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.

SUR-REPLY 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 sur-reply to the Reply Brief 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

In July of 2020, the City of Kenosha accepted a grant from the Center for Tech & Civic Life (herein "CTCL grant"). This event was widely publicized, and two of the Complainants served as officials in elections implementing the grant. Yet, they did not challenge its acceptance. Two full election cycles then passed, in which CTCL grant funds were employed.

Further, there was a national legal campaign seeking to bar various localities from accepting CTCL grant funds, but each challenge was rejected. Now, a year later—and after the grant has been fully expended—the Complainants seek to do what a national campaign of cases could not, invalidate the acceptance of this grant. In arguing for this result, they cannot cite to a law that the Respondents violated. Lacking such, they ask WEC to read obligations into the Constitution, and then to decide that the Respondents failed to meet them. They inaccurately portray both the law and the facts in relation to Kenosha, and this Sur-Reply is necessary to correct these errors.

FACTUAL BACKGROUND

The Complainants have a profound misunderstanding of what actually occurred in the City of Kenosha during the November 2020 election. Much of this is likely caused by the manner in which they gathered their "facts." They seem to have acquired[1] emails and the Wisconsin Safe Voting Plan via public record requests, and then proceeded to take guesses as to their meaning. Complainants' Verified Complaint at 3 n.2 ("virtually all of the complaint's allegations are based on" the emails, and the "complaint's inferences from the emails are based upon information and belief"). Therefore, the Respondents seek to correct the factual record.[2]

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[1] It is critical to point out that *none* of the Complainants' exhibits have been properly authenticated by a witness. They simply have been attached to the Complaint and Reply Brief. The Kenosha Respondents' references to the appendix contained herein is for the ease of the WEC only, as the City objects to the introduction of all of the Complainants' exhibits in their multiple appendices.

The Complainants' speak generically and note that they obtained emails through public record requests. However, the individuals making the requests are not identified. It is not at all clear that the Complainants' themselves actually made the requests, indeed, the Respondents assert that in reference to many or all of the emails submitted, none of the Complainants were the ones making the public record requests. These should not be admitted, as without establishing some basic foundational material as to the method they were obtained and their accuracy, these cannot be said to have sufficient probative value to be admitted. EL 20.06(5); Complainants' Verified Complaint at 3 n.2.

[2] The Complainants level many allegations over the course of their hundred and thirty pages of briefing, the most egregious of which will be addressed herein. The affidavits of Christina Oppenneer, Carol Stancato, and two affidavits of Matt Krauter are incorporated by reference as if fully stated herein and serve to supplement and further correct the record. However, the Respondents contest the factual and legal allegations against them in full.

I. The Complainants Misinterpret The City's Actions Regarding Historically Disenfranchised Voters.

The Complainant's Reply Brief makes a number of assertions regarding "historically disenfranchised" voters in an attempt to show that the Respondents treated different classes of voters differently, but nothing could be further from the truth. The Complainants' incorrectly read the words "historically disenfranchised" voters in the Wisconsin Safe Voting Plan to imply that the Respondents discriminated on the basis of race. They interpret the phrase in isolation, but when read in context and compared to the election procedures that actually took place, it is clear that that the Respondents were not discriminating against anyone.

The language regarding historically disenfranchised voters appears within Recommendation II of the Wisconsin Safe Voting Plan (herein the "Plan"), but the Complainants neglect its context, which makes clear all would be treated equally. Exhibit A to the Affidavit of Matt Krauter. The structure of the Plan includes recommendations on how to improve election administration within a group of five cities, including Kenosha. Each recommendation begins with introductory comments that are not specific to any one city, and then moves to a discussion of potential[3] uses of CTCL grant funds within each individual City. The full recommendation in question reads "Recommendation II: Dramatically Expand Voter & Community Education & Outreach, Particularly to Historically Disenfranchised Residents[.]" *Id.* at 15 (period added).[4] When one reads the section specific to Kenosha thereunder,[5] there is no reference at all to race or

[3] The word "potential" is an intentional reference. The Complainants assume the premise that every potential use of the CTCL grant contained in the Wisconsin Safe Voting Plan was actually carried to fruition, but this premise is false. Simply because a potential use appeared in the Plan, does not mean that it actually occurred in practice. A prominent example of this is the Plan's reference to care-a-vans, Exhibit A to the Affidavit of Matt Krauter at 20, which were never actually utilized. Affidavit of Christina Oppenneer at ¶ 8. Instead, the Plan speaks broadly about potential uses of the CTCL grant.

[4] This is in keeping with a municipal clerk's duties pursuant to Wis. Stat. § 7.15.

[5] "Kenosha: Would like to directly communicate to all Kenosha residents via professionally-designed targeted mail postcards that include information about the voter's polling location, how to register to vote, how to request an absentee ballot, and how to obtain additional information. The City would have these designed by a graphic

any other means of classifying a group. It plainly states that the City "[w]ould like to directly communicate to *all* Kenosha residents[.]" Exhibit A to the Affidavit of Matt Krauter at 16 (alterations bracketed, emphasis added). The Plan makes clear Kenosha wanted to communicate to everybody, not just certain groups of voters. Indeed, all references to race or other classifications appear under the sections attributed to Cities other than Kenosha.[6] This follows the Complainants' pattern of attempting to lump the actions of officials in Kenosha, Racine, Milwaukee, Madison, and Green Bay together in order to avoid their burden of proving that the individual Respondents did anything wrong.[7]

In addition to the language of the Wisconsin Safe Voting Plan regarding all equally, the Respondents actual practices during the election confirmed that there was no discrimination. As opposed to favoring certain groups of people, the Clerk-Treasurer's Office sought to ensure it was communicating to everybody on an equal basis. Therefore, it used means of communication that would reach everybody, employing both online and print means of communication. Affidavit of Christina Oppenneer at ¶ 7 (explaining some measures the City took that provided equal access to information). This ensured that all voters could receive City communications, regardless of their level of access to technology. *Id.*; c*ompare* Exhibit A to the Affidavit of Matt Krauter at 16 ("The City would also like resources for social media advertising . . . and for targeted radio and print advertising . . . and large graphic posters . . . to display in low-income

designer, printed, and mailed ($34,000). The City would also like resources for social media advertising, including on online media like Hulu, Spotify, and Pandora ($10,000) and for targeted radio and print advertising ($6,000) and large graphic posters ($3,000) to display in low-income neighborhoods, on City buses, and at bus stations, and at libraries ($5,000)." Exhibit A to the Affidavit of Matt Krauter at 16.

[6] To be clear, the Respondents are not implying that other Cities used CTCL funds in a discriminatory fashion. The crux of the matter is that this election complaint regards the Kenosha Respondents , and the actions that may or may not have occurred elsewhere are of no consequence to this proceeding.

[7] For example, the Complainants take issue with the involvement of a Michael Spitzer-Rubenstein in Green Bay's election, Complainants' Reply Brief 42-44, but there is no evidence he was involved at all in Kenosha's elections. Affidavit of Christina Oppenneer at ¶ 20.

neighborhoods, on City buses, and at bus stations, and at libraries[.]") (ellipsis added and alterations bracketed).

The Reply Brief compounds these problems by inaccurately asserting that the Respondents transported "people of color—instead of all people—to the polls" using "Care-a-vans[.]" Complainants' Reply Brief at 22. However, the Respondents did not even use "care-a-vans"— or any other bus or van service—to transport people to the polls, Affidavit of Christina Oppenneer at ¶ 8, much less in a discriminatory fashion. The Complainants base their assertion of racial bias on language from a document entitled "Wisconsin Municipalities' Center for Tech & Civic Life Planning Grant[.]" Complainants' Reply Appendix at 00924. Notably, Ms. Oppenneer is identified by that document as one of the individuals who helped prepare it. *Id.* Further, the language in question was not put into the Wisconsin Safe Voting Plan. Exhibit A to the Affidavit of Matt Krauter.

II. CTCL Had No Influence Over Kenosha's Elections. The Clerk-Treasurer's Office Remained In Full Control Of Election Administration.

The Complainants allege that CTCL caused City officials to "eagerly step aside, and other times to be pushed aside, to let CTCL and its private corporate partners engage in aspects of election administration[,]" Complainants' Reply Brief at 48 (alteration bracketed), however, these City Officials tell a different story. The City Clerk-Treasurer has repeated that the "City retained complete control over its election procedures at all times it used CTCL grant funds" and CTCL "did not exercise control over any election procedures[.]" Affidavit of Matt Krauter (alteration bracketed). Though the Complainants reference a Green Bay clerk who seems dissatisfied with her city's relationship with CTCL, what occurred in Green Bay has no bearing on the Kenosha Respondents.

The Complainants' also allege that Kenosha was "contractually bound to use only the 'organizations' that CTCL approved 'in advance, in writing[,]" but this too is incorrect. Complainants' Reply Brief at 31 (alteration bracketed). Again, the Clerk-Treasurer has explained, "CTCL did not require the City to use any particular services or partnering entities in carrying out the Wisconsin Safe Voting Plan." Affidavit of Matt Krauter; *see also* Affidavit of Christina Oppenneer at ¶¶ 12-13, 15 (indicating that CTCL did not determine how the City utilized poll workers, and detailing how Kenosha did not accept all suggestions made by CTCL on how to conduct its election). The Complainants point to nothing in the Wisconsin Safe Voting Plan that requires the use of pre-authorized vendors, as the plain language of the Plan does not require them.

Additionally, the Complainants' believe that it "was assumed that each City would vote to accept the money" from CTCL "and the terms of the agreement were not important." Complainants' Reply Brief at 28. Here the Complainants' own Reply Appendix undermines their allegation, plainly demonstrating that prior to the Mayor signing the Grant Agreement, a member of the Clerk-Treasurer's Office wanted to be sure that it would not lock the City in to performing election functions it did not want to undertake. Complainants' Reply Appendix at 00543.

III. The Complainants' Themselves Have Certified That The November 2020 Election In The City Of Kenosha Complied With The Law.

One need look no further than the Complainants' own certified statements to determine whether election laws were complied with. Complainants Mary Magdalen Moser and Matthew Augustine each certified "that the election was held in accordance with the laws of the State." Exhibit A and B to the Second Affidavit of Matt Krauter. By that time, the acceptance of CTCL grant funds for the election had been public knowledge for months, and despite both of them being City election officials that assisted in conducting an election where the funds were utilized,

see Affidavit of Christina Oppenneer at Christina Oppenneer ¶ 19, they both certified that there was nothing unlawful about the election. Yet, they now ask the WEC to discredit their own certified statements and accept their allegations that the Respondents acted unlawfully. However, the simple truth is that there was nothing untoward about the Respondents' use of the CTCL grant, and the Complainants knew and certified as much.

ARGUMENT

The Complainants' allegations fail for a multitude of reasons. First, WEC does not have jurisdiction over them. Second, the Complaint was filed in an untimely manner as mandated by Wis. Stat. § 5.06(3) and the doctrine of laches. Third, the Reply Brief inaccurately argue that the home rule doctrine prevents the City from accepting the CTCL grant. Fourth, though the Complainants' attempt to argue that various constitutional provisions bar the City's use of CTCL grant funding in an election, these provisions do no such thing. Lastly, their contract claims ignore Wisconsin's established law regarding them. For these reasons, the Complaint must be dismissed.

IV. WEC Does Not Have Jurisdiction Over The Complainants' Allegations.

Prior to adjudicating this matter, the WEC must satisfy itself that it has jurisdiction over the subject matter of the Complainants' allegations, but because the WEC does not, this matter can go no further. As an administrative agency, WEC has "only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates[,]" *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶ 62, 342 Wis. 2d 444, 478, 820 N.W.2d 404, 420 (alteration bracketed); *Koschkee v. Taylor*, 2019 WI 76, ¶ 14, 387 Wis. 2d 552, 563, 929 N.W.2d 600, 605, thus, if it is to adjudicate a claim, it must have been given the authority to do so. WEC has been granted jurisdiction over a limited number of claims, and this authority has many specific limits. In order for the WEC to adjudicate a claim, a Complaint must

demonstrate that 1. an elector has, 2. stated probable cause, 3. that a decision, act, or failure to act, 4. of an election official, 5. regarding a matter the Commission has jurisdiction of, 6. was contrary to law or an abuse of discretion. Wis. Stat. § 5.06(1); *see also Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 487 N.W.2d 639 (Ct. App. 1992) (regarding the importance of complying with Wis. Stat. § 5.06). The Complaint and Reply Brief have not done so, instead alleging the wrongdoing of a non-election official and stating causes of action outside WEC's purview. Thus, this matter should be dismissed based on a lack of probable cause that a law within WEC's jurisdiction has been violated.

A. The Mayor Is Not An Election Official, And Must Be Dismissed.

To begin, Mayor Antaramian is not an election official, and thus must be dismissed from this action. *See Trump v. Wisconsin Elections Comm 'n*, 506 F.Supp. 3d, 620, 626 (E.D. Wis. Dec. 12, 2020), affd, 983 F.3d 919 (7th Cir. 2020), cert. denied, 141 S. Ct. 1516 (2021) ("Under Wisconsin's election statutes, mayors play no formal role in presidential elections."); Wis. Stat. § 5.06(1) ("Whenever any elector of a jurisdiction or district served by *an election official* believes that a decision or action *of the official* or the failure *of the official* to act") (italics added). Thus, he must be dismissed and all claims specific to him must also be dismissed. The CTCL grant agreement was signed by him, Exhibit A to the Affidavit of Matt Krauter, thus all of the Complainants arguments regarding either the question of whether the City could accept the grant or the substance of the grant agreement must be dismissed for want of jurisdiction, as the stem from an official beyond the WEC's jurisdiction.

B. The Complainants' Substantive Allegations Are Beyond The WEC's Authority.

Even apart from the need to dismiss the Mayor, the substance of the Complainants' allegations demonstrate that WEC could not adjudicate this matter. WEC's authority is not sufficient for it to adjudicate any and all election issues, rather, its authority was specifically limited by the Legislature in Wis. Stat. § 5.06(1). Matters under WEC's jurisdiction have been expressly stated, and it can hear seven types of complaints. These include complaints 1. concerning nominations, 2. qualifications of candidates, 3. voting qualifications, including residence, ward division and numbering, 4. recall, 5. ballot preparation, 6. election administration, or 7. conduct of elections. *Id.* Yet, the Complaint implicates none of these.

Rather than squarely address the jurisdictional question, the Complainants make broad statements, asserting that "no one should dispute the Commission plays a key role in the conduct of Wisconsin elections as a core government function[,]" Complainants' Reply Brief at 2 (alteration bracketed), and asking the Commission to "declare that the Commission indeed *has* a role in the administration of election laws" in regard to the CTCL grant. Verified Complaint at 5 (emphasis original). Despite not addressing the issue, the Complainants' plainly do not challenge a 1. nomination, 2. qualification of a candidate, 3. voting qualification, 4. recall, or 5. ballot preparation. *E.g.* Complainants' Reply Brief at 54 ("The 2021 complaint is not about the 2020 election outcomes regarding statewide or federal congressional elections. There is no claim here representing dissatisfaction with the electoral outcomes. Instead, the complainants' focus is on the city's election processes in 2022, 2024 and beyond."); *id.* at 56 ("the Complainants do not assert how the voters are prejudiced" and "the complaint does not constitute a contest of the 2020 election results"). This means that in order for WEC to hear this matter, it must intend to implicate its jurisdiction over 6. election administration, or 7. the conduct of elections, Wis. Stat. § 5.06(1), however, it does not.

The Complainants' allegations neither regard elements of "election administration" nor the "conduct of elections," and therefore, must be dismissed as outside the WEC's jurisdiction. "Election administration" is not a defined term in chapter 5 of the Wisconsin Statutes, and no case appears to have settled its definition. However, the meaning is reasonably clear, as the WEC employs the term regularly. The WEC is tasked with "the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns, other than laws relating to campaign financing." Wis. Stat. § 5.05(1). In the course of administering these laws, the WEC is statutorily directed to, Wis. Stat. § 7.08(3), and has published the "Election Administration Manual for Wisconsin Municipal Clerks." *Wis. Election Admin. Manual* (September 2020). Thus, the term "election administration" refers to the technical details of how an election is to be held, such as described in chapters 5 to 10 and 12 of the Wisconsin Statutes and the Election Administration Manual.

The "conduct of elections" is also a reasonably clear phrase; if "election administration" refers to the manner an election is to be held, the "conduct of elections" consists of whether the election was actually held in accordance with these standards. Recently, when addressing matters of election administration in a challenge to the 2020 election, the Federal Court for the Eastern District of Wisconsin juxtaposed elements of election administration against the conduct of the election in the same manner. *See Trump v. Wisconsin Elections Comm'n*, 506 F.Supp. 3D 620, 637 (2020). Discussing WEC guidance given "on three issues related to the *administration of the election*[,]" *id.* (italics and comma added), the Court wrote the following.

> Plaintiff seizes upon three pieces of election guidance promulgated by the Wisconsin Elections Commission (WEC) . . . and argues that the guidance, *along with election officials' conduct in reliance on that guidance*, deviated so significantly from the requirements of Wisconsin's election statutes that the election was itself a "failure."

Trump v. Wisconsin Elections Comm'n, 506 F.Supp. 3D 620, 624 (2020) (italics and ellipsis added). Thus, the Court contrasted an element of election administration—WEC's guidance—with the "conduct in reliance on that guidance" in the same manner suggested by this brief. *Id.* In sum, a proper challenge to the rules of election administration would include matters such as whether they were properly within the WEC's authority, enacted, or promulgated, *see e.g. Metz v. Veterinary Examining Bd.*, 2007 WI App 220, ¶ 29, 305 Wis. 2d 788, 812, 741 N.W.2d 244, 256 ("Whether an agency has applied a rule without promulgating it as requires . . . is an issue that an administrative agency has the authority to rule on.") (citing *Heritage Credit Union v. OCU*, 2001 WI App 213, ¶¶ 27–28, 247 Wis.2d 589, 634 N.W.2d 593), whereas the "conduct of elections" consists of whether the rules were followed. *See Trump v. Wisconsin Elections Comm'n*, 506 F.Supp. 3d 620, 624 (2020); Wis. Stat. § 5.05(1).

The Complainants make no attempt to argue that WEC's guidance or Manual improperly exercised the authority delegated from the Legislature, and thus are not seeking to invoke "election administration" jurisdiction. Instead their arguments track more along the lines of the "conduct of elections." *E.g.* Complainants' Reply Brief at 2 ("The Wisconsin 5 cities no not have the legal authority to depart from the Wisconsin's election law scheme which includes . . . the Commission's 250-page Election Administration Manual for Wisconsin Municipal Clerks.").

Further, the Complainants' do not properly invoke "conduct of elections" jurisdiction either. To do so, the Complainants must identify a rule that was expressly included in WEC's enforcement authority, *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶ 62, 342 Wis. 2d 444, 478, 820 N.W.2d 404, 420, and argue how it was violated. Wis. Stat. § 5.06(1). However, the Legislature only expressly delegated authority over "the administration of chs. 5 to 10 and 12 and other laws relating to elections and election campaigns[.]" Wis. Stat. § 5.05(1)

(period added). These laws govern technical elements of election administration, such as discussed in the Manual, and stand in striking opposition to the sweeping structural arguments the Complainants make. As will be discussed in more detail later in this brief, the Complainants' are not asking the WEC to enforce the technical laws of election administration, they ask the WEC to institute broad, structural changes to how elections are funded. Yet, if the Legislature intended for the WEC to take up these arguments, it would have expressly delegated that authority, instead of limiting it to chapters 5 to 10, 12, and other election laws. Indeed, WEC has declined to take up constitutional questions in the past, *Kuechmann v. Sch. Dist. of La Crosse*, 170 Wis. 2d 218, 225, 487 N.W.2d 639, 642 (Ct. App. 1992), and should do so again. *See also Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021) (collecting cases) (federal agencies "are generally ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise"). Indeed, arguments about the Home Rule Amendment, contract law, the open meetings law, and the like are plainly outside of WEC's jurisdiction.

Furthermore, even though the Complainants' include a small section at the end of their brief discussing absentee balloting, the WEC does not have jurisdiction over this claim either. The Complainants do not actually allege a violation of the absentee balloting law, and raise it only as a public policy reason in support of their contract claim. Complainants' Reply Brief at 76 *et seq.* However, the WEC does not have jurisdiction over ordinary contract matters. Even so, the Complainants do not include any facts that demonstrate probable cause that the absentee law was violated, as their Brief simply cites the law while providing no facts actually implicating it. Thus, this too should be dismissed. Wis. Stat. § 5.06(1).[8]

[8] Though it is difficult to determine just what the Complainants are alleging, they may be attempting to argue a discrimination claim as part of their Equal Protection argument, that, though completely without merit, potentially falls under WEC's jurisdiction. However, the WEC has no jurisdiction over the portion of the Complainants' allegations that the Equal Protection Clause requires the City to provide assistance to those outside its borders, as such a holding would require the reinterpretation of a City's Home Rule authority. *E.g. Wisconsin's Env't Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 518, 533 n.8, 271 N.W.2d 69, 76 (1978).

V. The Complaint Is Not Timely.

Though the CTCL grant was publicly accepted in July of 2020, implemented during two different elections, Affidavit of Christina Oppenneer at ¶ 21, and fully spent by January, 2021, the Complainants delayed until May to file their Complaint. Even then they reserved many of their claims until an August briefing. *See* Complainants' Reply Brief at 52. This delay renders their allegations untimely under both Wis. Stat. § 5.06(3) and the doctrine of laches. Furthermore, the Complainants' proposed justifications for their delay are insufficient.

The Wisconsin Supreme Court has made clear that there is a heightened need to file election disputes in a timely manner. Just last year it held that "[e]xtreme diligence and promptness are required in election-related matters, particularly where actionable election practices are discovered prior to the election." *Trump v. Biden*, 2020 WI 91, ¶ 11, 394 Wis. 2d 629, 636–37, 951 N.W.2d 568, 572, cert. denied, 141 S. Ct. 1387 (2021) (citing 29 C.J.S. Elections § 459 (2020)) (alteration bracketed). Implementing this purpose, Wis. Stat. § 5.06(3) requires election complaints to be filed "promptly so as not to prejudice the rights of any other party." Indeed, the statute contemplates very short timelines to file complaints, stating "[i]n no case may a complaint relating to nominations, qualifications of candidates or ballot preparation be filed later than 10 days after the complainant knew or should have known that a violation of law or abuse of discretion occurred or was proposed to occur." Wis. Stat. § 5.06(3) (alteration bracketed). Similarly, this same need for promptness underscores the doctrine of laches. *Trump*, 2020 WI 91, ¶ 11 ("For obvious reasons, laches has particular import in the election context.").

The Complaint is plainly untimely under Wis. Stat. § 5.06(3) and the doctrine of laches. The CTCL grant was employed in not one, but two elections prior to this challenge. Affidavit of Christina Oppenneer at ¶ 21 (August and November 2020). However, waiting through multiple

complete elections to challenge the acceptance of the grant is improper. *See Trump*, 2020 WI 91, ¶¶ 14-22 (delaying "until after the votes were cast" and through multiple election cycles was unreasonable). Further, the Complainants waited until after all CTCL grant funds were expended to raise their challenge. *See* Exhibit A to the Affidavit of Carol Stancato. Yet, waiting until the "money has been spent, revenues have come in, and the books have already been closed" is unreasonable. *Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 17, 393 Wis. 2d 308, 320–21, 946 N.W.2d 101, 107–08. That they ask WEC prevent future acceptance of the grant does nothing to aid their claim. Complainants' Reply Brief at 54. The Complaint has not stated probable cause that the grant will either be offered or accepted in the future. Even assuming for the sake of argument that accepting the grant was improper, asking WEC to assume it will happen again, and then to take preemptive action based on that assumption is clearly improper.

The Complainants assert that their allegations are timely for three reasons, however, none justify their delay. First, they argue that they had "no ability . . . to know" about the CTCL grant and its uses. Complainants' Reply Brief at 55. Second, they argue that "the city is effectively admitting they cannot or are not willing to acknowledge the implications or illegalities of their past actions to act in accordance with the law in the future. So, in effect, the Commission must act because the city lacks the self-reflection to consider why the complainants are concerned about future departures and violations from Wisconsin's election law scheme in the 2022 elections and beyond." Complainants' Reply Brief at 56. Third, they offer the fact that they "do not assert how the voters are prejudiced as each were unknowingly subjected to the city's invitation of private entities to the election process" as a final justification for their delay. Complainants' Reply Brief at 56. Each will be addressed in turn.

A. The City's Acceptance Of The CTCL Grant Was Widely Known, And There Is No Reason For The Complainants' Delay In Filing.

The Complainants' assertion that they had "no ability . . . to know" about the CTCL grant or its uses is far from true. Complainants' Reply Brief at 55. Not only did they have access to information about the grant, two of the Complainants were election officials in the City of Kenosha. Exhibits A and B to the Second Affidavit of Matt Krauter. Not only were they election officials, but they served in two different elections where the City of Kenosha used CTCL grant funds. Affidavit of Christina Oppenneer ¶¶ 19, 21 (August and November 2020). Now, long after these two elections were completed, the votes tallied, and after certifying that the election was held lawfully, Exhibits A and B to the Second Affidavit of Matt Krauter, they are saying they had no ability to know about the CTCL grant. Their assertion is plainly false.

Laches is implicated when a party has knowledge of an election process prior to the election, but waits until after the election to challenge it, *Trump v. Biden*, 2020 WI 91, ¶¶ 20-21, 394 Wis. 2d 629, 642–43, 951 N.W.2d 568, 575, cert. denied, 141 S. Ct. 1387 (2021); yet, the acceptance of CTCL grant was widely publicized,[9] but no challenge came. Prior to either the August or November elections, on July 7, 2020, CTCL itself published the Wisconsin Safe Voting Plan. It wrote that the "grants, awarded to the cities of Green Bay, Kenosha, Madison, Milwaukee, and Racine, will be used to implement the Wisconsin Safe Voting Plan — a vision

[9] To provide a sample, consider the following articles published in early July of 2020. Mary Spicuzza, *Wisconsin's five largest cities awarded $6.3 million in effort to make elections safer amid coronavirus pandemic*, MILWAUKEE JOURNAL SENTINEL (Jul. 6, 2020) (https://www.jsonline.com/get-access/?return=https%3A%2F%2Fwww.jsonline.com%2Fstory%2Fnews%2Fpolitics%2F2020%2F07%2F06%2Fwisconsins-five-largest-cities-awarded-6-3-million-effort-make-elections-safer-amid-coronavirus-pand%2F5382546002%2F); Kenneth P. Vogel, *Short of Money to Run Elections, Local Authorities Turn to Private Funds*, N.Y. TIMES (Sept. 26, 2020) (https://www.nytimes.com/2020/09/25/us/politics/elections-private-grants-zuckerberg.html); Jackson Danbeck, *Wisconsin's largest cities get $6.3M in grants to support safer elections*, NBC15.com (July 6, 2020) (https://www.nbc15.com/2020/07/06/wisconsins-largest-cities-get-63m-in-grants-to-support-safer-elections/); *Kenosha, Racine Among Cities To Receive Grant Money For Nov. Election* (Jul. 7, 2020) (https://www.wlip.com/kenosha-racine-among-cities-to-receive-grant-money-for-nov-election/). These are but a few of the articles published over the last year regarding the CTCL grant.

for a safe, inclusive, and secure voting process in 2020 elections." *CTCL Partners with 5 Wisconsin Cities to Implement Safe Voting Plan*, Center for Tech and Civic Life (July 7, 2020) (https://www.techandciviclife.org/wisconsin-safe-voting-plan/). Indeed, Kenosha's acceptance of the CTCL grant made both local and national headlines. There was simply no reason for the Complainants to delay their Complaint.

A party that closes their eyes to the facts in front of them cannot defeat a laches argument by saying they did not have sufficient information to bring their claim sooner. *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶ 20, 389 Wis. 2d 516, 529, 936 N.W.2d 587, 594, cert. denied sub nom. *Wisconsin ex rel. Wren v. Richardson*, 140 S. Ct. 2831 (2020). "[U]nreasonable delay in laches is based not on what litigants know, but what they might have known with the exercise of reasonable diligence." *Id.* at ¶ 20 (alteration bracketed). The Wisconsin Supreme Court has re-affirmed that the inquiry into what one "might have known" with reasonable diligence is not what one would be able to accidentally come across or discover with minimal effort. Indeed, the Court recently held that a non-lawyer with a second grade reading level should have known to "research, consult others, and find out" whether he needed to file a motion accusing his own lawyer of providing inadequate legal representation, and that he unreasonably delayed in bringing his motion. *Id.* at ¶¶ 22-24. If the Complainants in this matter did not know about the grant, it was not for want of available information. Their delay in researching and accessing resources was unreasonable.

Furthermore, though the Complainants argue that they needed to delay because they did not know how the CTCL grant would be implemented and needed to wait and see, Complainants' Reply Brief at 51,[10] but even after waiting, base their allegations in the language

[10] "The acceptance of the conditional grants are one thing as is the general outlined use of the funds as indicated in the Wisconsin Save (sic) Voting Plan (WSVP). It is quite another thing to know of how the City implemented the WSVP's provisions." Complainants' Reply Brief at 56.

of the Wisconsin Safe Voting Plan rather than its implementation. They continually argue by quoting provisions of the Wisconsin Safe Voting Plan, and guessing "on information and belief" how they think it was implemented based on their reading of it and some emails obtained through public record requests. *E.g.* Complainants' Reply Brief at 72-73 (§ IV, C, 2). Their claim that they needed to wait and gather facts is undermined by their absence from the briefing. Rather, once the grant was accepted, "the underlying facts of the original action were set" and the need to file any intended challenge became urgent. *See Wisconsin Small Businesses United, Inc. v. Brennan*, 2020 WI 69, ¶ 15, 393 Wis. 2d 308, 319, 946 N.W.2d 101, 107; *see also Texas Voters All. v. Dallas Cty.*, 495 F. Supp. 3d 441, 471 (E.D. Tex. 2020) (terming a far shorter delay in challenging the acceptance of a CTCL grant from November's election unreasonable). Because the Complainants' unreasonably delayed, this action must be barred.

B. Arguing That The Complainants' Delay Was Justified Because The City Has Not Admitted To Wrongdoing Is A Non-Starter.

The Complainants erroneously believe that because the Respondents "cannot or are not willing to" admit to their allegations, that they are entitled to an additional delay in filing their Complaint. Complainants' Reply Brief at 56.[11] Arguments such as this indicate a lack of seriousness on the part of the Complainants, and are wholly frivolous. Complaints are filed and disputes progress *because* two sides do not agree that one violated the law. Far from granting a party additional time to file a complaint, asserting that one side does not agree that it acted unlawfully has no bearing on the timing of the filing. To the contrary, the doctrine of laches regularly applies despite a party not admitting to wrongdoing. *E.g. Trump v. Biden*, 2020 WI 91, ¶ 6, 394 Wis. 2d 629, 634, 951 N.W.2d 568, 571, cert. denied, 141 S. Ct. 1387 (2021),

[11] They argue, "the city is effectively admitting they cannot or are not willing to acknowledge the implications or illegalities of their past actions to act in accordance with the law in the future. So, in effect, the Commission must act because the city lacks the self-reflection to consider why the complainants are concerned about future departures and violations from Wisconsin's election law scheme in the 2022 elections and beyond." Complainants' Reply Brief at 56.

Wisconsin Small Businesses, 2020 WI 69, ¶ 1. The use of such arguments demonstrate that the Complainants' are grasping at straws in an attempt to justify their plainly unreasonable delay.

C. The Complainants Clarify That They Are Not Asserting How Their Votes Were Prejudiced, And Believe That Doing So Entitles Them To More Time To File Their Complaint. In Actuality, This Reason Serves To Bar Consideration Of Their Allegations.

As a further reason that their delay was justifiable, the Complainants assert that they "do not assert how the voters are prejudiced" by the Respondents' acceptance of the CTCL grant, Complainants' Reply Brief at 56, but it is not at all clear why. To the contrary, this admission forecloses some of their arguments. For example, their equal protection arguments, *e.g.* Complainants' Reply Brief at 68, hinge on the right to vote being infringed. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197–98, 128 S. Ct. 1610, 1620–21 (2008) (Stevens, J., lead opinion) (Roberts, C.J., and Kennedy, J., joining); *id.* at 204-05 (Scalia, J., concurring) (joined by Thomas and Alito, JJ); *Anderson v. Celebrezze*, 460 U.S. 780, 782, 103 S. Ct. 1564, 1566 (1983). As the Complainants do not allege any actions by the Respondents that infringe this right, they cannot bring the claim. Furthermore, alleging that the Complainants think their right was infringed, but that they do not know how, certainly falls below the requirement to state probable cause. Wis. Stat. § 5.06(1). Far from entitling the Complainants to additional delay, this factor serves to foreclose their claims.

VI. The Complainants Inaccurately Describe Municipal Home Rule In Wisconsin.

The Complainants paint an inaccurate picture of Wisconsin cities' home rule authority. First, the Complainants assert that Wis. Stat. § 7.15 serves to limit a city's ability to fund the conducting of its election, but no such limitation exists. Second, they argue that there is no law specifically authorizing a city to accept a grant, and in the absence of such a law, the Respondents' may not do so. Complainants' Reply Brief at 63. However, this argument turns the

analysis on its head, and accepting it would require the WEC to reinterpret the Home Rule Amendment in a manner inconsistent with the Wisconsin Supreme Court's precedent.

A. Wis. Stat. § 7.15 Does Not "Unambiguously" Limit The City's Power To Fund The Conducting Of Elections.

As to the Complainants first argument, Wis. Stat. § 7.15 does not "unambiguously" constitute "an express statutory limitation of the common council's powers . . . over 'charge and supervision of elections and registration in the municipality." Complainants' Reply Brief at 59 (ellipsis added). Wis. Stat. § 62.11 provides that "the council shall have the management and control of the city . . . finances," and § 7.15 does nothing to change that. It is striking that in a statute that is alleged to "unambiguously" and expressly limit this power, the Complainants can cite to no specific provision within it so doing. In order to limit the Common Council's power over the City's finances, there must be an "express limitation" so doing, Wis. Stat. § 7.15 contains none. Wis. Stat. § 62.11(5). Undermining their position, WEC's Election Administration Manual informs municipal clerks that their municipalities are to pay for their election expenses. *Wis. Election Admin. Manual*, 225-227 (September 2020).

Wis. Stat. § 7.15 does not purport to change the fundamental manner elections are funded. A recent report from the Congressional Research Service has confirmed that local jurisdictions are frequently tasked with funding election expenditures.

> States typically have primary responsibility for making decisions about the rules of elections (policymaking). Localities typically have primary responsibility for conducting elections in accordance with those rules (implementation). Localities, with varying contributions from states, typically also have primary responsibility for paying for the activities and resources required to conduct elections (funding).

See 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 Sept. 21, 2021). The City of Kenosha also has funded its own elections for years. *Budget Documents*, City of Kenosha (https://www.kenosha.org/departments/finance#budget-documents) (accessed June 9, 2021). Wis. Stat. § 7.15 does nothing to change this arrangement.

B. The Complainants' Remaining Home Rule Arguments Turn The Appropriate Analysis On Its Head.

The Complainants argue that in the absence of a law specifically authorizing the acceptance of the CTCL grant, Wisconsin's home rule doctrine bars its acceptance,[12] but to do so would be to invert the analysis. In fact, the opposite is true, "[l]ongstanding Wisconsin law supports the proposition that political subdivisions retain their ability to govern in the absence of state legislation." *Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶ 29, 342 Wis. 2d 444, 462–63, 820 N.W.2d 404, 413 (citing *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 637, 639, 209 N.W. 860 (1926)) (capitalization altered).

Cities in Wisconsin operate under a grant of home rule authority from Article XI, section 3 of the Wisconsin Constitution and from Wis. Stat. § 62.11. *Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 63, 373 Wis. 2d 543, 892 N.W.2d 233; *City of S. Milwaukee v. Kester*, 2013 WI App 50, ¶ 16, 347 Wis. 2d 334, 347, 830 N.W.2d 710, 717. Though it is true that absent this home rule power, cities "are creatures of the state legislature and have no inherent right of self-government beyond the powers expressly granted to them[,]" *Madison Tchrs., Inc. v. Walker*, 2014 WI 99, ¶¶ 88-89, 358 Wis. 2d 1, 62–63, 851 N.W.2d 337, 367, the "legislature has given cities all powers not denied them by other statutes or the constitution." *Metro. Milwaukee Ass'n of Com., Inc. v. City of Milwaukee*, 2011 WI App 45, ¶ 81, 332 Wis. 2d 459, 506–07, 798 N.W.2d 287, 311; *Apartment Ass'n of S. Cent. Wisconsin, Inc. v. City of Madison*, 2006 WI App

[12] "Here, the absence of any legislative action is the legislative rejection of the city's authority to accept conditional grants for statewide and federal congressional elections that allow the engagement of private entities into the core governmental function of election processes through the municipal clerk." Complainants' Reply Brief at 63.

192, ¶ 13, 296 Wis. 2d 173, 184–85, 722 N.W.2d 614, 619–20; *Wisconsin's Env't Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 518, 531–33, 271 N.W.2d 69, 75–76 (1978). Prior to the enactment of modern home rule authority, municipal powers "were limited to those expressed in the statutes[,]" but now, "cities possess all powers not denied them by the statutes or the constitution. Instead of the powers being specified, as formerly, the limitations are now enumerated." *Wisconsin's Env't Decade, Inc.*, 85 Wis. 2d 518, 531–33 (alterations bracketed). The Legislature has not limited a City's ability to accept the CTCL grant. To the contrary, there is specific legislation protecting a city's control over its finances, and its ability to act for the health, safety, and welfare of the people in it. Wis. Stat. § 62.11(5); *Iowa Voter All. v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559, at *3 (N.D. Iowa Oct. 20, 2020).

The Complainants then insinuate that the Respondents have withheld a pertinent case citation supporting their position, this too is incorrect. They write of the Respondents' Answer, "there is no mention of the Wisconsin appellate court decision in *Loc. Union No. 487, IAFF AFL-CIO v. City of Eau Claire*," Complainants' Reply Brief at 60, this is true, as the decision is irrelevant. Unlike the present matter, that case deals with situations where a state statute has preempted a municipal action. *Loc. Union No. 487, IAFF AFL-CIO v. City of Eau Claire*, 141 Wis. 2d 437, 442–43, 415 N.W.2d 543, 545 (Ct. App. 1987), aff'd sub nom. *Loc. Union No. 487, IAFF-CIO v. City of Eau Claire*, 147 Wis. 2d 519, 433 N.W.2d 578 (1989) (addressing whether Wis. Stat. § 62.13, among other statutes, preempted the combining of fire and police functions at the municipal level). In 130+ pages of briefing, the Complainants have yet to successfully identify a provision of law that prohibits the acceptance of the CTCL grant, thus rendering the preemption doctrine irrelevant.

Ironically, just one page after implying dishonesty on the part of the Respondents, the Complainants plainly misrepresent the holding of a case. On page 61 of the Reply Brief, the Complainants write, "the Wisconsin Supreme Court has recognized as early as 1931 that 'elections are matters of state–wide concern. *State v. Richter*, 234 N.W. 909, 911 (Wis. 1931)." Complainants' Reply Brief at 61. This is inaccurate, and the very next sentence reveals that the Wisconsin Supreme Court declined to decide the matter. *Id.* at 911 ("However, it is not necessary to pass on this question.").

VII. The Reply Brief's Attempts To Identify A Law The Respondents Violated All Fail.

Seemingly recognizing the need to cite a specific provision of law that was violated, the Complainants attempt to argue that Wis. Stat. § 20.907(1), as well as the Elections and Electors Clauses of the United States Constitution demonstrate that the City cannot accept the CTCL grant, but none of these authorities do so. Complainants' Reply Brief at 61, 63.

A. Wis. Stat. § 20.907(1) Has No Bearing On This Matter.

First, the Complainants argue that pursuant to Wis. Stat. § 20.907(1) "the state legislature provided for itself a law and procedure regarding the acceptance of grants." Complainants' Reply Brief at 61. However that statute applies only to grants to "the state or to any state agency[.]" Wis. Stat. § 20.907(1) (alteration bracketed). The plain language of the statute demonstrates that it does not apply to the City of Kenosha. Wis. Stat. § 20.001(1) ("State agency' means any office, department or independent agency in the executive branch of Wisconsin state government, the legislature and the courts."); *see also State ex rel. Kalal v. Cir. Ct. for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 663–64, 681 N.W.2d 110, 124.

If it has any relevance at all, Wis. Stat. § 20.907(1) demonstrates that the Legislature is perfectly capable of writing a statute regulating the acceptance of grants when it chooses to do

so. That it has chosen not to in circumstances such as the CTCL grant appears even more intentional[13] after consulting Wis. Stat. § 20.907(1). *See Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶ 29, 342 Wis. 2d 444, 462–63, 820 N.W.2d 404, 413 (citing *State ex rel. Ekern v. Milwaukee*, 190 Wis. 633, 637, 639, 209 N.W. 860 (1926)).

B. The Complainants' Elections Clause Arguments Deviate From The Text Of The Constitution, Do Not Square With Prior Precedents, And Have Already Been Rejected By Other Courts.

Second, the Reply Brief attempts to deviate from the text of the United States Constitution to create obligations within the Elections Clause that do not exist. It argues, "the Elections Clause . . . of the United States Constitution requires that federal elections be exclusively publicly-funded, unless the state legislature has legally authorized grants for election administration." Complainants' Reply Brief at 63. Yet, the constitutional text admits of no such interpretation. It reads, the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators." U.S. Const. Art. I, § 4, cl. 1. The Clause means what it says, and it plainly does not "impose[] specific limits or restrictions as to how a federal election must be funded." *Iowa Voter All. v. Black Hawk Cty.*,

[13] That there is no law barring the acceptance of the grant should end the analysis without resort to legislative history. However, if consulted, it reveals that the Legislature believes that accepting election grants is lawful, as it recently passed a Bill seeking to make it unlawful for a municipality to accept such grants. 2021 Assembly Bill 173. The Bill passed both the Senate and Assembly, but was ultimately vetoed by the Governor.

The Legislature is presumed to act "with full knowledge of the existing condition of the law and with reference to it[.]" *See Wisconsin Carry, Inc. v. City of Madison*, 2017 WI 19, ¶ 62 n.44, 373 Wis. 2d 543, 582–83, 892 N.W.2d 233, 252 (citing *Town of Madison v. City of Madison*, 269 Wis. 609, 614, 70 N.W.2d 249 (1955)) (period added). If accepting the grant was already unlawful, what purpose could there be in passing a law to again declare the same act unlawful?

Rather, the Bill's purpose was in line with the testimony of Senator Duey Stroebel, one of its cosponsors, stating that there exists "no similar regulation for private funds awarded under contract to government entities responsible for administering and conducting our elections." LC Hearing Materials for AB173, Wisconsin Legislature, 3 (https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/ab173) (last accessed Sept. 23, 2021) (within Senator Stroebel's "Testimony on AB 173"); *see* Veto Message, Wisconsin Legislature (https://docs.legis.wisconsin.gov/2021/proposals/reg/asm/bill/ab173) (last accessed Sept. 23, 2021) (confirming the same understanding). For WEC to hold otherwise would be to usurp the authority of the Legislature.

No. C20-2078-LTS, 2020 WL 6151559, at *3 (N.D. Iowa Oct. 20, 2020) (alteration bracketed). The WEC should not deviate from the text to read obligations into the Constitution simply because the Complainants would like them to exist.

The Complainants further Elections Clause arguments generally assert that in the absence of a law authorizing the acceptance of the CTCL grant, the Elections Clause serves to prohibit its acceptance, yet this is not true. The Complainants' view is the actual opposite of how the Supreme Court has interpreted the Clause. The Elections "Clause functions as "a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8–9, 133 S. Ct. 2247, 2253–54 (2013) (quoting *Foster v. Love*, 522 U.S. 67, 69, 118 S.Ct. 464 (1997)). This broad authority includes election funding and administration. *See Cook v. Gralike*, 531 U.S. 510, 523–24, 121 S. Ct. 1029, 1038 (2001). Therefore, states are free to make decisions on how to fund and administer elections, unless and until Congress preempts those choices. The State of Wisconsin has determined that localities fund elections, *e.g. Wis. Election Admin. Manual*, 225-27 (September 2020), Wis. Stats. §§ 5.68, 7.03, 7.15, 62.11(5); and by not restricting this general authority to fund elections, it may be employed to accept grants. *All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510, at *2 (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) ("Absent such a prohibition, the Court lacks the authority to enjoin them from accepting such assistance."); *see Adams v. State Livestock Facilities Siting Rev. Bd.*, 2012 WI 85, ¶ 29, 342 Wis. 2d 444, 462–63, 820 N.W.2d 404, 413.

Undertaking this same analysis, regarding same grant, used in the same election as the present matter, the Federal District Court for the Northern District of Georgia reached the same result, concluding that the acceptance of CTCL grant funds "standing alone, does not impede Georgia's duty to prescribe the time, place, and manner of elections[.]" *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1255–56 (N.D. Ga. 2020) (alteration bracketed). "Georgia law leaves it to counties to fund election expenditures that exceed federal and state funds. By applying for and accepting the CTCL grant, Fulton County is merely exercising its prerogative of locating funding." *Id.*

C. The Electors Clause Contains No Guidance On How Elections Must Be Funded.

The Complainants also argue that the "Electors Clause of the United States Constitution requires that federal elections be exclusively publicly-funded, unless the state legislature has legally authorized grants for election administration." Complainants' Reply Brief at 63. The text of the Electors Clause evidences no such requirement. Instead, it reads, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector." U.S. Const. art. II, § 1, cl. 2. The Complainants cite no cases that establish this requirement, and ask the Commission to create a new constitutional provision to suit their preferences The Commission should decline this invitation. The remainder of the Reply Brief's Electors Clause argument has been addressed in the Respondents' Answer, § II, C, and rather than adding additional length to this Sur-Reply, the Respondents will incorporate it by reference, as if fully stated herein.

VIII. The Complainants' Contract Claims All Fail.

The Complainants argue that the CTCL Grant Agreement, Exhibit A to the Affidavit of Matt Krauter, should be voided as against public policy, Complainants' Reply Brief at 64, but as neither a party to it, nor a third-party beneficiary, they do not have standing to assert their contractual claim; yet, even if they did, they have not demonstrated any legal reason to void it. Furthermore, WEC does not have jurisdiction over whether a contract should be voided as against public policy, as it is not a matter of "election administration" or the "conduct of elections." Wis. Stat. § 5.06(1).

A. The Complainants Do Not Have Standing To Challenge The CTCL Grant Agreement.

"The general rule is that only a party to a contract may enforce it." *Sussex Tool & Supply, Inc. v. Mainline Sewer & Water, Inc.*, 231 Wis. 2d 404, 409, 605 N.W.2d 620, 622–23 (Ct. App. 1999) (citing *Schilling v. Employers Mut. Cas. Co.*, 212 Wis.2d 878, 886, 569 N.W.2d 776, 780 (Ct. App. 1997)). The CTCL Grant Agreement has been submitted as Exhibit A to the Affidavit of Matt Krauter, and there is plainly no signature by or mention of any of the Complainants, thus, they are not parties to the Agreement.

"The exception to that rule is a contract specifically made for the benefit of a third party." *Goossen v. Est. of Standaert*, 189 Wis. 2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994) (citing *Abramowski v. Wm. Kilps Sons Realty*, 80 Wis.2d 468, 472 n.3, 259 N.W.2d 306, 308 (1977)); *Lamb v. Manning*, 145 Wis. 2d 619, 626, 427 N.W.2d 437, 440–41 (Ct. App. 1988). "A third-party beneficiary is one who the contracting parties intended to 'directly and primarily' benefit." *Becker v. Crispell-Snyder, Inc.*, 2009 WI App 24, ¶ 11, 316 Wis. 2d 359, 367, 763 N.W.2d 192, 196 (citing *Winnebago Homes, Inc. v. Sheldon*, 29 Wis.2d 692, 699, 139 N.W.2d 606 (1966)). "A party proves its third-party beneficiary status by pointing to specific language in

the contract establishing intent." *Id.* (citing *Schilling*, 212 Wis.2d 878, 886-87); *see Goossen v. Estate of Standaert*, 189 Wis.2d 237, 249, 525 N.W.2d 314, 319 (Ct. App. 1994)). "The benefit proven must be direct; an indirect benefit incidental to the primary contractual purpose is insufficient." *Id.* (citing *Sussex Tool & Supply, Inc.*, 231 Wis. 2d 404, 409).

Though the burden of proof is on the party asserting third-party beneficiary status, *see Goossen*, 189 Wis. 2d 237, 249 (citing *Krawczyk v. Bank of Sun Prairie*, 174 Wis.2d 1, 7–8, 496 N.W.2d 218, 220 (Ct. App. 1993)); *see Schell v. Knickelbein*, 77 Wis. 2d 344, 348–49, 252 N.W.2d 921, 924–25 (1977), the Complainants never even assert that they are third-party beneficiaries of the CTCL Grant Agreement. Thus, their claim fails without further consideration. *E.g. Goossen*, 189 Wis. 2d 237, 249 (citing *Krawczyk v. Bank of Sun Prairie*, 174 Wis.2d 1, 7–8, 496 N.W.2d 218, 220 (Ct. App. 1993)). Nor could they prove third-party beneficiary status, as they would be blocked by multiple appellate precedents. *See e.g. Becker*, 2009 WI App 24, ¶ 11, *Sussex Tool & Supply, Inc.*, 231 Wis. 2d 404, 407-10, *Schilling*, 212 Wis. 2d 878, 889–92.

B. Upon The Merits, Public Policy Would Not Void The CTCL Grant Agreement.

Even if considered, the claim that the contract is void as against public policy would fail on its merits. Courts strive to protect the freedom to contract, and have "endeavored to protect the right . . . by ensuring that promises will be performed." *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2014 WI App 87, ¶ 22, 356 Wis. 2d 249, 264, 853 N.W.2d 618, 625, aff'd, 2015 WI 65, ¶ 22, 363 Wis. 2d 699, 866 N.W.2d 679 (quoting *Sonday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶ 53, 293 Wis.2d 458, 718 N.W.2d 631). In deference to this freedom, courts will not frustrate the intentions of contracting parties unless it is "free from doubt" that the public policy interests against enforcement outweigh those in favor of it. *N. States Power Co. v. Nat'l Gas Co.*, 2000 WI App 30, ¶ 8, 232 Wis. 2d 541, 545–46, 606 N.W.2d 613, 615–16 (citing *Continental*

Ins. Co. v. Daily Express, Inc., 68 Wis.2d 581, 589, 229 N.W.2d 617, 621 (1975)); *Ash Park, LLC*, 2014 WI App 87, ¶ 22 (quoting *Sonday v. Dave Kohel Agency, Inc.*, 2006 WI 92, ¶ 53, 293 Wis.2d 458, 718 N.W.2d 631).

In light of a municipality's interest in securing election funding as expressed in Wis. Stats. §§ 5.68, 7.03, 7.15, 62.11(5) and the *Wis. Election Admin. Manual*, 225-27 (September 2020), there are strong policy reasons supporting the acceptance of the CTCL grant. *See In re F.T.R.*, 2013 WI 66, ¶ 68, 349 Wis. 2d 84, 121, 833 N.W.2d 634, 652 (citing *N. States Power Co..*, 2000 WI App 30, ¶ 8) (public policy interests may be found in statutes, regulations, or court opinions). This is especially true where, as in the present matter, the statutes do not affirmatively prohibit the act in question, *i.e.* the acceptance of grant funds. *See e.g. In re F.T.R.*, 2013 WI 66, ¶ 40, *N. States Power Co.*, 2000 WI App 30, ¶¶ 17, 21; *see also Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1255–56 (N.D. Ga. 2020) (The statutes leave it to the City to fund elections, and it "is merely exercising its prerogative of locating funding").

C. The Complainants Own Public Policy Arguments Are All Misplaced.

The Complainants' affirmative case that public policy interests weigh against enforcement is merit-less. Many of their arguments can be quickly dispatched, but for completeness, the Respondents will touch on each.

The Complainants cite to unpublished and irrelevant authority as the basis of the public policy argument. The begin by citing to *American Federation of State, Mun., and County Employees v. Wisconsin Law Enforcement Ass'n*, 2008 WI App 51, ¶ 1, 2008 WL 516738, at *1 (Wis.App. 2008), however, pursuant to Wis. Stat. Ann. § 809.23, this case is not cite-able, and it may be error for the Commission to rely upon it. *See Metropolitan Holding Co. v. Board of Review*, 167 Wis. 2d 134, 141 n.10, 482 N.W.2d 654 (Ct. App. 1992), rev'd on other grounds, 173 Wis. 2d 626, 495 N.W.2d 314 (1993). The Complainants' continue by citing to *Wells* and

Chippewa Valley, but these are irrelevant. Cases about union disputes involving their treasuries, *Wells*, or disputes involving 19th century railroads, *Chippewa Valley* do not aid their position.

The Complainants then assert three more reasons that the CTCL Grant Agreement violates public policy, but these are merit-less.

> First, the WSVP provisions are an unconstitutional departure from the Wisconsin state election law scheme—as explained above. Second, the WSVP provisions are illegal and violate public policy because they treat geographic and demographic groups differently in the same election. Third, the WSVP is illegal and violates public policy because its privately-funded absentee voting contractual provisions contain geographic and demographic classifications amongst voters in the same election which violate state statutes—and, in turn, violate the Elections Clause and Electors Clause which grants to the state legislatures, not municipalities, the power to make federal election law. Wis. Stat. § 6.84, et seq. (absentee voting laws); U.S. Const., Art. I, § 4, cl. 1, Art. II, § 1, cl. 2.

Id. As argued in the Respondents' Answer, § II, C, the CTCL grant does not constitute an unconstitutional departure from Wisconsin's election scheme, and again, that argument is incorporated here by reference as if fully restated herein. The Complainants also re-cycle their Elections and Electors Clause arguments, but as has already been shown in this Sur-Reply, these arguments misstate the law, and these clauses were not violated. The Complainants also cite the absentee voting law, but simply describe its subsections, rather than providing any argument as to how it was violated or how any policy interests stemming from it are relevant, Complainants' Reply Brief at 76-80, thus, it too can be disregarded. They also argue that the City treated voters unequally, and say that in doing such have violated the Equal Protection Clause, which they also argue provides a policy reason to void the contract, but, as will be shown, these arguments are merit-less.

The Complainants' Equal Protection arguments never make it off the ground. They begin by arguing that there was discriminatory treatment, then that their voting rights have been

burdened, and finally, that the City's actions were unequal in that they did not effect those outside the City. As to their first argument, the Complainants have alleged that the City provided care-a-vans to people in a discriminatory manner, but as discussed in section I of this Sur-Reply, the City never used care-a-vans, much less in a discriminatory manner. Thus, this claim fails.

Secondly, the Complainants' argue that the WEC should apply strict scrutiny because they allege that their voting rights have been burdened, Complainants' Reply Brief at 68, but this argument is misplaced. The Complainants' concede that they cannot identify any burden on their voting rights. Complainants' Reply Brief at 56 ("the Complainants do not assert how the voters are prejudiced"); Wis. Stat. § 5.06(1) (without describing how these rights are burdened, the Complaint cannot state probable cause). Without such a burden, the analysis ends. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204-05, 128 S. Ct. 1610 (2008) (Scalia, J., concurring) (joined by Thomas and Alito, JJ) ("Of course, we have to identify a burden before we can weigh it."). The line of United States Supreme Court precedent cited in the Reply Brief bears this out, as an identifiable burden is needed to trigger a voting rights analysis. *E.g. Crawford*, 553 U.S. 181, 197–98 (Stevens, J., lead opinion) (Roberts, C.J., and Kennedy, J., joining), *id.* at 204-05 (Scalia, J., concurring) (joined by Thomas and Alito, JJ) (whether requiring voter identification was overly burdensome), *Clingman v. Beaver*, 544 U.S. 581, 587, 125 S. Ct. 2029, 2035 (2005) (whether Oklahoma's semiclosed primary system was overly burdensome), *Burdick v. Takushi*, 504 U.S. 428, 430, 112 S. Ct. 2059, 2061 (1992) ("whether Hawaii's prohibition on write-in voting unreasonably infringes upon its citizens' rights"), *Anderson v. Celebrezze*, 460 U.S. 780, 782, 103 S. Ct. 1564, 1566 (1983) ("whether Ohio's early filing deadline placed an unconstitutional burden on the voting and associational rights of Anderson's supporters"), *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 664, 86 S. Ct. 1079, 1080 (1966)

(whether a poll tax was overly burdensome). Indeed, the entire analysis "depends upon the extent to which a challenged regulation burdens" one's rights. *Burdick*, 504 U.S. 428, 434. Yet, the Complainants freely admit that they "do not assert how the voters are prejudiced[,]" Complainants' Reply Brief at 56 (alteration bracketed), this ends the inquiry.

Third, the Complainants repeatedly argue that the grant expenditures do not effect "Wisconsinites outside the Wisconsin 5 cities[,]" *e.g.* Complainants' Reply Brief at 73, and because they do not, the Equal Protection Clause is implicated; however, this argument is inaccurate. The City has no jurisdiction outside its borders, and cannot be held accountable for those outside of it. *See Wisconsin's Env't Decade, Inc. v. Dep't of Nat. Res.*, 85 Wis. 2d 518, 533 n.8, 271 N.W.2d 69, 76 (1978) (citing *Safe Way Motor Coach v. Two Rivers*, 256 Wis. 35, 39 N.W.2d 847 (1949)) ("This is not to imply that the jurisdiction and authority of a city is not limited to the territory within its boundaries. It is.").

CONCLUSION

It has been said that the definition of insanity is doing the same thing over and over again and expecting different results, the Respondents would submit that the definition of frivolity is filing challenges to the CTCL grant in courts around the country, having them all rejected, and continuing to press the issue.

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 Sur-Reply, and that the above Sur-Reply 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 27th day of September, 2021.

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Subscribed and sworn to before me
this 27th day of September, 2021

Kirsten DeVries

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