STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

BRIAN THOMAS, TAMARA WEBER, MATTHEW AUGUSTINE, KEVIN MATHEWSON, MARY MAGDALEN MOSER, PAMELA MUNDLING,

Complainants,

v.

MEAGAN WOLFE, in her capacity as Administrator of the Wisconsin Elections Commission, JOHN M. ANTARAMIAN, in his capacity as Mayor of the City of Kenosha, MATT KRAUTER, in his capacity as the City Clerk/Treasurer of the City of Kenosha

Respondents.

ANSWER OF RESPONDENTS ANTARAMIAN AND KRAUTER

Respondents John M. Antaramian, in his capacity as Mayor of the City of Kenosha, and Matt Krauter, in his capacity as the City Clerk/Treasurer of the City of Kenosha (collectively, "Respondents"), by and through its attorneys in the Kenosha City Attorney's Office, hereby submit the following response to the Complaint filed by Brian Thomas, Tamara Weber, Matthew Augustine, Kevin Mathewson, Mary Magdalen Moser, and Pamela Mundling (collectively, "Complainants") with the Wisconsin Elections Commission ("Commission" or "WEC").

INTRODUCTION

The 2020 election season was one like no other, due in no small part to the COVID-19 pandemic. Unfortunately, the November presidential election has been the center of extensive misinformation and unfounded allegations. Chief among those allegations are the claims made by Complainants here—claims which have already been rejected by numerous decisions[1] by

[1] Federal Courts have repeatedly rejected arguments presented by the Complainants' same counsel, Attorney Kaardal, against the acceptance of these grants. *Wisconsin Voters Alliance v. City of Racine et al.*, No. 20A75,

federal courts across the Country—concerning the City's acceptance and use of grant funds from the Center for Tech and Civic Life ("CTCL"). Despite these decisions, the Complainants now ask WEC to become the first authority in the nation to invalidate a municipality's acceptance of grant funding to help defray the costs of safely holding an election during a pandemic. Yet, Complainants have not cited any law which prohibits the City's acceptance of outside funds in order to provide a safer voting experience for its electorate. Thus, the Complaint fails to state a valid legal basis upon which to proceed, and must be dismissed accordingly.

FACTUAL BACKGROUND

Respondents dispute the facts as alleged by Complainants in their entirety as inaccurate, misstated, and inflected with bias. To more objectively state the relevant facts, the Respondent will instead present them as the federal courts found them in the previous cases challenging the acceptance of CTCL grant funding. During the summer of 2020, the City of Kenosha accepted a grant from the Center for Tech & Civic Life (herein "CTCL") in order to defray the cost of holding elections during a global pandemic. Exhibit A to the Affidavit of Matt Krauter. CTCL "is a nonpartisan, nonprofit organization formed in 2012 by a 'team of civic technologists, trainers, researchers, election administration and data experts' to 'foster a more informed and engaged democracy' and to help 'modernize elections.' *Pennsylvania Voters All. v. Ctr. Cty.*,

Pennsylvania Voters All. v. Ctr. Cty., Pennsylvania, 141 S. Ct. 1126 (2021), *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Wisconsin Voters All. v. City of Racine*, No. 20-3002 (7th Cir. Nov. 6, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2021 WL 276700 (N.D. Iowa Jan. 27, 2021), *All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021), *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6591209 (E.D. Wis. Oct. 21, 2020), *Pennsylvania Voters All. v. Ctr. Cty.*, 496 F. Supp. 3d 861, 864 (M.D. Pa. 2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559 (N.D. Iowa Oct. 20, 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605987 (W.D. Mich. Oct. 19, 2020), *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937 (D. Minn. Oct. 16, 2020), *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), appeal dismissed sub nom. *Wisconsin Voters All. v. City of Racine*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605985 (W.D. Mich. Oct. 2, 2020).

There were at least 2 others as well. *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1252 (N.D. Ga. 2020); *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 448 (E.D. Tex. 2020).

496 F. Supp. 3d 861, 865 (M.D. Pa. 2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020). "CTCL awarded COVID-19 Response Grants to various local election offices throughout the summer of 2020 to assist with the substantial costs entailed with administering an election during a global pandemic." *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *1–2 (D. Minn. Oct. 16, 2020). As municipalities did not anticipate a pandemic when they set their budgets going into 2020, many "concluded that the grant could help alleviate the budget challenges facing" them, *id.*; these funds served "as supplemental funding to ensure the safety of voters." *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 449 (E.D. Tex. 2020). The scope of these funds covers ordinary activities associated with holding an election:

> These funds may be used for election-related expenses, including to: maintain in-person polling on election day; obtain personal protective equipment for election officials and voters; support drive-thru voting; publish reminders to voters to update their voter registration information; educate voters on election policies and procedure; recruit and hire poll workers; provide increased cleaning and sanitation at poll sites; train poll workers; expand in-person early voting sites; and deploy additional staff or technology to improve mail ballot processing.

Pennsylvania Voters All., 496 F. Supp. 3d 861, 865 (M.D. Pa. 2020). "All counties and cities in the United States are eligible to apply for funds under the grants, regardless of the political affiliation of their officials or the voting tendencies of their electorates." *Texas Voters All.*, 495 F. Supp. 3d 441, 449 (E.D. Tex. 2020). "To be considered for a grant, applicants need only submit basic information—such as the number of active registered voters in the jurisdiction, the number of full-time staff on the election team, the election office's budget, and a W-9." *Id.*

"CTCL approves the application of every eligible election department and subsequently awards these departments a minimum of $5,000. CTCL does not request or consider any partisan criteria." *Id.* "More than 1,100 jurisdictions have applied so far, in almost every state, with most

applicants serving jurisdictions with fewer than 25,000 registered voters." *Minnesota Voters All.* , 2020 WL 6119937, at *1–2 (D. Minn. Oct. 16, 2020). Yet, rather than CTCL exercising firm control over the funds once given to municipalities, "the government has discretion to decide how those funds will be spent." *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1253 (N.D. Ga. 2020).

Far from acting outside the law, in accepting the funds, the City specifically agreed to comply with the law. The City signed an agreement "promising to use the grant funds in compliance with United States tax laws." Exhibit A to the Affidavit of Matt Krauter. As a municipal corporation, the City is already required to comply with state and federal laws, even without an agreement to do so. Notably, the agreement does not state that the City is required "to return the moneys to . . . CTCL, if [CTCL] disagreed as to how those moneys were spent." Complaint at ¶ 25. Furthermore, the City was one of 218 municipalities in Wisconsin to receive grant funds from CTCL ("WI-218"). *See* COVID-19 Response Grants, Center for Tech & Civic Life (https://www.techandciviclife.org/our-work/election-officials/grants/) (last accessed June, 14, 2021). Yet, the Complainants have chosen to commence election complaints against only certain municipalities that they perceive as having electorates with a different political preference than their own, and even then after waiting ten months from when the grants were accepted.

ARGUMENT

The Commission should dismiss the instant Complaint for several reasons. First, the Complaint is neither timely nor sufficient as to form, and it does not set forth facts establishing probable cause to believe that a violation of law has occurred. Additionally, the arguments offered by Complainants' find no basis in law, as has been determined by the Eastern District of Wisconsin as well as a plethora of other courts.[2] Finally, and perhaps most significantly,

[2] *See supra* note 1.

Complainants seek to have the Commission do administratively that which is the sole purview of the legislature: craft new election law. For all of these reasons, the Complaint should be dismissed.

I. Timeliness, Sufficiency as to Form, and Probable Cause

The Elections Commission Administrative Code directs the Administrator to serve a gatekeeper function with respect to complaints. Within ten days, the Administrator must determine whether the complaint is timely, sufficient as to form, and states probable cause. WIS. ADMIN. CODE §§ EL 20.04(1). Based on that determination, the Administrator will determine whether to return the complaint to the complainant to cure any defect, or forward it to the respondent for an answer. WIS. ADMIN. CODE §§ EL 20.04(1)-(3).

Administrator Meagan Wolfe is named as a Respondent in the Complaint along with the City Respondents, and two adjudicators have been appointed to serve in her place. Though the adjudicators are standing in for the Administrator, it appears that there was no initial determination as to whether the Complaint is timely, sufficient as to form, and/or states probable cause.[3] Respondents therefore respectfully submit that the Complaint is not timely and does not state probable cause, and should therefore be dismissed.

A. The Complaint Is Untimely, And Therefore Must Be Dismissed

The Complaint was made pursuant to Wisconsin Statutes section 5.06, (Complaint at p. 2.), which requires that it "be filed promptly so as not to prejudice the rights of any other party." WIS. STAT. § 5.06(3) (2019-20).[4] Where a term is not defined, "statutory language is given its common, ordinary, and accepted meaning." *State ex rel. Kalal v. Circuit Court for Dane*

[3] In an email response to a question from the City of Kenosha concerning probable cause, the adjudicators were asked if there had been a finding of timeliness or probable cause, to which they replied, "Any respondent who wishes to contest probable cause as referenced in [the aforementioned] email may do so in his or her response." Exhibit F to the Affidavit of Bryan A. Charbogian.

[4] All references to the Wisconsin Statutes are to the 2019-2020 version unless otherwise indicated.

County, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110. A filing is understood to be "prompt" if it is done at once or without unreasonable delay. The doctrine of laches is also instructive in applying Section 5.06(3), and provides additional grounds upon which to find the Complaint untimely. Laches applies to bar a claim when there is an unreasonable delay in bringing the claim, a lack of knowledge the claim would be raised, and prejudice to the responding party. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 15, 389 Wis. 2d 516, 936 N.W.2d 587. "Parties bringing election-related claims have a special duty to bring their claims in a timely manner." *Trump v. Biden*, 2020 WI 91, ¶ 30, 394 Wis. 2d 629, 645–46, 951 N.W.2d 568, 577, cert. denied, 141 S. Ct. 1387 (2021). The Wisconsin Supreme Court has explained this duty as follows:

> Extreme diligence and promptness are required in election matters, particularly where actionable election practices are discovered prior to the election. Therefore, laches is available in election challenges. . . . Such doctrine is applied because the efficient use of public resources demands that a court not allow persons to gamble on the outcome of an election contest and then challenge it when dissatisfied with the results, especially when the same challenge could have been made before the public is put through the time and expense of the entire election process.

Trump v. Biden, 2020 WI 91, ¶ 11, 951 N.W.2d 568 (quoting 29 C.J.S. Elections § 459 (2020)). Failing to exercise "extreme diligence" harms everyone, "causing needless litigation and undermining confidence in the election results." *Id.* at ¶ 30. Complainants unreasonably delayed bringing this Complaint, and their claims should therefore be barred as untimely.

1. *The Complainants Have Unreasonably Delayed In Filing Their Complaint By A Wide Margin*

What constitutes an unreasonable delay for purposes of laches varies depending on the circumstances of a particular case. *Id.* at ¶ 13. Whether a delay is reasonable "is based not on what litigants know, but what they might have known with the exercise of reasonable diligence."

Id. The allegations of wrongdoing in the Complaint center around the City's acceptance and use of grant funds from CTCL, which occurred during the summer of 2020, yet Complainants waited until May 2021 to file this Complaint. Complainants cannot assert in good faith that they "promptly" filed the Complaint. WIS. STAT. § 5.06(3). Further, the Complainants reasonably should have consulted the plethora of federal decisions upholding the acceptance of CTCL grant funds, especially since their counsel brought many of those cases.[5]

When the Wisconsin Supreme Court examined President Trump's decision to wait until after the election to challenge certain events that had occurred well before November, despite the fact that he could have made such a challenge when the events were announced, the court called the delay "patently unreasonable." *Trump*, 2020 WI 91, ¶ 21. The same is true here: Complainants could and should have brought their concerns to the Commission when the grants were accepted; to wait ten months—and after all grant funds have been expended—before filing the Complaint is patently unreasonable.

In a challenge to Texas municipalities accepting CTCL grant funds, the federal court wrote on the issue of timeliness. *Texas Voters All.*, 495 F. Supp. 3d 441, 471 (E.D. Tex. 2020). There, the municipalities publicly accepted the CTCL grants in September of 2020, but the plaintiffs waited until October 9th, 2020 to file a challenge. *Id.* The Court considered that the plaintiffs had notice of the municipalities' actions the previous month, and that it "was foreseeable that [the municipalities] would immediately spend these funds[.]" *Id.* Therefore, the Court held that the delay of one month "was unreasonable." *Id.* [6] The Complainants in the present matter delayed ten times as long, and this delay was similarly unreasonable.

---

[5] *See supra* note 1.

[6] WIS. STAT. § 5.06 contemplates short timelines, after it discusses the need to file promptly, it specifically limits the time to file certain actions to 10 days after a party should have known of a violation.

Presumably as a justification for the delay, Complainants point to certain public record requests that were filled in the early part of this year. However, when record requests were submitted or fulfilled is irrelevant to whether the Complaint is timely, because the requests themselves do not constitute circumstances giving rise to a complaint. Rather, the pertinent inquiry is when the complainants knew or should have known of those circumstances. *Trump*, 2020 WI 91, ¶ 13. As stated earlier, the fact that the City accepted CTCL grant funding was public information as of last summer. Moreover, though Complainants go to great lengths to detail the contents of many of those records request responses, the contents of those responses do not appear to have given rise to new legal arguments, as those proffered in the Complaint largely mirror those asserted in the unsuccessful challenges decided last fall and winter.[7] Additionally, even though they now have extensive records at their disposal, Complainants make many of their allegations "on information and belief," and ask the Commission to conduct additional investigations based solely on those spurious allegations. All of which, taken together, makes it clear that Complainants and their counsel seek to use the complaint procedure under Section 5.06 to sow further doubt as to the outcome of the November 2020 election, or for other political purposes, rather than to make any credible allegations of violations of elections law by

[7] For example, an argument that the Elections Clause of the United States Constitution foreclosed municipal acceptance of CTCL grant funds was rejected on numerous occasions. *Wisconsin Voters Alliance v. City of Racine et al.*, No. 20A75, *Wisconsin Voters All. v. City of Racine*, No. 20-3002 (7th Cir. Nov. 6, 2020), *Pennsylvania Voters All. v. Ctr. Cty., Pennsylvania*, 141 S. Ct. 1126 (2021), *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2021 WL 276700 (N.D. Iowa Jan. 27, 2021), *All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021), *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6591209 (E.D. Wis. Oct. 21, 2020), *Pennsylvania Voters All. v. Ctr. Cty.*, 496 F. Supp. 3d 861, 864 (M.D. Pa. 2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559 (N.D. Iowa Oct. 20, 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605987 (W.D. Mich. Oct. 19, 2020), *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937 (D. Minn. Oct. 16, 2020), *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), appeal dismissed sub nom. *Wisconsin Voters All. v. City of Racine*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605985 (W.D. Mich. Oct. 2, 2020); *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1252 (N.D. Ga. 2020); *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 448 (E.D. Tex. 2020).

Respondents. Indeed, the Complainants' counsel has recently been referred for possible sanctions for "political grandstanding" in another election lawsuit he brought. *Wisconsin Voters All. v. Pence*, No. CV 20-3791 (JEB), 2021 WL 686359 at *1 (D.D.C. Feb. 19, 2021).

The Complainants knew or should have known about the circumstances giving rise to their Complaint in July of 2020. Yet they failed to exercise the "[e]xtreme diligence and promptness [that] are required in election matters, particularly where actionable election practices are discovered prior to the election," *Trump*, 2020 WI 91, ¶ 11. Even a one month delay in challenging the acceptance of these specific grants is unreasonable, *Texas Voters All.*, 495 F. Supp. 3d 441, 471 (E.D. Tex. 2020), but the Complainants delayed almost ten months before filing the Complaint, and have provided no justification for such a delay. The first element of laches is therefore satisfied. *Trump*, 2020 WI 91, ¶ 13.

2. *The Respondents Did Not Know That This Claim Would be Raised*

The second element of laches requires that the Respondents lack knowledge that the Complaint would be filed. *Trump*, 2020 WI 91, ¶ 23. As the Respondents assert that they did not expect to have to defend such a suit, and since the record does not suggest otherwise, this element is met. *Id.*. Respondents and officials from myriad other jurisdictions have already had to respond to defend their acceptance of CTCL grant funds in federal court, and without exception, those legal arguments have been rejected.[8] In fact, Complainants' counsel brought an action in the Eastern District of Wisconsin against the Cities of Milwaukee, Madison, Green Bay, Racine, and Kenosha on the same grounds as those asserted in the Complaint, and that case was dismissed in its entirety after the judge determined that the plaintiffs were not likely to succeed on the merits. *Wisconsin Voters All. v. City of Racine*, No. 20-C-1487, 2020 WL

[8] Although the plaintiffs in those actions were different from the Complainants here, Complainants' counsel was an attorney of record for several such cases. *See supra* note 1.

6129510 (E.D. Wis. Oct. 14, 2020); *Wisconsin Voters All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021). Given the City's previous success against many of the same legal arguments asserted here, as well as the failure of those arguments in federal courts across the country, Respondents did not have any reason to expect that they would be subject to yet another proceeding, in yet another forum, to re-litigate this matter. Indeed, the federal case against the City of Kenosha was dismissed in January, and there is no reason to suspect to have to defend a case on the same issues twice. Therefore, the second element of laches is established.

3. *The Respondents are Prejudiced by the Complainants' Delay*

The final element of the laches analysis examines prejudice to the Respondents. "What amounts to prejudice . . . depends upon the facts and circumstances of each case, but it is generally held to be anything that places the party in a less favorable position." *Wren*, 389 Wis. 2d 516, ¶ 15. Waiting "until after the election to raise [an] issue is highly prejudicial." *Trump*, 2020 WI 91, ¶¶ 25-27; *Trump v. Wisconsin Elections Comm'n*, No. 20-CV-1785-BHL, 2020 WL 7318940, at *13 n.10 (E.D. Wis. Dec. 12, 2020), aff'd, 983 F.3d 919 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021) ("If these issues were as significant as plaintiff claims, he has only himself to blame for not raising them before the election."). Respondents are prejudiced in several ways by Complainants' unreasonable delay.

The Respondents are in a substantially worse position than it would have been in responding to a promptly filed complaint. Since last summer when, the CTCL grant funds were accepted, the City now has a new Clerk/Treasurer, with the former having retired. Additionally, the City employee who primarily worked with the grant funds took a new job with a different employer. Thus, the City has substantially less information to draw from in order to respond to the present challenge, than it would have had if this Complaint would have been filed promptly.

The City has been and continues to be prejudiced by the ceaseless attacks on the free and fair election that occurred in November, 2020, and that prejudice has been amplified each time a new action, complaint, investigation, etc., has been initiated against the City. One significant impact of such a substantial delay in filing this Complaint is the continued undermining of public confidence in the legitimacy of the City's elections over an extended period of time. *Trump*, 2020 WI 91, ¶¶ 29-30 (The failure to promptly file an election challenge "affects everyone, causing needless litigation and undermining confidence in the election results.") This is especially true when Complainants waited ten months, and then attempt to call the election into question yet again by dredging up the same legal arguments that have been rejected so many times before.[9] Under these circumstances, prejudice to the City and its entire electorate is clear, as is the harm to the City Respondents' credibility as public servants.[10] As the Wisconsin Supreme Court succinctly put it:

> Unreasonable delay in the election context poses a particular danger—not just to municipalities, candidates, and voters, but to the entire administration of justice. The issues raised in this case, had they been pressed earlier, could have been resolved long before the election. Failure to do so affects everyone, causing needless litigation and undermining confidence in the election results.

Trump, 394 Wis. 2d 629, ¶ 30.

In a related manner, Respondents are also prejudiced by again having to respond to baseless claims that have already been addressed and rejected in several other fora. Back in September 2020, Complainants' counsel, representing a different group of plaintiffs, brought suit against the City, as well as the Cities of Racine, Kenosha, Milwaukee, and Madison, based on

[9] *See supra* note 1.

[10] This is especially true for City Clerk/Treasurer Matt Krauter, who was not even employed by the City of Kenosha at the time that the CTCL grant was accepted, much less was he involved in the decision to accept the funds. Exhibit A to the Affidavit of Matt Krauter.

the many of the same legal theories. *Wisconsin Voters Alliance*, 2020 WL 6578061. Rather than doing so concurrently with that lawsuit—or prior to filing that suit, as required by statute, WIS. STAT. § 5.06(2)—Complainants' counsel did not file anything with the Commission until six months after Judge Griesbach had already rejected the legal arguments contained therein.[11] Exhibit G to the Affidavit of Bryan A. Charbogian (The arguments regarding the Elections Clause, equal protection, and the grant imposing private corporate conditions were already addressed in that case.). Respondents should not have to re-litigate previously decided issues.

The principles of claim preclusion and issue preclusion are instructive here. Claim preclusion bars the re-litigation of an entire *claim* between two parties to a lawsuit who were also parties in a previous lawsuit in which the same claim was resolved; issue preclusion prevents a party from re-litigating an *issue* that was resolved in a previous lawsuit, even if the issue is related to a different claim in the new lawsuit. The underlying rationale for both of these doctrines is the idea that parties should not be given multiple "kicks at the can"; once an issue is decided, the parties cannot continue to sue one another in an attempt to yield a different outcome.

That idea is particularly applicable to this matter. Here, Respondents are prejudiced by having to respond to legal claims and issues identical to ones that have already been considered and rejected in other fora, including federal court and even complaints before this Commission. Not only have the legal theories advanced in the Complaint been rejected by federal courts previously, they have been repeatedly rejected.[12] Further, the Commission itself has already opined on the acceptance and use of private grant funds. Commission Administrator Meagan

[11] Judge Griesbach's decision in *Wisconsin Voters Alliance v. City of Racine, et al.*, was one of many federal decisions concluding that, among other things, there was no merit to the claims that acceptance of CTCL grant funds constituted a violation of the Elections clause, the Supremacy Clause, and/or the Help America Vote Act. 2020 WL 6129510; *also see, e.g.*, *Iowa Voter Alliance*, 2020 WL 6151559; *Texas Voters Alliance v. Dallas County*, 495 F. Supp. 3d 441; *Georgia Voter Alliance v. Fulton County*, 499 F. Supp. 3d 1250.

[12] *See supra* note 1.

Wolfe testified to the Wisconsin Assembly Committee on Campaigns and Elections about complaints to the Commission that raised those specific issues, explaining, "[t]he Commission dismissed the complaint, noting that there is nothing in Wisconsin elections statutes which prohibits, proscribes, or even discusses grant funding." *Informational Hr'g on Green Bay Election Before the Assemb. Comm. on Campaigns and Elections*, 2021-22 Sess. (March 31, 2021) (testimony of Meagan Wolfe, Administrator, Wisconsin Elections Commission), *available at* https://wiseye.org/2021/03/31/assembly-committee-on-campaigns-and-elections-14/ (4:40-5:15).

The principles underlying claim and issue preclusion provide guidance on the issue of prejudice in this matter. In the same way that claim and issue preclusion protect a party to a lawsuit from harassment by another party who may otherwise endlessly file successive lawsuits and attempt to re-litigate settled issues and/or claims, Respondents should be protected from having to re-litigate the same arguments time and again.

The Complaint attempts to link the actions of five municipalities, calling them the "Wisconsin Five;" but the Complainants' use of a catchy nickname cannot mask the fact that CTCL grant funds were accepted by 218 Wisconsin municipalities, both urban and rural, and both conservative and liberal. Indeed, the Respondents would be further prejudiced by the WEC determining that they could not receive grant funds, but allowing others to accept funding. *Trump v. Biden*, 2020 WI 91, ¶ 26, 394 Wis. 2d 629, 644–45, 951 N.W.2d 568, 576, cert. denied, 141 S. Ct. 1387 (2021) ("Applying any new processes to two counties, and not statewide, is also unfair to nearly everyone involved in the election process, especially the voters"); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *4–5 (N.D. Iowa Oct. 20, 2020) ("Prohibiting only these two counties from using the grants would put their residents at a

disadvantage as compared to the residents of those counties that are not judicially restrained from utilizing CTCL grant money."). Further, the Complainants appear to take no issue with municipalities that have consistently voted for republican presidential candidates, such as the Cities of Waukesha and Brookfield, receiving CTCL grant funds.[13] *See* COVID-19 Response Grants, Center for Tech & Civic Life (https://www.techandciviclife.org/our-work/election-officials/grants/) (last accessed June, 14, 2021); Election, Wisconsin Elections Commission (https://elections.wi.gov/elections-voting/results-all) (last accessed June 14, 2021).

Complainants did not file the Complaint "promptly so as not to prejudice the rights of" the Respondents. WIS. STAT. § 5.06(3). They unreasonably delayed filing, doing so in May 2021, rather than July 2020, when the circumstances complained of arose; Respondents had no reason to suspect that they would be sued again after successfully overcoming a nearly identical challenge in federal court months ago; and Respondents have been prejudiced by that unreasonable delay. Accordingly, under both Section 5.06(3) and the doctrine of laches, the Complaint should be dismissed as untimely.

B. The Complaint Does Not State Probable Cause

Wisconsin Statutes section 5.06(1) requires that a complaint "set forth such facts . . . to show probable cause to believe that a violation of law or abuse of discretion has occurred or will occur." *See also* WIS. ADMIN. CODE § EL 20.03(3). "The complaint shall specify the statutory basis for the complaint and shall set forth the facts which are alleged to establish probable cause." *Id.* "Information which may establish probable cause includes allegations that set forth which persons are involved; what those persons are alleged to have done; where the activity is believed to have occurred; when the activity is alleged to have occurred and who are the

[13] Even less populous communities with strong conservative voting histories received CTCL grant funding, but the Complainants say nothing about them. An example is the Town of Ixonia, where in 2020 the republican presidential candidate won 72% of votes cast for a major parties' candidate. In 2016 it was 73%, in 2012, it was 72%, and in 2008 it was 66%. *Id.*

witnesses to the events." *Id.* Respondents submit that the Complaint does not establish probable cause that a violation of law has occurred, and therefore should have been returned to Complainants upon initial review, and should be dismissed now.[14]

To begin, the Mayor is not a proper party to this Complaint. The WEC has the authority to hear complaints only when they are against "an election official[.]" WIS. STAT. § 5.06(1). An election official is defined as "an individual who is charged with any duties relating to the conduct of an election." WIS. STAT. § 5.02(4e). However, "[u]nder Wisconsin's election statutes, mayors play no formal role in presidential elections." *Trump v. Wisconsin Elections Comm'n*, No. 20-CV-1785-BHL, 2020 WL 7318940, at *3 (E.D. Wis. Dec. 12, 2020), aff'd, 983 F.3d 919 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021). Thus, Mayor Antaramian was inappropriately named in this case. WEC has no authority to adjudicate this matter as it relates to him, and he should be immediately dismissed.

Significantly, Complainants have largely presented legal arguments in support of a claim of a violation of election laws which have already been rejected by numerous courts across the country.[15] WIS. ADMIN. CODE § EL 20.03(3). Though Complainants' same counsel was faulted by numerous courts for failing to articulate a *specific* provision of federal or state law that prohibits the acceptance of private grant funds to fund an election, *see, e.g.*, *Wisconsin Voters Alliance*, 2020 WL 6129510; *Iowa Voter Alliance v. Black Hawk County*, No. C20-2078-LTS, 2020 WL 6151559 (N.D. Iowa Oct. 20, 2020); the instant Complaint also fails to identify with any specificity the election laws containing such a prohibition. *See generally* Complaint; WIS.

[14] Respondents respectfully submit that rather than requiring an Answer from Respondents, the adjudicators, standing in Administrator Wolfe's position, should have conducted an initial determination as required by Wis. Admin. Code section EL 20.04(1) and sent the Complaint back to Complainants for being untimely and lacking probable cause.

[15] *See supra* note 1.

ADMIN. CODE § EL 20.03(3) ("The complaint shall specify the statutory basis for the complaint."). Notably, the Complaint fails to point the WEC to any statute that actually prohibits municipalities from accepting grant money for elections.

The merits of each legal theory offered by the Complaint will be discussed in the following sections, but none hold water, and many have already been rejected by multiple federal courts. The Complaint refers to the Elections Clause of the United States Constitution as barring the acceptance of CTCL grant funding, however, federal courts have repeatedly held that it does no such thing.[16] The Complaint further claims the Electors Clause was violated, but under analogous circumstances the Seventh Circuit Court of Appeals determined "Wisconsin lawfully appointed its electors[.]" *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 927 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021) (alteration bracketed). The Complaint then alleges a violation of Wisconsin's absentee voting law, however its citation thereto is misplaced at best. The Complaint cites a statement of legislative policy as if it was a statute imposing a specific requirement on the process of absentee voting; regardless, even the statement of policy was not violated by its plain terms. Thus, the Complainants have fallen well short of demonstrating probable cause to believe that a violation of law or abuse of discretion occurred. At the end of the day, the Complaint can point to no law that prohibits the conduct complained of, however, there is a specific law that prohibits the filing of a complaint without citing a statute that has been violated, WIS. ADMIN. CODE § EL 20.03(3), therefore, the Complaint must be dismissed.

Additionally, even if it had cited a relevant statute, the Complaint frequently fails to state facts specific to the City of Kenosha. The Complaint often complains of actions allegedly taken in other communities, *e.g.* Complaint at ¶ 64, 65, 67, 68, 71, 72, 73, and then says that the Complainants believe similar things occurred in the City of Kenosha. However, a simple

[16] *See supra* note 1.

statement that they think the same things happened in Kenosha establishes nothing, and the Complaint never does establish a legitimate basis for such belief. Indeed, the majority of the Complaint's attached documentation reflects the experiences of other communities and is not specific to the City of Kenosha. It says nothing about what the Respondents factually did or did not do. Upon review, the attached documents do not appear to contain a single reference to Respondent Matt Krauter,[17] and they contain almost nothing about Respondent John Antaramian. Attaching some scattered emails between various City employees and CTCL does not establish the Complainants' allegations.

In another telling sign, after 30 pages of allegations related to the November 2020 election, Complainants make a request for relief that asks the Commission to conduct an investigation into the election and determine whether any state or federal election laws were violated. Complaint p. 31-32. They even request that said investigation consist of extensive fact-gathering via "document production, depositions, and testimony" of a whole host of individuals. *Id.* Even Complainants seem to be aware that they have not sufficiently shown probable cause to believe any election laws were violated: rather than articulating the specific legal and factual bases demonstrating probable cause, and requesting corresponding relief, Complainants instead ask the Commission to conduct an "investigation" in the hopes of *possibly* finding some violation of the law. Complainants are far from providing facts establishing probable cause. WIS. ADMIN. CODE § EL 20.03(3). Accordingly, the Complaint should be dismissed, both as untimely and for failing to show probable cause to believe that a violation of law has occurred.[18]

[17] More fundamentally, he was not even employed by the City when it accepted the CTCL grant funding. Exhibit A to the Affidavit of Matt Krauter.

[18] The Complaint has alleged no violation of law, and even if it had, a complaint about such would be barred as untimely, but putting both of those concerns about past action aside for the moment, the Complaint alleges that improper conduct will continue in the future. Yet, it has failed to meet its burden to demonstrate probable cause that any unlawful act "will occur" in the future. WIS. STAT. § 5.06(1). The only facts supplied as to whether any grant funds will be awarded in the future is a citation to the attached documents at bates number 8049-8057,

II. Complainants' Theories Find No Basis in Law

Complainants assert that the City violated both Wisconsin and federal election laws by accepting the CTCL grant funds, but these theories find no basis in law. Specifically, they assert that by accepting those funds, the City violated the Electors and Elections Clauses of the U.S. Constitution, as well as provisions of state law that delegate election administration authority exclusively to the Commission. As will be explained in this section, all of Complainants' arguments fail—and in fact most have been rejected before. *E.g. Pennsylvania Voters All. v. Ctr. Cty.*, 496 F. Supp. 3d 861, 866 (M.D. Pa. 2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020) ("Plaintiffs make sweeping constitutional claims. But there is less to this case than meets the eye."); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2021 WL 276700, at *5–8 n.3 (N.D. Iowa Jan. 27, 2021) ("I remain thoroughly unconvinced that the counties violated any particular law by accepting the CTCL grants."); *All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166, at *3 (E.D. Wis. Jan. 19, 2021) ("Plaintiffs have offered only a political argument for prohibiting municipalities from accepting money from private entities to assist in the funding of elections for public offices."); *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 470 (E.D. Tex. 2020) ("the Counties' actions are legal" in accepting CTCL grant funds).

Complainants also offer a second argument, alleging that Respondents also violated state law by agreeing to the conditions placed on the grant of funds by CTCL. Complainants point to no specific statutory provision that prevents a municipality receiving grant funds subject to conditions from the grantor. Moreover, as detailed in this section, multiple courts, including the U.S. District Court for the Eastern District of Wisconsin, have concluded that the arguments

Complaint at ¶ 84, however, those pages do not exist in the attached documents. Thus, the Complaint points to no facts sufficient to give WEC jurisdiction over a future unlawful act, much less to establish probable cause for a future violation of law.

asserted in the Complaint fail to support the broader proposition—that is, that *any* receipt of private grant funds is a violation of applicable law. *E.g.*, *Wisconsin Voters Alliance*, 2020 WL 6129510, *2 ("[T]he Court finds nothing in the statutes Plaintiffs cite, either directly or indirectly, that can be fairly construed as prohibiting the defendant Cities from accepting funds from CTCL."). The Complainants cannot succeed on either iteration of their argument. Exhibit G to the Affidavit of Bryan Charbogian (The arguments regarding the Elections Clause, equal protection, and the grant imposing private corporate conditions were already addressed by Judge Griesbach.) Accordingly, these two interrelated arguments will be treated as one for purposes of this Answer.

A. The Elections Clause Does Not Prohibit The Receipt of Grant Funds

Complainants assert that the City's receipt of CTCL grant funding violates the Elections Clause of the U.S. Constitution. This same assertion has been rejected in courts across the country,[19] however, for the reasons explained in this section.

The Elections Clause gives state legislatures the authority to set the "times, places and manner" of federal elections, and gives Congress the authority to alter those regulations. U.S. Const. art. I, § 4, cl. 1. It operates as a "default provision[;]" where States are responsible for the mechanics of running congressional elections, though Congress retains the authority to override the State's legislative choices. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8–9, 133 S. Ct. 2247, 2253–54 (2013). The State election procedures control unless Congress has enacted a law that "directly conflict[s]" with that of the State. *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 466 (E.D. Tex. 2020) (bracketed language is original); *Arizona*, 570 U.S. 1, 8–9 (2013). This Clause has a broad scope, as the terms "Times, Places, and Manner" are "comprehensive words[]" *Id.* at 8–9 (alteration bracketed), and it delegates broad authority on

[19] *See also supra* note 1.

matters such as election notices, registration, protection of voters, and supervision of voting. *Cook v. Gralike*, 531 U.S. 510, 523–24, 121 S. Ct. 1029, 1038 (2001).

Complainants allege that "the election authority of Congress, the Wisconsin state legislature, the Commission and the Kenosha City Clerk" was "diverted" by the Respondents, ostensibly in violation of the Elections Clause. Complaint at ¶ 83. Complainants make no attempt to explain with specificity how the Elections Clause is implicated, however. Though the Elections Clause allows Congress to pre-empt state election statutes by passing a law, the Complainants have cited no act of Congress that has been violated. Additionally, this same argument has already been rejected in other federal actions. For example, while analyzing an equivalent argument in the *Georgia Voters Alliance* case, Judge May, federal district court judge for the Northern District of Georgia, explained: "Fulton County[, Georgia]'s acceptance of private funds, standing alone, does not impede Georgia's duty to prescribe the time, place, and manner of elections, and Plaintiffs cite no authority to the contrary." *Georgia Voter Alliance v. Fulton County*, 499 F. Supp. 3d 1250, 1255 (N.D. Ga. 2020); *see also Iowa Voter Alliance*, 2020 WL 6151559, at *3. In Iowa, the Court wrote that the "Plaintiffs have not provided any authority, nor have I found any, suggesting that the Elections Clause imposes specific limits or restrictions as to how a federal election must be funded[,]" *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *3 (N.D. Iowa Oct. 20, 2020) (alterations bracketed), and went on to write in a separate opinion, "I remain thoroughly unconvinced that the counties violated any particular law by accepting the CTCL grants." *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2021 WL 276700, at *5–8 n.3 (N.D. Iowa Jan. 27, 2021). In Texas, the Court put it plainly by holding that the municipalities' acceptance of CTCL grant funds was "legal." *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 470 (E.D. Tex. 2020). Complainants' counsel

argued to Judge Griesbach, in the Eastern District of Wisconsin, that the Elections Clause prohibited the City of Kenosha Respondents from accepting CTCL grant funds. The Court wrote that it was a mere "political argument for prohibiting municipalities from accepting money from private entities to assist in the funding of elections for public offices." *All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021).

As repeatedly held by federal courts, there are no laws that prevent the Respondents from accepting the CTCL grant funds. Since the Election Clause operates when there is a specific federal law that directly contradicts a state law, the lack of a federal law contradicting the acceptance of the grant is fatal to the Complaint.[20] *Texas Voters All.*, 495 F. Supp. 3d 441, 466 (E.D. Tex. 2020); *Arizona*, 570 U.S. 1, 8–9 (2013). The Complainants' assertion that the Elections Clause "provides no power to municipal governments" to accept grant funds turns the analysis on its head. Complaint at ¶15. The Elections Clause is a default provision where State election laws are valid unless specifically outlawed by Congress. *Arizona*, 570 U.S. 1, 8–9 (2013). The Complainants have stated it in the reverse, that the Elections Clause serves to disallow electoral procedures, unless specifically authorized. *Texas Voters All.*, 495 F. Supp. 3d 441 (E.D. Tex. 2020). This interpretation is contrary to multiple United States Supreme Court precedents[21] and a host of federal decisions specifically rejecting this argument in regards to this specific grant.[22]

---

[20] The absence of an act of Congress is further notable because Congress has been intentional in its decisions to use its authority to re-write state election procedures or to leave a state process in place, and it "has regularly exercised its Elections Clause power." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2495 (2019).

[21] *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8–9, 133 S. Ct. 2247, 2253–54 (2013); *Cook v. Gralike*, 531 U.S. 510, 522–23, 121 S. Ct. 1029, 1037–38 (2001).

[22] *Wisconsin Voters Alliance v. City of Racine et al.*, No. 20A75, *Wisconsin Voters All. v. City of Racine*, No. 20-3002 (7th Cir. Nov. 6, 2020), *Pennsylvania Voters All. v. Ctr. Cty., Pennsylvania*, 141 S. Ct. 1126 (2021), *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2021 WL 276700 (N.D. Iowa Jan. 27, 2021), *All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021), *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6591209 (E.D. Wis. Oct. 21, 2020), *Pennsylvania Voters All. v. Ctr. Cty.*, 496 F. Supp. 3d 861, 864 (M.D. Pa.

Even so, there is statutory authority for the City of Kenosha to accept CTCL grant funds. The legislature has also assigned significant authority and duties under state election laws to municipal clerks. *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 923 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021); *Trump v. Wisconsin Elections Comm'n*, No. 20-CV-1785-BHL, 2020 WL 7318940, at *2 (E.D. Wis. Dec. 12, 2020), aff'd, 983 F.3d 919 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021); *State ex rel. Zignego v. Wisconsin Elections Comm'n*, 2020 WI App 17, ¶ 42, 391 Wis. 2d 441, 464–65, 941 N.W.2d 284, 295, aff'd as modified, 2021 WI 32, ¶ 42, 957 N.W.2d 208; WIS. STAT. § 7.15. "Municipalities run the election, and each municipality's own clerk 'has charge and supervision of elections and registration in the municipality."[23] *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 923 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021). Among their many statutory responsibilities, clerks are directed to "[e]quip polling places," "[p]rovide for the purchase and maintenance of election equipment," "[p]repare" and "distribute ballots and provide other supplies for conducting all elections," "[p]repare official absentee ballots," "[p]repare the necessary notices and publications in connection with the conduct of elections or registrations," "[t]rain election officials" and "advise them of changes in laws, rules and procedures," and educate voters. WIS. STAT. §§ 7.15(1), (9),

2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559 (N.D. Iowa Oct. 20, 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605987 (W.D. Mich. Oct. 19, 2020), *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937 (D. Minn. Oct. 16, 2020), *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), appeal dismissed sub nom. *Wisconsin Voters All. v. City of Racine*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605985 (W.D. Mich. Oct. 2, 2020); *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1252 (N.D. Ga. 2020); *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 448 (E.D. Tex. 2020).

[23] That municipalities fund elections is a common practice nationally, *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *1 (D. Minn. Oct. 16, 2020) (citing Congressional Research Service, The State and Local Role in Election Administration: Duties and Structures, at Summary (Mar. 4, 2019), available at https://fas.org/sgp/crs/misc/R45549.pdf (last visited Oct. 13, 2020)), and the City of Kenosha has self-funded its presidential elections for years. *Budget Documents*, City of Kenosha (https://www.kenosha.org/departments/finance#budget-documents) (accessed June 9, 2021) (containing the City's budgets dating back to 2008, including funds budgeted for elections).

(11). The CTCL grant allows the Clerk to better perform these functions. Indeed, every federal court to hear the question has determined that municipalities were within their authority to accept CTCL grant funding,[24] the Respondents were as well.

B. The Complaint's Absentee Ballot Allegation Is A Non-Starter

The Complainants attempt to shoehorn language from WIS. STAT. § 6.84(1) into the issue of authority to accept grant funding, but this argument is a non-starter. Complaint at ¶ 52. The statute is a statement of policy,[25] not a list of requirements. The next paragraph, § 6.84(2), states where one can look to find requirements for absentee balloting. Notably, the Complaint alleges no violation of this or any other provision of absentee ballot law. Ignoring the distinction between policy and mandate, the Complaint recites the statement of legislative policy and alleges that CTCL grants were being used to over-zealously solicit people to vote absentee. The aforementioned problems with the Complaint's argument notwithstanding, the legislative policy is not to prevent the solicitation of absentee votes, but the *over-zealous* solicitation thereof. WIS. STAT. § 6.84(1). Not only is absentee voting far safer due to the global pandemic, but the Wisconsin Supreme Court has recognized that the pandemic itself causes absentee vote totals to rise:

> Because of the global COVID-19 pandemic, municipalities have more absentee ballot requests on file than ever before. Unofficial tallies for the August 2020 primary election indicate that over 80% of voters participated by mail, and both the Commission and local election officials are preparing for a volume of absentee voting for the general election at around the 80% level.

Hawkins v. Wisconsin Elections Comm'n, 2020 WI 75, ¶ 7, 393 Wis. 2d 629, 633–34, 948 N.W.2d 877, 879 (order). Even it could be a basis to file a complaint, nothing in the Complaint

[24] *See supra* note 1.

[25] Indeed, it is titled "Legislative Policy."

or its supporting documentation establishes that absentee votes were over-zealously solicited. Even if the WEC takes the Complaint's allegations at face value,[26] they would not state a violation of law. Thus, the Complaint's allegations regarding absentee ballots fail.

C. The Electors Clause Does Not Prohibit The Receipt of Grant Funds

The Complaint also alleges a violation of the Electors Clause, which states that each state shall appoint a number of presidential electors "in such manner as the legislature thereof may direct." U.S. Const. art. II, § 1, cl. 2. In support of their claim that Respondents may have violated the Electors clause, Complainants rely on a quote from the Seventh Circuit's decision in *Trump v. Wisconsin Elections Commission*, 983 F.3d 919, in which the court explained that in other cases, courts have found that a significant departure from "legislative scheme for appointing electors"—that is, the statutory apportionment of responsibility for election administration—may constitute a violation of the Electors clause. 983 F.3d at 926-27 (citing *Bush v. Gore*, 531 U.S. 98, 116, 121 S. Ct. 525 (2000) (Rehnquist, C.J., concurring) (finding departure from election administration scheme in when Florida Supreme Court rejected the Secretary of State's interpretation of election laws); *Carson v. Simon*, 978 F.3d 1051, 1060 (2020) (holding that the Minnesota Secretary of State likely violated the Electors Clause by extending the deadline for receipt of absentee ballots without having statutory responsibility for election administration)). Complainants conveniently truncated the paragraph when including it in the Complaint, however—the remainder of the paragraph states, "[b]y contrast, whatever actions the Commission took here, it took under color of authority expressly granted to it by the Legislature. And that authority is not diminished by allegations that the Commission erred in its exercise." *Trump v. WEC*, 983 F.3d at 927. In other words, an officer or entity legislatively

[26] To be clear, the Respondents dispute the accuracy of all of the allegations against them regarding absentee balloting. But even if the WEC took them at face value, the allegations would fail.

endowed with election-administration authority does not violate the Electors clause when acting under color of that authority.

As part of the "legislative scheme" for appointing electors in Wisconsin, the legislature has divided responsibility for the administration of elections. The legislature created the Commission in 2015 and endowed it with the responsibility for the administration of election laws. WIS. STAT. § 5.05. However, the legislature has also assigned significant authority and duties under state election laws to municipal clerks. WIS. STAT. § 7.15. Among their many statutory responsibilities, clerks are directed to "[e]quip polling places," "[p]rovide for the purchase and maintenance of election equipment," "[p]repare" and "distribute ballots and provide other supplies for conducting all elections," "[p]repare official absentee ballots," "[p]repare the necessary notices and publications in connection with the conduct of elections or registrations," "[t]rain election officials" and "advise them of changes in laws, rules and procedures," and educate voters. WIS. STAT. §§ 7.15(1), (9), (11). The City Clerk's office took necessary actions to fulfill its responsibilities for the administration of the elections in 2020, such as using CTCL grant funds. Those actions were taken under color of the authority granted by the Wisconsin Legislature, and, just as in the *Trump v. WEC* case, "that authority is not diminished by allegations that [the Clerk] erred in its exercise." 983 F.3d 927.

However, there are additional reasons for rejecting the Complainants' Electors Clause argument. The Seventh Circuit recognized that there are at least two possible interpretations of the Elections Clause. *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 926–27 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021). The first being that the Clause has nothing to do with whether an election was properly administered, and thus directly foreclosing the Complainants' argument that the Clause was violated because the election was improperly administered.

Whereas the second would interpret the term "Manner" in the Electors Clause to encompass "acts necessarily antecedent and subsidiary to the method for appointing electors—in short, Wisconsin's conduct of its general election." *Id.* The Seventh Circuit did not resolve which was the proper interpretation, because it determined that under either theory Wisconsin's electors were lawfully appointed. *Id.* Though the U.S. Supreme Court has not resolved the question, in *Chiafalo*, one of the Court's most recent Electors Clause cases, Justice Clarence Thomas wrote in the decision's lone concurring opinion that in his view, the proper interpretation may be the first—that the Electors Clause does not extend to the conduct of a general election. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2330 (2020) (Thomas, J., concurring). In order for the Complainants' claims to have even a chance of success, WEC would have to make new law and go further than either the Seventh Circuit or the U.S. Supreme Court has, and find that the proper interpretation of the Electors Clause extends to the conduct of a general election, *i.e.* the second interpretation.

Even if the Commission interpreted the Electors Clause to encompass the conduct of Wisconsin's general election, the Complainants' arguments would still fail. The Complainants cite to Chief Justice Rehnquist's concurring opinion in *Bush v. Gore* and the Eighth Circuit's opinion in *Carson v. Smith* as supporting their Electors Clause allegations, but those opinions are of no aid to the them. First, the Seventh Circuit addressed both the *Bush* and *Carson* opinions prior to finding that Wisconsin's electors were lawfully appointed. The Seventh Circuit wrote,

> In his concurring opinion in Bush v. Gore, Chief Justice Rehnquist suggested that the proper inquiry under the Electors Clause is to ask whether a state conducted the election in a manner substantially consistent with the "legislative scheme" for appointing electors. 531 U.S. 98, 113, 121 S.Ct. 525 (2000) (Rehnquist, C.J., concurring). *We would not go further and ask, for example, whether Wisconsin's officials interpreted perfectly*

> *"[i]solated sections" of the elections code.* Id. at 114, 121 S.Ct. 525.

Trump v. Wisconsin Elections Comm'n, 983 F.3d 919, 926–27 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021) (italics added). The italicized language is critical, the Seventh Circuit held that the proper inquiry in whether an election was "substantially consistent" with the legislative scheme involves looking at the whole system of laws regarding elections, and that the proper inquiry is not whether isolated sections of the law have been followed. Thus, to succeed, the Complainants would have to show that Wisconsin's election was not held in a manner substantially consistent with the whole of the State's legislative scheme, rather than pointing to isolated sections of the elections code. However, the Complaint fails to demonstrate even a single violation of an isolated section of the election code, which is fatal to their Electors Clause claim. Second, the factual circumstances of *Bush* and *Carson*, are distinct from Wisconsin's election. In *Bush*, the Florida Supreme Court had unlawfully extended the 7-day statutory certification deadline after the Presidential election. *Bush v. Gore*, 531 U.S. 98, 117–20, 121 S. Ct. 525, 536–38 (2000) (Rehnquist, C.J., concurring). In *Carson v. Smith*, nearly the same thing happened, as the case turned on a statutory deadline for ballot submission being altered. *Carson v. Simon*, 978 F.3d 1051, 1054 (8th Cir. 2020). In contrast, Wisconsin's election did not see any deadlines extended without legislative consent. Thus, the Complainants' Electors Clause claims fail any of four ways. The end result is as the Seventh Circuit held, "Wisconsin lawfully appointed its electors in the manner directed by its Legislature." *Trump v. Wisconsin Elections Comm'n*, 983 F.3d 919, 927 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021).

D. Acceptance Of Grant Funds Falls Under The City's Home Rule Authority

Complainants' arguments also fail for reasons beyond the lack of federal or state law prohibiting the use of private grant funds. For one, municipalities, and municipal clerks in particular, possess broad authority with respect to the administration of elections within their jurisdictions.[27] *See, e.g.*, WIS. STAT. § 7.15. This is also consistent with the long-established principles of home rule. Elements of the administration of elections are matters of statewide concern; accordingly, the legislature has created a statutory structure within which all elections must be administered, and has designated the Commission as the entity that administers the state's elections. Certain other elements of election administration, however, are matters of local concern, subject to local control under municipal home rule authority. Wis. Const. art. XI, § 3. In the Iowa challenge to accepting CTCL grant funds, Judge Strand interpreted a similar provision of Iowa law as granting municipalities the authority to accept CTCL grant funding. The Court noted that an Iowa county has the authority to "perform any function it deems appropriate to protect and preserve the rights, privileges, and preserve . . . and improve the peace, safety, health, welfare, comfort, and convenience" of its residents. *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *3 (N.D. Iowa Oct. 20, 2020). The Court held that this language encompassed the authority to receive and use CTCL grant funds, as the funding served those purposes. *Id.* Here too, the City had comparable authority to accept CTCL grant funding. WIS. STATS. §§ 66.0101; 62.11(5); 62.09.

A municipality may exercise its home rule authority to come up with the most appropriate solution to fit its unique circumstances. This includes the state leaving it up to municipalities to fund election expenditures that exceed federal and state funds. In 2020, the

[27] Especially considering that the November 2020 election was not *only* a federal election. *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 455 (E.D. Tex. 2020). Even if the Elections or Electors Clause was to prohibit the Respondents from accepting CTCL grant funds, it would only be in regard to federal elections, and would not prohibit the Respondents from accepting or using the funds for state and local elections, which were occurring at the same time. *Id.*

City's unique local circumstances included being in the middle of the COVID-19 pandemic, expecting exponentially higher numbers of absentee ballots than in past years, facing a critical shortage of poll workers, having spent the entire budget for all 2020 elections on the April 2020 election alone, and myriad other difficulties. *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 449 (E.D. Tex. 2020); *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *2 (D. Minn. Oct. 16, 2020). The only workable solution was an influx of grant money to ensure that the City had necessary equipment and staff to make the fall elections far more successful than the April 2020 election had been. Exhibit A to the Affidavit of Matt Krauter No statutory provision prohibits the City from accepting outside funding for the purpose of administering an election; the City was therefore well within its rights to seek out and accept the grant funds from CTCL, and to put those funds to use as described above.

E. Commission Precedent And Estoppel Supports Dismissal

As mentioned above, the Commission may have already addressed the issue of municipal receipt of private grant funds. Administrator Wolfe told the Assembly Committee on Campaigns and Elections that Commission staff worked with the City and others "to ensure that local election officials had the information and resources they needed to administer a successful election in November." (*Informational Hearing on the Green Bay Election Before the Assemb. Comm. on Campaigns and Elections*, 2021-22 Sess. (March 31, 2021) (testimony of Meagan Wolfe, Administrator, Wisconsin Elections Commission), *available at* https://wiseye.org/2021/03/31/assembly-committee-on-campaigns-and-elections-14/ (4:03-4:16).) Administrator Wolfe further informed the Committee that a complaint concerning whether municipal election entities could accept and use private grant funds had been filed with

the Commission, and that "the Commission dismissed the complaint, noting that there is nothing in Wisconsin elections statutes which prohibits, proscribes, or even discusses grant funding." (*Id.* at 4:40 to 5:15.) The same is true regarding federal law, there is none that prohibit the acceptance of these grants. In short, there is nothing in any law Complainants cite, whether federal or state, that addresses the issue of private grant funding, let alone prohibits it. Accordingly, consistent with Commission precedent and the many federal cases that have preceded it, the Complaint should be dismissed.

F. CTCL Grant Funds Were Not Targeted Toward Large Progressive Cities

The Complaint briefly alleges that CTCL grants were targeted toward large, urban cities, with the implication being that CTCL sought to favor one political party over another, but this claim is wholly frivolous. *E.g.* Complaint at ¶¶ 22, 54, 55. Far from being targeted, the City of Kenosha was one of over a thousand municipalities to receive funding, including 218 in Wisconsin. *See* COVID-19 Response Grants, Center for Tech & Civic Life (https://www.techandciviclife.org/our-work/election-officials/grants/) (last accessed June, 14, 2021). Rather than the recipients consisting of large, urban, municipalities with long voting histories of voting for one political party, "most applicants [serve] jurisdictions with fewer than 25,000 registered voters." *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/ TNL), 2020 WL 6119937, at *1–2 (D. Minn. Oct. 16, 2020) (alteration bracketed). Indeed, every eligible municipality that applied for the grant was approved, regardless of political affiliation. *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 449 (E.D. Tex. 2020). Indeed, many Wisconsin municipalities with strong histories of voting for conservative candidates were among the grant recipients; these include cities such as Waukesha and Brookfield, and small towns such as Ixonia. *See* COVID-19 Response Grants, Center for Tech & Civic Life

(https://www.techandciviclife.org/our-work/election-officials/grants/) (last accessed June, 14, 2021); Election, Wisconsin Elections Commission (https://elections.wi.gov/elections-voting/results-all) (last accessed June 14, 2021). Indeed every court to consider whether there was anything unequal about the CTCL grants has rejected the challenge as counter-factual and merit-less. *E.g. All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166, at *3 (E.D. Wis. Jan. 19, 2021), *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1252 (N.D. Ga. 2020), *Pennsylvania Voters All. v. Ctr. Cty.*, 496 F. Supp. 3d 861, 865 (M.D. Pa. 2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020), *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *4 (N.D. Iowa Oct. 20, 2020), *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 452 (E.D. Tex. 2020), *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605987, at *2 (W.D. Mich. Oct. 19, 2020), *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937, at *7 (D. Minn. Oct. 16, 2020).

However, though the CTCL grant funds were accepted by 218 Wisconsin Municipalities, the Complainants complain about the actions of only those that they perceive as having a difference of political opinion. Indeed, to single out the Respondents and determine that they alone of the 218 municipalities should not receive CTCL grant funding would be unequal. *See Trump v. Biden*, 2020 WI 91, ¶ 26, 394 Wis. 2d 629, 644–45, 951 N.W.2d 568, 576, cert. denied, 141 S. Ct. 1387 (2021) ("Applying any new processes to two counties, and not statewide, is also unfair to nearly everyone involved in the election process, especially the voters"); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *4–5 (N.D. Iowa Oct. 20, 2020) ("Prohibiting only these two counties from using the grants would put their residents at a disadvantage as compared to the residents of those counties that are not judicially restrained from

utilizing CTCL grant money."). Indeed, Complainants' counsel, has embarked on a national campaign attempting to invalidate the acceptance of CTCL grant funds,[28] and on every occasion has only ever argued against municipalities he views as progressive receiving funds, always conveniently ignoring whether areas he views as conservative apply for and receive funds as well. Any inequity in this matter has been injected wholly by the Complainants.

Importantly, the Complainants make "no argument that the municipalities that received the funds used them in an unlawful way to favor partisan manner[,]" as any such allegation would also be frivolous. *See All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166, at *3 (E.D. Wis. Jan. 19, 2021); Exhibit A to the Affidavit of Carol Stancato (detailing the grant's expenditures). The funds were used with no partisan motive, as the funds were spent on items such as personal protective equipment to keep poll workers and voters safe. *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 456 (E.D. Tex. 2020) ("The Court sees no way to differentiate the supposedly partisan hand sanitizer from the impartial.").

III. Complainants Ask The Commission To Exceed Its Authority

Complainants have seemingly chosen to bring their Complaint to the Commission because it provides them another venue in which to assert the same legal arguments that courts across the country have rejected. Rather than bringing a complaint alleging violations of specific provisions of state or federal law, however, Complainants instead attempt to politicize the complaint process established in Section 5.06 in a manner in which it was not intended to be used. After a multitude of decisions[29] upholding municipal acceptance of CTCL grant funds, the Complainants ask WEC to disagree with the weight of the federal judiciary and become the first authority in the nation to invalidate the acceptance of these funds. Federal courts have repeatedly

[28] *See supra* note 1.

[29] *See supra* note 1.

found that no laws were violated by accepting CTCL grant funding. *E.g. Pennsylvania Voters All. v. Ctr. Cty.*, 496 F. Supp. 3d 861, 866 (M.D. Pa. 2020), appeal dismissed sub nom. *Pennsylvania Voters All. v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2021 WL 276700, at *5–8 n.3 (N.D. Iowa Jan. 27, 2021); *All. v. City of Racine*, No. 20-C-1487, 2021 WL 179166, at *3 (E.D. Wis. Jan. 19, 2021); *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 470 (E.D. Tex. 2020).[30]

When asked to invalidate the acceptance of CTCL grants, the federal judiciary regularly held that to do so would be to usurp the legislature's role. Wisconsin law gives the Commission responsibility for the *administration* of election laws, not the authority to create new ones. WIS. STAT. § 5.05(1). That authority lies squarely within the purview of the legislature, as Judge Griesbach aptly explained:

> Plaintiffs have presented at most a policy argument for prohibiting municipalities from accepting funds from private parties to help pay the increased costs of conducting safe and efficient elections. . . . These are all matters that may merit a *legislative* response but the Court finds nothing in the statutes Plaintiffs cite, either directly or indirectly, that can be fairly construed as prohibiting the defendant Cities from accepting funds from CTCL.

Wisconsin Voters Alliance, 2020 WL 6129510, *2 (emphasis added).[31] In the Texas challenge to CTCL grant funding, Judge Mazzant, United States District Judge for the Eastern District of Texas, emphasized the importance of maintaining the separation of powers, even in politically charged matters.

---

[30] The Complainants also note concerns about compliance with the Open Meetings Law, and take issue with a jest from a CTCL staff member that they should create "WI-5 t-shirts." Neither the Open Meetings Law nor the production of t-shirts by private organizations are within the jurisdiction of the Commission as part of its 5.06 review.

[31] Other federal courts have said the same. *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *4 (N.D. Iowa Oct. 20, 2020); *Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 448–49 (E.D. Tex. 2020).

> Plaintiffs' counsel argues that "federal courts have a role in protecting the integrity of federal elections". The Court agrees. And for that exact reason, the Court will not legislate on Plaintiffs' behalf. Texans deserve confidence in their electoral process. That confidence comes from their elected officials making policy decisions, not from courts creating policy. The Counties have made the policy decision to use nonpartisan funds to protect residents during an unprecedented public health crisis. The Court will not interrupt the Counties' decision-making process to wade into legislative waters it should undeniably avoid.

Texas Voters All. v. Dallas Cty., 495 F. Supp. 3d 441, 472 (E.D. Tex. 2020) (citations omitted). Whether changes to existing laws should be made in order to prevent municipal acceptance of private grant funds is a question most appropriately decided in the legislature, as it is not only far beyond the scope of a complaint under Section 5.06, it also exceeds the Commission's authority. Election laws are the purview of the legislature, and should not be created by the Commission under circumstances such as these.

CONCLUSION

Concurring in the dismissal of the Wisconsin Voters Alliance's petition for an original action in the Wisconsin Supreme Court, Justice Brian Hagedorn commented on the legal and factual deficiencies in said petition, and offered the following caution:

> At stake, in some measure, is faith in our system of free and fair elections, a feature central to the enduring strength of our constitutional republic. . . . Judicial acquiescence to such entreaties built on so flimsy a foundation would do indelible damage to every future election. . . . This is a dangerous path we are being asked to tread. The loss of public trust in our constitutional order resulting from the exercise of this kind of judicial power would be incalculable.

Wisconsin Voters Alliance v. Wisconsin Elections Commission, 2020AP1930-OA, Dismissal Order (Wis. Sup. Ct. Dec. 4, 2020) (Hagedorn, J., concurring). Though this action is in front of the Commission, rather than the courts, Justice Hagedorn's concerns are no less applicable. Complainants and others, often linked by shared counsel, have continually pursued frivolous

claims against the City despite those same claims having failed in other fora. Respondents respectfully request that the Commission not indulge them any further.

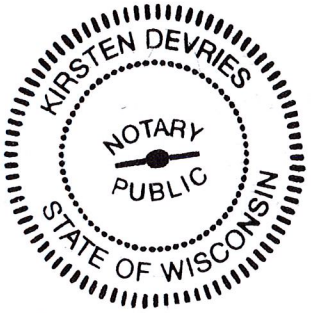
For the foregoing reasons, Respondents respectfully request that the Commission dismiss the Complaint on its merits, with prejudice.

I, Bryan A. Charbogian, being first duly sworn on oath state that I personally read the above verified response, and that the above response is true based on my personal knowledge and, as to those responses stated on information and belief, I believe them to be true.

Dated this 15th day of June, 2021.

Bryan A. Charbogian

Bryan A. Charbogian
State Bar No. 1113801
Attorney for Respondents
John M. Antaramian and Matt Krauter
Kenosha City Attorney's Office
625 52nd Street
Kenosha, WI 53140
bcharbogian@kenosha.org



Subscribed and sworn to before me
this 15th day of June, 2021

Kirsten DeVries

Kirsten DeVries
Notary Public, Kenosha County, WI.
My Commission expires on March 27, 2025