STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

CYNTHIA WERNER, ROCHAR C. JEFFRIES, MARK AZINGER, DAVE BOLTER, and DANIEL JOSEPH MILLER,

Complainants,

v.

Administrator MEAGAN WOLFE, Mayor TOM BARRETT, and JIM OWCZARSKI,

Respondents.

ANSWER OF RESPONDENTS BARRETT AND OWCZARSKI

Respondents Mayor Tom Barrett and Jim Owczarski, (collectively, "Respondents"), by and through Assistant City Attorneys James M. Carroll and Kathryn Z. Block, hereby submit the following response to the Complaint filed by Cynthia Werner, Rochar C. Jeffries, Mark Azinger, Dave Bolter, and Daniel Joseph Miller, (collectively, "Complainants") with the Wisconsin Elections Commission ("Commission").

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 in dozens of lawsuits across the Country—concerning the City of Milwaukee's, ("City's"), acceptance and use of grant funds from the Center for Tech and Civic Life, ("CTCL"). However, Complainants fail to point to any law that prohibits the City's acceptance of outside funds in order to provide a safer voting experience for its electorate, or even any law they claim was violated. As with the federal case in the Eastern District of Wisconsin and numerous other jurisdictions across the country, the Complaint fails to state a valid legal basis for any challenge to the City's administration of the 2020 elections and must be dismissed accordingly.

FACTUAL BACKGROUND

Respondents dispute the facts as alleged by Complainants in their entirety as factually inaccurate and grossly misstated.[1] Respondents do not dispute that the City sought and accepted grants from the CTCL, primarily on account of need to conduct the 2020 spring Presidential Preference Primary and Fall Presidential Elections safely in the midst of the COVID-19 pandemic. The need for funding is particularly acute because, in Wisconsin, elections are

[1] Complainants have attached a 702-page exhibit to their Complaint, the majority of which appears in no way to relate to the City. The exception appears to be pages 587-698 of the exhibit which primarily reproduce the e-mails of the Executive Director of the Milwaukee Election Commission, Claire Woodall-Vogg, who is not a party to this Complaint. None of those pages, however, reference Respondents in any meaningful way. Pages 689-698 merely reproduce a report of the Common Council file accepting the CTCL grant and an affidavit from Woodall-Vogg, yet Complainants use them to make allegations upon information and belief regarding Respondent Barrett that are not remotely inferable from these pages (specifically "Upon information and belief, Milwaukee [sic] Tom Barrett communicated with CTCL about Milwaukee and the other Wisconsin Five cities accepting private corporate conditions on state and federal elections;" "[u]pon information and belief, Milwaukee Mayor Tom Barrett coordinated on accepting private corporate conditions on state and federal elections with the other Mayors of the Wisconsin 5… and by having virtual meetings;"). Complaint at ¶¶ 23-24.

administered at the local level. As explained by the Wisconsin Elections Commission, ("WEC"):

> Unlike most states, Wisconsin administers elections at the municipal level, rather than at the county level. What this means is that each of Wisconsin's cities, towns, and villages has a local election official who, by state law, is responsible for voter registration, absentee balloting, establishing polling places, training poll workers, and tallying and certifying results.
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> ...
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> WEC does not have statutory authority over how municipalities conduct elections. Each municipality is responsible for adhering to the elections laws established by the legislature. Some state statutes establish very specific guidelines, such as when and where a voter can register to vote, while other statutes leave decisions like how many polling places to establish entirely in the hands of each municipal clerk and their governing body.[2]

To that end, the CTCL grant award required that "[t]he grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in the City of Milwaukee in accordance with the 2020 Wisconsin Safe Voting Plan...."[3] The CTCL grant required the City to "promis[e] to use the grant funds in compliance with United States tax laws," something the City is already required to do as a municipal corporation. Exhibit A, p.1. Notably, the agreement does not state that the City is required "to return the moneys to . . . CTCL if [CTCL] disagreed how [sic] those moneys were spent." Complaint at ¶ 24. Furthermore, the City was one of 218 municipalities in Wisconsin to receive grant funds from CTCL ("WI-218").[4] https://www.techandciviclife.org/our-work/election-

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[2] WEC publication "How Wisconsin is Prepared for the November 3 Election" p. 33, available at https://elections.wi.gov/sites/elections.wi.gov/files/2020-09/D.%20How%20Wisconsin%20is%20Prepared%20for%20the%20November%203%20Election.pdf

[3] Application for the Grant was approved by the Milwaukee Common Council and signed by the City's Director of the Community Development Block Grant Office. Complaint, (689-691); Exhibit A, p.1.

[4] https://www.techandciviclife.org/our-work/election-officials/grants/

officials/grants/. The City's Comptroller maintained financial accounting records of the City's expenditures under the grant, in accordance with its standard procedures.

ARGUMENT

The Commission should dismiss the instant Complaint for several reasons. Chief among these is that Respondents are not "election officials" as that term is used under Wis. Stat. § 5.06[5], and therefore the Complaint fails to state a claim. Additionally, 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. Finally, the arguments offered by Complainants' find no basis in Wisconsin law or any other applicable election law, as has been determined by the Eastern District of Wisconsin as well as several other courts. 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. Respondents are not Election Officials within the Meaning of Wisconsin Statutes

This Complaint was filed pursuant to Wis. Stat. § 5.06(1), (Complaint at p. 2), which allows an elector to challenge "a decision or action" of an "election official." "Election Official" is defined in Wis. Stat. § 5.02(4e) as "an individual who is charged with any duties relating to the conduct of an election." "Municipal Clerk" is defined in Wis. Stat. § 5.02(10) as "the city clerk, town clerk, village clerk and the executive director of the city election commission and their authorized representatives. Where applicable, "municipal clerk" also includes the clerk of a

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

school district." Respondent Barrett is the Mayor of the City of Milwaukee and Respondent Owczarski is the City Clerk of the City of Milwaukee, both in point of fact and as alleged by Complainants. They are the only parties named by Complainants who are City officials.

Chapters 5 through 12 of the Wisconsin Statutes govern elections. The only powers granted to mayors that appear therein are in Wis. Stats. §§ 7.20, 7.30, and 7.53, pertaining to the power of mayors to appoint or nominate certain election commissioners, officials, or boards of canvassers; actions that are not challenged here.

With respect to Respondent Owczarski, because of the population of the City, Wis. Stat. § 7.20(1) required the City to establish a Board of Election Commissioners and Wis. Stat. § 7.21(1) provides:

> All powers and duties assigned to the municipal or county clerk or the municipal or county board of canvassers under chs. 5 to 12 shall be carried out by the municipal or county board of election commissioners or its executive director, unless specifically retained or assigned in this section or s. 7.22.

Currently, there are no such duties specifically retained by or assigned to the municipal clerk in either Wis. Stats. §§ 7.21 or 7.22. Further, 7.21(2) explains that [a]n executive director of the city board of election commissioners shall be appointed under s. 62.51."

That Respondents are improper parties is clear from the face of the Complaint itself. As previously stated, the allegations against Respondent Barrett are made upon information and belief (Complaint at ¶¶ 23-32), and cannot be said to allege a violation against an "election official," at least not for any purpose a mayor serves under Chapters 5 through 12. Similarly, while a municipal clerk is certainly an "election official" in most Wisconsin municipalities, this cannot be said in Milwaukee. As previously stated, the City has an Elections Commission with

an Executive Director, Claire Woodall-Vogg, and, in fact, Complainants have attached nearly 100 pages of e-mails from Woodall-Vogg to their Complaint and have referenced her actions numerous times (Complaint at ¶¶ 41, 71-72). In contrast, Respondent Owczarski's name is mentioned exactly once in the Complaint: "Respondent Jim Owczarski is the Milwaukee City Clerk." Complaint at ¶ 8. It is thus abundantly clear Respondent Owczarski is not an "election official" in the City, as that term is used in Chapter 5.02. For these reasons, the Complaint states no claim against the City Respondents and must be dismissed.

II. Timeliness, Probable Cause

The Elections Commission Administrative Code contemplates that the Administrator will serve a gatekeeper function with respect to complaints: within ten days, they shall determine whether the complaint is timely and states probable cause. Based on that determination, the Administrator will decide 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 Respondents, and an adjudicator has been appointed to serve in her place. Though the adjudicator is standing in for the Administrator, it is unclear to the Respondents if any initial determination has been made as to whether the Complaint is timely and/or states probable cause.[6] In any event, Respondents respectfully submit that the Complaint is not timely and does not state probable cause, and should therefore be dismissed.

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[6] To the contrary, it appears to Respondents that such an inquiry was not conducted. When a specific question concerning probable cause was raised by Kenosha Assistant City Attorney Bryan Charbogian in a related matter, in

A. Timeliness

The Complaint was made pursuant to Wis. Stat. § 5.06, (Complaint at p. 2), which requires that "[a] complaint filed under this section shall be filed promptly so as not to prejudice the rights of any other party Wis. Stat. § 5.06(3). 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 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.

It cannot be said that Complainants have promptly filed their Complaint; to the contrary, they did not file until five months after the election, seven months after a federal lawsuit against the City asserting the same legal theories had been filed, and over nine months after the City's Common Council voted to accept the first grant from CTCL. Notably, Complainants' filing also comes several months after the plethora of court cases rejecting legal arguments identical to those now asserted.

Complainants knew or should have known of the circumstances giving rise to this Complaint long ago, as well as the fact that these same legal arguments had already been rejected.[7] Such a delay under these circumstances suggests an effort to continue sowing doubt

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an email response the adjudicator stated, "Any respondent who wishes to contest probable cause as referenced in [Attorney Charbogian's] email may do so in his or her response." (Exhibit B, May 15, 2021 email from Deborah C. Meiners.) That misstates the requirements of the statutes and administrative code, and places the burden in the wrong place. Respondents were entitled to a determination from the adjudicator that the Complaint "state[d] probable cause" "within 10 business days," of the Complaint being filed and *prior to* being required to file this response. WIS. ADMIN. CODE EL 20.04(1)-(3).

[7] Although the plaintiffs in those actions were different from the Complainants here, Complainants' counsel was an attorney of record for several such cases. *E.g.*, *Wisconsin Voters Alliance v. City of Racine, et al.*, No. 20-C-1487,

among the electorate about the legitimacy of the 2020 elections, rather than a desire to use the Commission's complaint process to address legitimate legal concerns. If there were an issue with the validity of the City's acceptance of the CTCL grant funds, it arose last summer, when the funds were accepted, and nothing in the Complaint justifies Complainants' significant delay in bringing this matter to the Commission.

For these same reasons, the doctrine of laches is also instructive in applying Section 5.06(3). 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. Importantly, the Wisconsin Supreme Court recognized this doctrine holds particular significance in the elections context. *Trump v. Biden*, (2020 WI 91, ¶ 11). For the reasons noted herein, these elements are present here. As the Court wrote:

> 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.

Id. at ¶ 30. So too here.

Complainants unreasonably delayed bringing this Complaint. What constitutes an unreasonable delay for purposes of laches varies depending on the circumstances of a particular

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2020 WL 6578061 (E.D. Wis. Sept. 25, 2020); *Iowa Voters Alliance v. Black Hawk County*, No. C20-2078-LTS, 2020 WL 5894582 (N.D. Iowa Oct. 1, 2020); *Minnesota Voters Alliance v. City of Minneapolis*, No. 20-cv-2049-MJD-TNL, 2020 WL 5755725 (D. Minn. Sept. 24, 2020); *Pennsylvania Voters Alliance v. Centre County*, No. 4:20-cv-1761-MWB, 2020 WL 6578066 (M.D.Pa. Oct. 12, 2020); *Election Integrity Fund v. City of Lansing*, No. 20-cv-950, 2020 WL 5814277 (W.D. Mich. Sept. 29, 2020).

case. *Id.* at ¶ 13 (citations omitted). 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 spring of 2020, yet Complainants delayed until May of 2021 to file this Complaint.

Nor can Complainants credibly argue that information gleaned from responses to their public records requests, made after the November election and many months after acceptance of the CTCL grants, ultimately gave rise to their Complaint. First, court actions filed by their counsel came well in advance of those requests.[8] Second, despite the voluminous reproduction of documents produced in response to records requests appended to their Complaint, Complainants do little to rely on them, at least not with respect to any concrete allegations made against Respondents. To the extent Respondents are referred to by name at all, any allegations regarding them are made not with reference to documents appended to the Complaint, but upon information and belief. Complainants cannot assert in good faith their Complaint was filed promptly and without delay.

The second element of laches requires that the Respondents lack knowledge that the Complaint would be filed. *Id.* at ¶ 23. Respondents and officials from myriad other jurisdictions have already had to respond to identical legal arguments in federal court, and, without exception, those legal arguments have been rejected.[9] In fact, Complainants' counsel brought an action in

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[8] *Id.*
[9] *Id.*

the Eastern District of Wisconsin against the Cities of Milwaukee, Madison, Green Bay, Racine, and Kenosha—against all of whom complaints substantially similar to the one at issue here have now been filed with the Commission—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. Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020); *Wisconsin Voters All. v. Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021). Given the City's previous success against 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. Additionally, the City had spent the majority of the CTCL grant funds after the conclusion of the November 3 election, with most of the remaining money earmarked for paying employees and poll workers. Respondents had no reason to expect they would be subject to yet another proceeding about those grant funds when there had been substantial time between the receipt of the funds and November 3 during which any challenges could have been brought, but none—aside from the unsuccessful federal lawsuit—had been. The second element of laches is therefore satisfied.

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. Respondents are prejudiced in several ways. Memories fade over time, and accounts and details of events that occurred several months ago are not likely to be as fresh in the mind as they

would have been if the Complaint had been filed contemporaneously with the challenged activities. Respondents are also prejudiced by again having to respond to baseless claims that have already been addressed and rejected in several other fora, including the previously mentioned case in the eastern district against the City, when this Complaint could have been filed contemporaneously as required by statute. *Wisconsin Voters All. v. Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020); *Wisconsin Voters All. v. Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021). Throughout the course of that litigation, the City had to expend significant resources to defend itself.

By bringing a complaint before the Commission based on those same arguments, and doing so on a delayed basis, the City's rights are prejudiced because it is forced to expend more staff time and attention that could be better utilized elsewhere. Perhaps more importantly, however, the continued attacks on the City's handling of the 2020 elections can cause significant harm in less tangible ways. Every time these same de-bunked claims are repeated publicly, the public's confidence in the legitimacy of the election process in the City is being undermined.[10] Confidence in election administration is essential to a functional democracy, and these repeated, baseless attacks continue to harm the City. Respondents are prejudiced by the acceptance of the delayed filing of this Complaint.

A Complaint filed based on already-rejected legal theories, filed half a year after the election complained of, can do little more than prejudice the City by sowing doubt among its

[10] It is again worth noting that while Complainants Counsel has repeatedly attacked five Wisconsin municipalities for their acceptance of CTCL grant funds, as previously noted, 218 Wisconsin municipalities have accepted grant funds from the CTCL.

voters. Respondents therefore respectfully submit that the Complaint is not timely under WIS. STAT. § 5.06(2)—Complainants' counsel did not file anything with the Commission until filing this Complaint six months after Judge Griesbach had already rejected the legal arguments contained therein.[11] Respondents should not have to revisit previously decided issues simply because of Complainants' counsel's failure to utilize the proper avenue—that is, filing a complaint with the Commission—from the outset. The Complaint should be dismissed, therefore, as untimely.

B. 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). Probable cause under the administrative code is defined as "[i]nformation which may establish…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 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.

[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.

On a most basic level, Respondents are not the proper parties to this Complaint based on the alleged wrongdoing. As previously stated, the Respondents are not "election officials" within the meaning of Chapters 5 through 12 of the Wisconsin Statutes. Beneath the litany of allegations, all of Complainants' legal arguments center around the acceptance of the CTCL grant funds and approval of how those funds were to be used. Neither the Mayor nor the City Clerk, in any of their professional capacities, had authority to accept the CTCL grant. The Common Council took that action, yet it is not named as a party. The named Respondents are not synonymous with the entire City government; they have specific roles within it, and those roles do not include authority to accept the CTCL grant funds. Complainants have therefore not shown probable cause that *Respondents* have violated any election law.

Significantly, Complainants have not presented any legal argument in support of a claim of a violation of election laws that has not already been rejected by numerous courts across the country, as discussed in more detail later in this Response. Though Complainants' 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. Without having named the proper parties, nor cited a statute that actually prohibits the conduct complained of, Complainants have fallen well short of demonstrating probable cause to believe that a violation of law or abuse of discretion occurred.

Additionally, even after 30 pages of allegations related to the November 2020 election, Complainants make a prayer 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. 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 essence, a fishing expedition—in the hopes of *possibly* finding some violation of the law. Complainants are far from providing the requisite who, what, where, when, and how required to show 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 any law occurred.

III. 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. 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 explained in this section, all of Complainants' arguments fail—and, in fact, most have failed before.

Complainants also offer a second argument, alleging that Respondents 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, and in fact the practice is commonplace. 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 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."). Given that Complainants have not provided any legal support for their broader argument against all private grant funds, they certainly cannot provide such support for the more specific assertion that receipt of private grant funds *with conditions attached* is also prohibited; at least absent evidence that Respondents violated any corresponding legal duty. Accordingly, these two interrelated arguments will be treated as one for purposes of this Answer.

A. Neither the Elections nor Electors Clause Prohibits Receipt of Grant Funds

Complainants assert that the City's receipt of the CTCL grant funds violates the Elections and Electors Clauses of the U.S. Constitution. Those same assertions have been rejected in courts across the country 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. Federal laws concerning the time, place, and manner of federal elections are controlling when they directly conflict with state law. *Foster v. Love*, 522 U.S. 67, 69, 118 S.

Ct. 464 (1997). Absent a directly contradictory federal law that conflicts with state law, however, state law controls by default. *Texas Voters Alliance v. Dallas Cty.*, 495 F. Supp. 3d 441, 467, (E.D. Tex. 2020).

Complainants allege that "the election authority of Congress, the Wisconsin state legislature, the Commission and the Milwaukee City Clerk [one of the Respondents] was and will continue to be illegally and unconstitutionally diverted by the Respondents to entities and persons including Milwaukee's Common Council, Mayor [the other Respondent] and private corporations and their employees," ostensibly in violation of the Elections Clause. Complaints at ¶88. Complainants make no attempt to explain with specificity how the Elections Clause is implicated, however. Additionally, this same argument has already been rejected in other federal actions. 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.

The other law on which Complainants attempt to base their argument is 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 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 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. Stats. §§ 7.15(1), (9), (11). The City's Election Commission and its Executive Director took necessary actions to fulfill its responsibilities for the administration of the elections in 2020. 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. Just as with all of the other legal theories they have proffered, Complainants' Electors Clause argument fails entirely.

B. Home Rule Authority

Complainants' arguments also fail for reasons beyond the complete lack of federal or state law prohibiting the use of private grant funds. For one, municipalities, and municipal clerks (in the case of the City, the executive director of the Election Commission) in particular, possess broad authority with respect to the administration of elections within their jurisdictions. *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 to administrate those laws. 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. 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. Interpreting a substantially similar provision of Iowa law regarding the authority of counties, which administer elections in that state, Judge Leonard Strand, federal district court judge for the Northern District of Iowa, noted that "the duty to fund elections is delegated to the counties," and that accepting private grants to assist in fulfilling that obligation was consistent with that home rule authority. *Iowa Voter Alliance*, 2020 WL 6151559, at *3.

In 2020, the 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 budgeted for the 2020 elections prior to an unprecedented pandemic, and myriad other difficulties. 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. 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.

C. Commission Precedent and Estoppel

Administrator Wolfe told the Assembly Committee on Campaigns and Elections that Commission staff worked with the City of Green Bay and others "to ensure that local election officials had the information and resources they needed to administer a successful election in

November."[12] 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."[13] The same is true about federal law. 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.

Similarly, here, Complainants have not articulated any way in which the City's acceptance of the CTCL funds has interfered with either the State of Wisconsin's ability to prescribe the time, place, and manner of elections, or the ability of the federal government to alter those prescriptions. Accordingly, as they did in the federal cases, Complainants' arguments on this point must fail.

IV. Complainants Ask the Commission to Exceed their 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

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[12] *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).
[13] *Id.*

complaint process established in Wis. Stat. § 5.06 in a manner in which it was not intended to be used.

Perhaps even more egregiously, however, Complainants would have the Commission exceed its statutory authority by creating new election laws—essentially usurping legislative authority to do so. Wisconsin law gives the Commission responsibility for the *administration* of election laws, not 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). 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 certainly 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.

Dated this 15th day of June, 2021.

Respectfully submitted,

s/ Kathryn Z. Block
Kathryn Z. Block (State Bar No. 1029749)
James M. Carroll (State Bar No. 1068910)
Attorneys for City of Milwaukee Respondents
CITY OF MILWAUKEE
200 E. Wells St., Room 800
Milwaukee, WI 53202-3515
Telephone: (414) 286-2601
Facsimile: (414) 286-8550
kblock@milwaukee.gov
jmcarr@milwaukee.gov

VERIFICATION

I, KATHRYN BLOCK, being first duly sworn upon oath, state that I personally read the above verified Response, and that the above Response and attached Exhibits are true and correct based upon my personal knowledge.

Dated June 15, 2021

Kathryn Z. Block
Assistant City Attorney, City of Milwaukee
State Bar No. 1029749

STATE OF WISCONSIN)
)ss.
COUNTY OF MILWAUKEE)

Signed and sworn before me this 15th day of June, 2021, by Hannah R. Jahn.

(Seal)

NOTARY PUBLIC
HANNAH R. JAHN
STATE OF WISCONSIN

Signature

Assistant City Attorney
Title

My commission expires: is permanent.

CENTER FOR
TECH AND
CIVIC LIFE

July 24, 2020

City of Milwaukee

Dear Director Mahan,

I am pleased to inform you that the Center for Tech and Civic Life ("CTCL") has decided to award a grant to the City of Milwaukee Community Development Grant Administration to support the work of the City of Milwaukee.

The following is a description of the grant:

AMOUNT OF GRANT: Two million, one hundred fifty-four thousand, five hundred US dollars (USD $2,154,500).

PURPOSE: The grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in the City of Milwaukee in accordance with the Wisconsin Safe Voting Plan 2020 ("Appendix").

Before we transmit these funds, we ask that you sign this agreement promising to use the grant funds in compliance with United States tax laws. Specifically, by signing this letter you agree to the following:

1. The City of Milwaukee is a U.S., state, or local government unit or political subdivision in the meaning of 26 USC 170(c)(1).

Ex. A

2. This grant shall be used only for the public purpose described above, and for no other purposes.

3. The City of Milwaukee shall not use any part of this grant to give a grant to another organization unless CTCL agrees to the specific sub-recipient in advance, in writing.

4. The City of Milwaukee has produced a plan for safe and secure election administration in 2020, including an assessment of election administration needs, budget estimates for such assessment, and an assessment of the impact of the plan on voters. This plan is attached to this agreement as an Appendix. The City shall expend the amount of this grant for purposes contained in this plan by December 31, 2020.

5. This grant is intended to support and shall be used solely to fund the activities and purposes described in the plan produced pursuant to paragraph 4.

6. The City of Milwaukee shall produce a report documenting how this grant has been expended in support of the Appendix. This report shall be provided to CTCL by January 31, 2021.

7. The City of Milwaukee shall not reduce the budget of the City of Milwaukee Election Commission ("the Commission") or fail to appropriate or provide previously budgeted funds to the Commission for the term of this grant. Any amount reduced or not provided in contravention of this paragraph shall be repaid to CTCL up to the total amount of this grant.

8. CTCL may discontinue, modify, withhold part of, or ask for the return of all or part of the grant funds if it determines, in its sole judgment, that (a) any of the above conditions have not been met or (b) it must do so to comply with applicable laws or regulations.

9. The grant project period of June 15, 2020 through December 31, 2020 represents the dates between which covered costs may be applied to the grant.

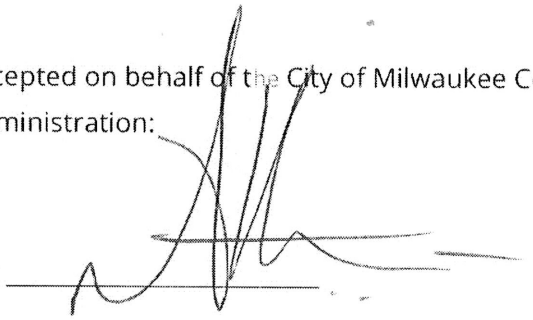
Your acceptance of these agreements should be indicated below. Please have an authorized representative of The City of Milwaukee Community Development Grant Administration sign below, and return a scanned copy of this letter to us by email at grants@techandciviclife.org

On behalf of CTCL, I extend my best wishes in your work.

Sincerely,

Tiana Epps Johnson
Executive Director
Center for Tech and Civic Life

Accepted on behalf of the City of Milwaukee Community Development Grant Administration:

By: 

Title: Director

Date: 07/29/2020

APPENDIX: Wisconsin Safe Voting Plan 2020 Submitted to the Center for Tech & Civic Life June 15, 2020

Block, Kathryn

From: Deborah C. Meiners <dcm@dewittllp.com>
Sent: Saturday, May 15, 2021 9:19 AM
To: Bryan Charbogian; Ed Antaramian; Vanessa Chavez; Lindsay.Mather@greenbaywi.gov; Lindsey.Belongea@greenbaywi.gov; Letteney, Scott; Carroll, James; Block, Kathryn; Kilpatrick, Steven C - DOJ; Bellavia, Thomas C - DOJ; kaardal@mklaw.com
Cc: Jon P. Axelrod; Witecha, James - ELECTIONS
Subject: Fw: Election Complaints

Categories: Print

Dear Counsel:

We, as Special Counsel for the Wisconsin Elections Commission (WEC), are in receipt of the below email relating to the Complaints filed by Attorney Erick Kaardal, on behalf of his various clients, against Meagan Wolfe, Administrator of the WEC, and respondents from the City of Green Bay, the City of Racine, the City of Kenosha, and the City of Milwaukee (in Case Nos. EL 21-24, EL 21-29, EL 21-30, and EL 21-31, respectively).

We are including on this response Attorneys Steven Kilpatrick and Thomas Bellavia, who are representing Administrator Wolfe with respect to these Complaints.

We hereby set a deadline of June 15, 2021 for all respondents to respond to the Complaints in the above-referenced matters. Any respondent who wishes to contest probable cause as referenced in the below email may do so in his or her response.

Complainants' deadline to reply will be June 29, 2021, 10 business days following the response deadline. Of course, if Complainants also need an extension, they should not hesitate to ask.

Sincerely yours,

Jon P. Axelrod
Deborah C. Meiners

Deborah C. Meiners
Partner
Ph: 608.252.9266
F: 608.252.9243
dcm@dewittllp.com
2 East Mifflin Street, Suite 600
Madison, Wisconsin 53703

DeWitt LLP Law Firm

www.dewittllp.com

Begin forwarded message:

Ex. B

From: Bryan Charbogian <bcharbogian@kenosha.org>
Date: May 13, 2021 at 8:16:08 AM CDT
To: "Jon P. Axelrod" <jpa@dewittllp.com>
Cc: Vanessa Chavez <Vanessa.Chavez@greenbaywi.gov>, Ed Antaramian <eantaramian@kenosha.org>, Scott Letteney <Scott.Letteney@cityofracine.org>, Lindsay Mather <Lindsay.Mather@greenbaywi.gov>, Lindsey Belongea <Lindsey.Belongea@greenbaywi.gov>, James Carroll <jmcarr@milwaukee.gov>, Kathryn Block <kblock@milwaukee.gov>, Erick Kaardal <kaardal@mklaw.com>
Subject: Election Complaints

Attorney Axelrod,

I represent the City of Kenosha respondents in Brian Thomas et al. v. Meagan Wolfe et al., EL 21-30.

I, and the attorneys for the Cities of Milwaukee, Racine, and Green Bay, against whom the complainants in EL 21-30 have also filed complaints, and who are cc'd in this email, wanted to inquire as to a couple of topics.

First, pursuant to EL 20.04(1), has there been a determination as to whether any or all of the complaints filed against each of us are timely, sufficient as to form, and state probable cause? Given that the substance of the complaint has already been rejected by the federal courts, we do not believe the complaints are timely, sufficient, or state probable cause, and therefore wanted to inquire. The City of Kenosha received a letter from the Wisconsin Elections Commission requesting a sworn written response to the complaint, but did not reference the items in EL 20.04(1). The other Cities received similar letters.

Second, if the complaints are determined to be sufficient, we would jointly request an extension of the time to file written responses or answers to our complaints so as to coordinate with each other and to collaborate on our legal arguments, though we are not requesting consolidation at this time. We would respectfully request that you allow each of us an extension, and to have the same response deadline, which we ask to be moved to sometime in mid-June.

Best,
Bryan Charbogian

Bryan A. Charbogian
Assistant City Attorney
Office of the City Attorney
625 52nd Street
Kenosha, Wisconsin 53140-3480
262-653-4170