic Party; it also directed the recipient to a website for the Democratic Party of Wisconsin (DPW). (Dkt. 45-2.)

Neither Civic Data nor DPW is a defendant in this case. (Dkt. 1.) Plaintiffs do not allege that any third party, including Civic Data or DPW, received information from Mr. Becker. (*Id.*) Nor do they allege that Mr. Becker is connected with either entity. (*Id.*) In fact, Plaintiffs do not allege that Mr. Becker disclosed Ms. McKinney's DMV information to *anyone*, let alone to the third parties that ultimately texted her. Plaintiffs' response clarifies that the Complaint alleges just four disclosures of Ms. McKinney's DMV data: "(1) from WisDOT to ERIC; (2) from WisDOT to Becker; (3) from ERIC to the CEIR; and (4) from ERIC to Becker." (Dkt. 43 at 23 (citing Dkt. 1, ¶¶ 13, 160, 165, 172, 176).)

Ms. McKinney's failure to trace the text messages to a disclosure by Mr. Becker dooms her claim. At bottom, Plaintiffs are asking the Court to take Plaintiffs' word that (a) the messages resulted from disclosure of her driver's license information despite there being other publicly

[4] Ms. McKinney's declaration had three attachments; the third attachment included two text messages to someone by the name of "Howe." (Dkt. 43-2 at 7.) Plaintiffs had to re-file the declaration with the exhibits separately. (*See* Dkts. 43, 45.) When the declaration was re-filed, the third attachment was replaced with an email not relevant to the injury/standing analysis, and the "Howe" communications were omitted entirely. (*See* Dkt. 45-3.) Defendants presume this was intentional and will not address messages to "Howe."

available sources of the very information at issue and (b) the disclosure is attributable to Mr. Becker, despite the fact that the communications she relies on have nothing to do with him.

Indeed, there is no reason why Civic Data, DPW, or Mr. Becker would need driver's license data to obtain the mailing address or cell phone number of a registered voter. Voting records—which are not governed by the DPPA—frequently include information such as a mailing address or telephone number. *See Lake v. Neal*, 585 F.3d 1059, 1061 (7th Cir. 2009) (holding that a voter registration form containing plaintiff's "name, date of birth, sex, address, former address, phone number, and social security number" was not protected by the DPPA).

This is true in Wisconsin; the Wisconsin voter registration application asks for both a phone number and a mailing address. And voting records are public records in Wisconsin. *See* Wis. Stat. §§ 19.31-.39. The Wisconsin Elections Commission even maintains a website—badgervoters.wi.gov—that facilitates public records requests for voter data that would include that information.

It is difficult to see how anyone could conclude that their information was obtained by political groups through unlawful access to driver's license records when the information is readily (and legally) available from voter registration records or any other number of sources. Despite this, Ms. McKinney assumes—and urges the Court to assume with her—that she received text messages like the ones in Exhibits 1 and 2 "as a result of the use and disclosure of her personal information from driving records obtained and used by Becker and his organizations."[5] (Dkt. 43 at 21.) But

[5] In addition to publicly available information available from voter's records, Ms. McKinney also ignores her own robust online presence when she asserts that the groups that sent her election-related material obtained her personal information from driver's license records. *See, e.g.*, Jennifer McKinney Fraud Update, https://www.sequenceinc.com/fraudfiles/2015/05/jennifer-mckinney-fraud-update/ (last visited Feb. 24, 2025)); https://www.linkedin.com/in/jennifer-mckinney-b03561193 (last visited Feb. 22, 2025); https://www.instagram.com/mckmama77/# (last visited Feb. 24, 2025). These websites feature an individual with the full name of "Jennifer Howe Sauls McKinney" (*see* fn. [4], *supra*), and a former spouse named Israel McKinney (*see* Dkt. 45-1) who lived in West Salem, Wisconsin in LaCrosse County. (Dkt. 1, ¶13.) Many political campaigns use publicly available voter records along with data mining of information on the internet to develop lists of voters to

Ms. McKinney does not explain why she believes Civic Data, DPW, or any organization received and then used DMV data from Mr. Becker[6] to contact her, and she does not include any such explanation in the Complaint. (Dkt. 1.) She asks the Court to make that assumption despite the fact that the outreach is far more plausibly explained by someone accessing voter contact information in Wisconsin based on public records law and the general availability of this type of information on the internet.[7]

While this Court must accept all well-pleaded facts, it need not accept as true these types of conclusory statements of fact or law. *Whitaker v. Ameritech Corp.*, 129 F.3d 952, 955 (7th Cir. 1997). Ms. McKinney's bald, conclusory assertion—which is utterly lacking in support—is not sufficient to sustain this case.

II. This Court does not have personal jurisdiction over Mr. Becker.

A. Plaintiffs concede the Court does not have general jurisdiction over Mr. Becker.

Plaintiffs' response does not address Mr. Becker's argument that this Court does not have general jurisdiction over him for purposes of Plaintiffs' claims. (Dkt. 43 at 24-28.) Plaintiffs have, therefore, conceded the issue. *Firestone*, 796 F.3d at 825.

B. The Court does not have specific jurisdiction over Mr. Becker.

Plaintiffs fail to adequately refute Mr. Becker's argument that this Court does not have specific jurisdiction over him for purposes of this lawsuit. In their response, Plaintiffs do not point to any facts in their Complaint that support personal jurisdiction over Mr. Becker. It is not Mr.

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contact. *See* How political campaigns use you data, Reuters, Oct. 12, 2020 available at https://www.reuters.com/graphics/USA-ELECTION/DATA-VISUAL/yxmvjjgojvr/.

[6] Of course, neither Mr. Becker nor CEIR ever had Wisconsin DMV data. (Becker Decl., Dkt. 37, at ¶ 6.)

[7] For example, an internet search for "Jennifer Mckinney La Crosse Wisconsin phone number" reveals multiple pages with phone numbers, some of which may belong to Plaintiff. *See generally* https://nuwber.com/person/563a1e4e4fd2d7d7141511d3 (containing phone numbers for Jennifer H. McKinney from West Salem, WI).

Becker's job to make sense of Plaintiffs' claim, nor is it this Court's. *United States v. Dunkel*, 927 F.3d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs.").

Importantly, Plaintiffs fail to refute Mr. Becker's evidentiary submission regarding his contacts with Wisconsin—namely, that neither he nor CEIR have ever received driver's data from Wisconsin. (Dkt. 43 at 24-28.) Plaintiffs' only acknowledgment of his declaration is a passing comment that whether he received Wisconsin DMV data is a factual dispute to be resolved later. (Dkt. 43 at 18.) It is not.

On a motion to dismiss for lack of personal jurisdiction pursuant to Rule 12(b)(2), Plaintiffs have "the burden of proving that the court can exercise personal jurisdiction" over defendants. *Total Admin. Servs. Corp. v. Pipe Fitters Union Local No. 120 Ins. Fund*, 131 F. Supp. 3d 841, 844 (W.D. Wis. 2015). Where, as here, a defendant "has submitted affidavits contesting personal jurisdiction," Plaintiffs "must go beyond the pleadings and submit affirmative evidence supporting the exercise of jurisdiction." *Id*. (quoting *Purdue Rsch. Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 783 (7th Cir. 2003)).

Plaintiffs have not done that. Instead, they rely on their Complaint's bald assertion that Mr. Becker accessed Wisconsin DMV data and "played a key role" in CEIR's and ERIC's undescribed and unexplained "improper use" of DMV records from Wisconsin. (Dkt. 43 at 26.) Because Plaintiffs have not refuted Mr. Becker's evidence with any of their own, his evidentiary submission is undisputed. *See Rayburn v. Apogee Enters., Inc.*, No. 23-CV-744-JDP, 2024 WL 3887583, at *1 (W.D. Wis. Aug. 21, 2024) ("In the face of [defendant's] evidence contesting personal jurisdiction, [plaintiff] was required to 'go beyond the pleadings and submit affirmative evidence supporting the exercise of jurisdiction.' . . . [Plaintiff] provides no evidence to rebut anything [in

the] declaration, so those facts are undisputed.") (quoting *Purdue Research Found.*, 338 F.3d at 783); *see also Matlin v. Spin Master Corp.*, 921 F.3d 701, 705 (7th Cir. 2019).

Moreover, Plaintiffs' argument that personal jurisdiction over Mr. Becker is a factual dispute not appropriate for resolution at this stage rests on the unfounded assumption that Mr. Becker "played a key role" in CEIR's and ERIC's use of Wisconsin DMV data, which had "foreseeable effects" in Wisconsin. (Dkt. 43 at 18.) This argument fails for two reasons.

First, the fact that Ms. McKinney claims the data came from Wisconsin DMV records is not sufficient to establish personal jurisdiction over Mr. Becker under the DPPA. *See, e.g.*, *Gakuba v. Jones*, No. 1:24-CV-1043, 2024 WL 4362598 (N.D.N.Y. Oct. 1, 2024). In *Gakuba*, a New York resident sued Illinois state officials for using his driver's license information in a criminal investigation in Illinois. *Id*. at *1. The court held that these allegations were insufficient to show conduct giving rise to personal jurisdiction in New York, given that the alleged wrongful conduct—the criminal investigation—occurred in Illinois. *Id.* at *3. The same analysis applies here.

Even if Mr. Becker did obtain Ms. McKinney's data from the Wisconsin DMV through disclosures between CEIR, ERIC, and/or Mr. Becker (which he did not), as alleged, his relevant conduct would have occurred in Washington, D.C., where the entities are based. (Dkt. 1, ¶¶18-19.) The Complaint does not allege that Mr. Becker or CEIR used this data within the state of Wisconsin, nor does it allege that Mr. Becker or CEIR engaged in any conduct related to this lawsuit within the state of Wisconsin at all. (*See generally* Dkt. 1.) [8] The fact that texts or election

[8] Peculiarly, the Complaint is also replete with information about Michigan's voter system and includes allegations about grants made by CEIR and ERIC to Michigan. (Dkt. 1, ¶¶ 84, 85, 104, 109-13, 115, 118.) Of course, conduct regarding grants given to Michigan does not establish personal jurisdiction over Mr. Becker in Wisconsin.

mailers were sent to a person in Wisconsin by groups that are not part of this lawsuit does not give rise to personal jurisdiction over Mr. Becker in Wisconsin.

Second, despite claims to the contrary, Plaintiffs have not alleged that Mr. Becker "aimed" any conduct at Wisconsin that would satisfy the "effects test" established in *Calder v. Jones*, 465 U.S. 783, 789 (1984). In *Calder*, a California resident sued the National Enquirer for libel, invasion of privacy, and intentional infliction of emotional harm, based on an article the Enquirer published about plaintiff and her husband. *Id*. at 785. The Supreme Court held that although the Enquirer was based in Florida, jurisdiction in California was proper because the newspaper intentionally targeted plaintiff with an article it knew "would have a potentially devastating impact" on her, in the state where she lived and worked and where the Enquirer had its largest circulation. *Id*. at 789-90.

This case is not *Calder*. Neither Mr. Becker nor CEIR have any substantive presence in Wisconsin, as evidenced by Mr. Becker's unrefuted declaration, and they are not alleged to have engaged in any intentional activity that directly targeted Ms. McKinney. The only "effect" Plaintiffs have discernably alleged Ms. McKinney experienced in Wisconsin was the receipt of election-related text messages. (Dkt. 43 at 26.) These text messages are very different from a "devastating" false article published in a newspaper with a circulation of 600,000 in the state where one lives and works. *Calder*, 465 U.S. at 785. *Calder* does not govern this case. This Court does not have personal jurisdiction over Mr. Becker.

III. Plaintiffs' Complaint fails to state a claim for relief under Fed. R. Civ. P. 12(b)(6).

Plaintiffs continue to misunderstand the difference between factual allegations and conclusory pleadings. Plaintiffs' "factual allegations" are nothing more than a recitation of the elements of their claim under the DPPA—the equivalent of alleging that a defendant entered a contract and breached that contract, without providing any facts about the contract itself or the

conduct that constituted a breach. This is not sufficient to state a claim for relief. *See Thomas v. Neenah Joint Sch. Dist.*, 74 F.4th 521, 523 (7th Cir. 2023) (observing that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" and affirming dismissal under Fed. R. Civ. P. 12(b)(6) for failing to allege facts sufficient to state a claim for relief).

In their response brief, Plaintiffs contend that Mr. Becker ***must*** understand their claims because of the length of his motion to dismiss. (Dkt. 43 at 31-35.) Plaintiffs miss the point. While it is clear from Plaintiffs' otherwise indecipherable Complaint that they lack standing and that this Court does not have personal jurisdiction over Mr. Becker, the Complaint does not alert Mr. Becker to what wrongful acts Plaintiffs believe he has committed. (*See generally* Dkt. 1.) Plaintiffs' response illuminates nothing.

Plaintiffs concede that Mr. Becker never disclosed Ms. McKinney's DMV data; their response made clear that there were only four alleged disclosures of DMV data, none of which were made by Mr. Becker. (*See* Dkt. 43 at 23.) Plaintiffs' attempt to circumvent that by alleging Mr. Becker engaged in an "impermissible use" under the DPPA. But the alleged "impermissible use" is based on a purported invasion of Ms. McKinney's privacy resulting from ***third parties*** sending her text messages and mailings. (*Id.* at 12, 15). The Complaint does not mention those third parties, let alone explain their connection to Mr. Becker. As such, it is unclear how Mr. Becker could be responsible for those third-party messages if he never disclosed Ms. McKinney's information (as Plaintiffs concede). (*See* Dkt. 1.)

It is virtually impossible to understand what Plaintiffs believe Mr. Becker has done that inspired this lawsuit, and Plaintiffs' unwillingness or inability to plainly and concisely state it is telling. It is equally difficult to understand how the Complaint's allegations relate to Ms.

McKinney or the State of Wisconsin. The Complaint does not contain any factual allegations about Ms. McKinney and does not once reference the text messages she has now provided as exhibits to her response. (*See generally* Dkt. 1.)

Plaintiffs' attempts to argue otherwise are insufficient. They argue it is "inconceivable" that the executive director of a non-profit does not personally access the non-profit's data. In support of this assertion, Plaintiffs offer an email from the ***Rhode Island*** Director of Elections to an employee of ERIC, in which the ***Rhode Island*** Director of Elections references "data sharing." (Dkt. 43 at 33 (citing 45-3).)[9] An email between a Rhode Island official and an ERIC employee that does not include Mr. Becker, or anyone from Wisconsin, is completely irrelevant.

Mr. Becker is not suggesting the Court dismiss Plaintiffs' complaint merely because it contains "superfluous" content. (Dkt. 43 at 34.) Rather, the Court should dismiss the Complaint because it does not allege relevant content beyond merely reciting the elements of a claim. Of course, merely reciting the elements is not sufficient to state a claim for relief. *See Thomas*, 74 F.4th at 523. This Court should dismiss the Complaint in its entirety.

IV. Plaintiffs concede that the DPPA does not allow a claim for declaratory relief.

Finally, Plaintiffs' response fails to address Mr. Becker's argument that the DPPA does not allow for declaratory relief, and therefore concedes the issue. This Court must therefore dismiss Plaintiffs' claims for declaratory relief. *See Firestone*, 796 F.3d at 825.

[9] While not relevant to this ground for dismissal, the Rhode Island correspondence is consistent with Mr. Becker's declaration. That declaration explains that certain—but not all—member states provided data for two research studies. (Dkt. 37 at ¶ 6.) This was permissible under the DPPA. Wisconsin was not one of the participating states. *Id.* But Rhode Island participated. *See* https://electioninnovation.org/research/does-state-outreach-to-people-who-are-eligible-but-unregistered-to-vote-increase-registration/ (last visited Feb. 20, 2025).

CONCLUSION

Plaintiffs are upset that Ms. McKinney, like many Americans, received election related texts and other communications right before the 2024 election. But they have failed to show how this amounts to an injury, how those texts can be traced to actions by Mr. Becker, or that Mr. Becker did anything at all in Wisconsin that would support personal jurisdiction. This Court should grant Mr. Becker's motion to dismiss Plaintiffs' complaint in its entirety for lack of personal jurisdiction, lack of subject matter jurisdiction, and for failing to state a claim.

Dated February 24, 2025

Respectfully submitted,

s/ David H. Angeli

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