STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

RICHARD CARLSTEDT, SANDRA DUCKETT, JAMES FITZGERALD, THOMAS SLADEK, and LARK WARTENBERG,

Complainants,

v.

MEAGAN WOLFE, in her capacity as Administrator of the Wisconsin Elections Commission, ERIC GENRICH, in his capacity as Mayor of the City of Green Bay, CELESTINE JEFFREYS, in her capacities as former Chief of Staff to the Mayor and current City Clerk of the City of Green Bay, and KRIS TESKE, in her capacity as former City Clerk of the City of Green Bay,

Respondents.

ANSWER OF RESPONDENTS GENRICH AND JEFFREYS

Respondents Eric Genrich, in his capacity as Mayor of the City of Green Bay, and Celestine Jeffreys, in her capacities as former Chief of Staff to the Mayor and current City Clerk of the City of Green Bay (collectively, "Respondents"), by and through their attorneys Vanessa R. Chavez, Esq. and Lindsay J. Mather, Esq., hereby submit the following response to the Complaint filed by Richard Carlstedt, Sandra Duckett, James Fitzgerald, Thomas Sladek, and Lark Wartenberg (collectively, "Complainants") with the Wisconsin Elections Commission ("Commission").

INTRODUCTION

As the Commission is aware, it administers state and federal election laws as enacted by the Wisconsin Legislature and U.S. Congress, and as interpreted by state and federal courts. Chief among the many flaws in Complainants' allegations and theories is this plain fact: the claim that

Wisconsin municipalities are prohibited from accepting private funds to assist in the administration of elections has been rejected by the federal district court for the Eastern District of Wisconsin in *Wisconsin Voters Alliance v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), *appeal dismissed sub nom. Wisconsin Voters Alliance v. City of Racine*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020); *Wisconsin Voters Alliance v. City of Racine*, No. 20-C-1487, 2021 WL 179166 (E.D. Wis. Jan. 19, 2021).[1] While the plaintiffs in that case chose to disregard the requirement in Wisconsin Statutes § 5.06 that complaints against local election official first be brought to the Commission, now that the Court has ruled, Complainants cannot ask the Commission to disregard the Court's ruling, especially given that this Complainants' counsel also represented the plaintiffs in the *Wisconsin Voters Alliance* litigation.

Likewise, the Commission cannot ignore the federal court's rulings and create a prohibition on municipalities using private grant funds when such a provision appears nowhere in state law. The Legislature has acknowledged that current law includes no such provision by its ongoing attempts to enact such a law. *See* 2021 Wis. S.B. 207 and 2021 Wis. Assemb. B. 173. Copies of the *Wisconsin Voter Alliance* decisions are attached to this Answer as Exhibits A and B.

Complainants disagree with the City of Green Bay's ("City") acceptance and use of grant funds from the Center for Tech and Civic Life ("CTCL"). However, Complainants fail to point to any law which 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 jurisdictions across the country, the Complaint

[1] The October 14, 2020 Order denying the Wisconsin Voters Alliance's request for an initial injunction and the January 19, 2021 Order dismissing the case are both relevant to the analysis within this Answer. However, as they are unpublished, they are identified with two different Westlaw citation numbers. For the sake of simplicity, all subsequent citations to *Wisconsin Voters Alliance v. City of Racine* will be to the October 14, 2020 Order, though such references are intended to encompass either or both decisions, unless identified with a pin cite.

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. Instead, attached as Exhibit 1 to the Affidavit of Vanessa R. Chavez accompanying this Answer is a detailed factual report regarding the November 2020 election that was drafted by City Attorney Vanessa R. Chavez, dated April 20, 2021. This report was prepared at the behest of the City of Green Bay Common Council ("Common Council") and provides a comprehensive accounting of events. The report is hereby incorporated as if set forth in full herein.

In addition, with respect to the grant agreement, the CTCL grant requires the City to sign an agreement "promising to use the grant funds in compliance with United States tax laws." (Ex. C, Green Bay CTCL Grant Agreement, at 1.) As a municipal corporation, the City is required to comply with state and federal laws. The City's Finance Department maintained financial accounting records of the City's expenditures under the grant in accordance with its standard procedures. 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." (Compl. at ¶ 24.) Furthermore, the Complaint conveniently ignores that the CTCL grants were issued to municipalities without regard to the partisan make-up of their electorates. In fact, the City was one of 218 municipalities in Wisconsin to receive grant funds from CTCL ("WI-218"). *CTCL COVID-19 Grantee Jurisdictions* (full list of jurisdictions awarded COVID-19 Response Grants), *available at* https://docs.google.com/spreadsheets/d/1pE0OTeAbLMBSW7vFg0KB5byV4ygtY-sLAU2w1HnnCjA/edit#gid=287048536. Among the WI-218 are four other municipalities in

Brown County, and 18 in close proximity to Green Bay in Northeast Wisconsin. Finally, Respondent Teske took FMLA leave on October 23, 2020 because she had a family matter that required her attention. Respondent Teske did not take a leave of absence to extract herself from the election as alleged.

ARGUMENT

The Commission should dismiss the instant Complaint for several reasons. First, the Complaint is not timely and does not set forth facts establishing probable cause to believe that a violation of law has occurred. Additionally, the arguments offered by Complainants find no basis in Wisconsin law or any other applicable election law, as has been determined by the Eastern District of Wisconsin as well as several other courts. Finally, and perhaps most significantly, Complainants seek to have the Commission do administratively that which is the sole purview of the legislature: craft new election law. For all of these reasons, the Complaint should be dismissed.

I. Timeliness and 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, is sufficient as to form, and states probable cause. WIS. ADMIN. CODE § EL 20.04. Based on that determination, the Administrator will return the complaint to the complainant to cure any defect or forward it to the respondent for an answer. *Id.*

Administrator Meagan Wolfe is named as a Respondent in the Complaint along with the City Respondents, and two adjudicators have been appointed to serve in her place. Though the adjudicators are standing in for the Administrator, it is unclear to the City Respondents whether any initial determination has been made as to whether the Complaint is timely, is sufficient as to

form, and/or states probable cause.[2] Respondents therefore respectfully submit that the Complaint is not timely and does not state probable cause, and should therefore be dismissed.

A. Timeliness

The Complaint was made pursuant to Wisconsin Statutes section 5.06, (Compl. 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) (2019-20).[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. 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 by the responding party that 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 has noted the particular applicability of laches in the election context:

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

[2] In an email response to a question from Attorney Bryan Charbogian from the City of Kenosha concerning probable cause, the adjudicators stated, "Any respondent who wishes to contest probable cause as referenced in [Attorney Charbogian's] email may do so in his or her response." (Ex. D, May 15, 2021 email from Deborah C. Meiners.)

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

Trump v. Biden, 2020 WI 91, ¶ 11, 951 N.W.2d 568 (quoting 29 C.J.S. Elections § 459 (2020)). Complainants unreasonably delayed bringing this Complaint, and their claims should therefore be barred as untimely and prejudicial.

What constitutes an unreasonable delay for purposes of laches varies depending on the circumstances of a particular case. *Id.* at ¶ 13. Whether a delay is reasonable "is based not on what litigants know, but what they might have known with the exercise of reasonable diligence." *Id.* The allegations of wrongdoing in the Complaint center around the City's acceptance and use of grant funds from CTCL, which occurred during the summer of 2020, yet Complainants waited until April 2021 to file this Complaint. Complainants cannot assert in good faith that they promptly filed the Complaint.

The CTCL grant was first discussed at the July 9, 2020 meeting of the Ad Hoc Committee on Elections, and the public notice of that meeting included the discussion topic, "Wisconsin Safe Voting Plan (grant funded)." (Ex. E.) Following unanimous approval by the Committee, the item was placed on the agenda for the next Common Council meeting on July 21, 2020, where it was approved. The grant issue was listed in the public meeting notice as, "To approve the Wisconsin Safe Voting Plan (grant funded by the Center for Tech and Civic Life) and the recommendations contained therein." (Ex. F at 7.) Complainants, including a former alderperson for the City of Green Bay, are imputed with knowledge of actions taken in public meetings. When the Wisconsin Supreme Court examined former President Trump's decision to wait until after the election to challenge certain events that had occurred well before November, despite the fact that it could have made such a challenge when the events were announced, the court called the delay "patently unreasonable." *Trump v. Biden*, 2020 WI 91, ¶ 21. The same is true here: Complainants could and

should have brought their concerns to the Commission when the grants were accepted; to wait almost nine months before filing the Complaint is patently unreasonable.

In addition, the Wisconsin Voters Alliance filed its complaint asserting that the City's acceptance of the CTCL grant funds violated state or federal law on September 24, 2020; the court in that case issued a decision denying preliminary relief on October 14, 2020, and its final order dismissing the action on January 19, 2021. Despite the fact that they are represented by the same counsel which initiated that litigation, Complainants failed to bring their identical concerns to the Commission until more than six months after the *Wisconsin Voters Alliance* complaint was filed.

Presumably as a justification for the delay, Complainants point to certain open records requests that were filled in the early part of this year. However, when records requests were submitted or fulfilled is irrelevant to whether a complaint is timely, because the requests themselves do not constitute circumstances giving rise to a complaint. Rather, the pertinent inquiry is when the complainants knew or should have known of those circumstances. In the months following the City's acceptance of the CTCL grant funds, none of the Complainants filed any records requests with the City, nor took any actions to stay abreast of the public actions of the City. Importantly, many of the issues complained of, such as the supposed usurpation of authority by the Ad Hoc Elections Committee, were repeatedly discussed in open session meetings, which are recorded and posted online for the public to view. Similarly, the City's records are publicly available. In the months between the election and the filing of the Complaint, numerous open records requests were fulfilled by the City, and the responses to several were made public. In fact, a significant portion of the documents comprising Complainants' appendix was included among the City's responses to open records requests released between November 2020 and February 2021. That Complainants failed to read public notices, request or inspect records in a timely

manner, or monitor the proceedings in high profile litigation involving the same issues and legal counsel does not excuse their delay in bringing this action.

Moreover, although Complainants go to great lengths to detail the contents of many of those records request responses, the contents of those responses do not appear to have given rise to new legal arguments, as those proffered in the Complaint mirror those asserted in the unsuccessful cases decided last fall. Additionally, even though they now have extensive records at their disposal, Complainants make many of their allegations "on information and belief," and ask the Commission to conduct additional investigations based solely on those spurious allegations. All of which, taken together, makes it clear that Complainants and their counsel seek to use the complaint procedure under Section 5.06 to sow further doubt relative to the outcome of the November 2020 election, or for other political purposes, rather than to make any credible allegations of violations of elections law by Respondents. In fact, despite naming Mayor Eric Genrich, current City Clerk Celestine Jeffreys, and former City Clerk Kris Teske as respondents, the legal allegations have very little to do with their actions. Instead, Complainants challenge many of the processes chosen by the City generally, including the creation of and decisions by the Ad Hoc Elections Committee—a subcommittee of a public body required to conduct business in a public meeting.

The Complainants knew or should have known about the circumstances giving rise to their Complaint in July of 2020. Yet they failed to exercise the "[e]xtreme diligence and promptness [that] are required in election matters, particularly where actionable election practices are discovered prior to the election," *Trump v. Biden*, 2020 WI 91, ¶ 11, and instead unreasonably delayed almost nine months before filing the Complaint without providing any justification for such a delay. The first element of laches is therefore satisfied. *Id.* at ¶ 13.

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.[4] In fact, Complainants' counsel brought an action in 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 Alliance*, 2020 WL 6129510. 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 relitigate this matter. In fact, if Complainants subsequently initiate an appeal of the Commission's dismissal of the Complaint to circuit court, the Court is likely to find that Complainants and their Counsel are pursuing a frivolous action.

Additionally, the City had spent the majority of the CTCL grant funds by election day, with most of the rest earmarked for paying employees and poll workers. Respondents had no reason to expect they would be subject to another proceeding about those grant funds when there had been plenty of time between the receipt of the funds and Election Day during which any challenges could have been brought, but none aside from the unsuccessful federal lawsuit had been. The

[4] 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*, 2020 WL 6129510; *Iowa Voter Alliance v. Black Hawk Cty.*, No. C20-2078-LTS, 2020 WL 6151559 (N.D. Iowa Oct. 20, 2020); *Minnesota Voters Alliance v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937 (D. Minn. Oct. 16, 2020); *Pennsylvania Voters Alliance v. Ctr. Cty.*, 496 F. Supp. 3d 861, 2020 WL 6158309 (M.D. Pa. 2020), *appeal dismissed sub nom. Pennsylvania Voters Alliance v. Cty. of Ctr.*, No. CV 20-3175, 2020 WL 9260183 (3d Cir. Nov. 23, 2020); *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605985 (W.D. Mich. Oct. 2, 2020).

Eastern District federal court had already issued its order before the election denying preliminary relief based on its finding that the plaintiffs in that case were unlikely to succeed on the merits. The second element of laches is therefore satisfied. *See Trump v. Biden*, 2020 WI 91, ¶ 23.

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 by Complainants' unreasonable delay.

As an initial matter, the City has experienced staff changes in the nine months since the CTCL grant was accepted and the City began spending those funds. Respondent Kris Teske is particularly prejudiced, for example, because she no longer serves as Green Bay City Clerk, yet she is being required to respond to this Complaint. Similarly, the former Deputy City Clerk, who served as City Clerk during the November 3rd election while Respondent Teske was on leave, has since taken a job with another municipality. Had Complainants not unreasonably delayed filing this complaint, and instead filed when they knew or should have known about the acceptance and use of the grant funds—i.e., July 2020—former Clerk Teske and former Deputy Clerk Wayte would have still been City employees who could give real-time accounts of the situation. Additionally, 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. In September 2020, Complainants' counsel, representing a different group of plaintiffs, brought suit against the City, as well as the Cities of Racine, Kenosha, Milwaukee, and Madison, based on the same legal theories. *Wisconsin*

Voters Alliance, 2020 WL 6129510. Rather than doing so concurrently with that lawsuit—or prior to filing that suit, as required by statute, WIS. STAT. § 5.06(2)—Complainants' counsel did not file anything with the Commission until filing this Complaint six months after Judge Griesbach had already rejected the legal arguments contained therein.[5] Respondents should not have to relitigate 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.

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

That idea is particularly applicable to this matter. Here, Respondents are prejudiced by having to respond to legal claims and issues identical to ones that have already been considered and rejected in other fora, including federal court and even complaints before this Commission. Not only have the legal theories advanced in the Complaint been universally rejected by federal courts across the country, as discussed in more detail below, but the Commission itself has already opined on the acceptance and use of private grant funds. Commission Administrator Meagan Wolfe testified to the Wisconsin Assembly Committee on Campaigns and Elections about

[5] Judge Griesbach's decision in *Wisconsin Voters Alliance*, 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 Cty.*, 495 F. Supp. 3d 441, 2020 WL 6146248 (E.D. Tex. 2020); *Georgia Voter Alliance v. Fulton Cty.*, 499 F. Supp. 3d 1250, 2020 WL 6589655 (N.D. Ga. 2020).

complaints to the Commission that raised those specific issues, explaining, "[t]he Commission dismissed the complaint, noting that there is nothing in Wisconsin elections statutes which prohibits, proscribes, or even discusses grant funding." Wis. Legis., *Assemb. Comm. Campaigns and Elections Informational Hearing on Green Bay Election*, Wis. Eye (March 31, 2021), https://wiseye.org/2021/03/31/assembly-committee-on-campaigns-and-elections-14/, at 4:40-5:15 (testimony of Meagan Wolfe, Administrator, Wisconsin Elections Commission).

The principles underlying claim and issue preclusion provide guidance on the issue of prejudice in this matter. In the same way that claim and issue preclusion protect a party to a lawsuit from harassment by another party who may otherwise endlessly file successive lawsuits and attempt to relitigate settled issues and/or claims, Respondents should be protected from having to relitigate the same specious arguments time and again, especially given that it has already been the subject of numerous lawsuits, appeals, hearings, investigations, and reports focused on substantially the same issues.

Complainants' unreasonable delay further fundamentally prejudices Respondents because the City has accepted and spent the CTCL grant funds and Respondents had no reason to expect that a Complaint such as this would be brought against them so long after the events complained of. The proper time for bringing this matter to the Commission was when the City had accepted the grant funds and/or while the money was being spent. A complaint under Section 5.06 would have been more appropriate at that time, as Complainants could have sought actual relief such as restraining Respondents from spending any more of the funds, rather than seeking a declaratory ruling on alleged future practices. WIS. STAT. § 5.06(1). Instead of using Section 5.06 to correct erroneous behavior as it is happening—in other words, in the manner in which it was intended to be used— Complainants waited months to file a Complaint that instead asks the Commission to

examine the 2020 elections and use its findings to create forward-looking election laws about what money can be received and used by municipalities to fund future elections. A retrospective investigation followed by declarations of law to be applied to future elections is far less helpful than a timely-filed Complaint, and is not in line with the intent of Section 5.06.

The City needs to know immediately if any error is made during the administration of any election, so as to correct the error, return the funds, and make adjustments to its election planning and processes. To claim error in this manner several months after an election, when it is too late for the City to take any corrective action, not only prejudices the City Respondents, but prejudices every voter within the City of Green Bay who participated in the election according to the improved procedures and practices the City was able to implement by using the CTCL grant funds.

Finally, the City has been and continues to be prejudiced by the ceaseless attacks on the free and fair election that occurred on November 3, 2020, and that prejudice has been amplified each time a new action, complaint, investigation, etc., has been initiated against the City. One potentially significant impact of such a substantial delay in filing this Complaint is the continued undermining of public confidence in the legitimacy of the City's elections over an extended period of time. This is especially true when, as here, Complainants wait almost half a year and then attempt to call the whole election into question yet again by dredging up the same legal arguments that have failed so many times before. Under these circumstances, prejudice to the City and its entire electorate is obvious, as is the harm to the City Respondents' credibility as public servants. As the Wisconsin Supreme Court succinctly stated:

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

Trump v. Biden, 394 Wis. 2d 629, ¶ 30.

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

B. 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). "Information which may establish probable cause includes allegations that set forth which persons are involved; what those persons are alleged to have done; where the activity is believed to have occurred; when the activity is alleged to have occurred and who are the 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 be denied outright.[6]

The fact that Section 5.06(1) requires a probable cause showing is important, as it means the legislature specifically rejected any other pleading standard such as reasonable suspicion. Under a most fundamental understanding of probable cause, the Complaint must be supported by evidence strong enough to establish a presumption that the Respondents violated the laws in question. This standard is appropriate because violation of an election law is a significant

[6] Respondents respectfully submit that despite requiring an Answer from Respondents, the adjudicators, standing in Administrator Wolfe's position, should conduct an initial determination under WIS. ADMIN. CODE § EL 20.04(1) and deny the Complaint for being untimely and lacking probable cause.

allegation which should not be made lightly. Here, however, Complainants primarily rely on conjecture to support their allegations that the named Respondents violated any laws,[7] and worse, critical information they rely on is false. For example, then-Deputy Clerk Kim Wayte stepped in as acting City Clerk in Respondent Teske's absence. Yet, Complainants make outlandish allegations that other persons and organizations stepped in as acting City Clerk and ran the City's election, based on extremely strained readings of the various public records they cite. The purpose of Section 5.06(1) is very clear in that the Complainants carry a burden of proof in bringing forth a claim—a burden they have not met. At most, Complainants have a theory that something is amiss, and to support their theory, they have created a narrative that has no basis in truth, and then use conjecture to demonstrate that their theory is worth further investigation. Section 5.06(1) does not contemplate allegations of this nature; it contemplates a clear set of facts demonstrating a specific violation, supported by probable cause, being brought to the Commission for review.

Even more problematically, on a most basic level, Respondents are not the proper parties to this Complaint based on the alleged wrongdoing and prayer for relief. 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, his Chief of Staff, nor the City Clerk, in any of their professional capacities, had authority to accept the grant. The Common Council took that action. 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.

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

Significantly, Complainants have not presented any legal argument in support of a claim of a violation of election laws which has not already been rejected by numerous courts across the country, as discussed in more detail later in this Answer. 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. (*See generally* Compl.) 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.

Requiring a probable cause finding before requesting an answer of Respondents is intended to screen out frivolous complaints which have no basis in law or fact. If the Commission received a complaint with allegations that contradicted clear statutes or court decisions, or its own precedent—such as an appeal to not enforce the Voter Photo ID Law, or to prohibit municipal clerks from issuing any absentee ballots—it would reject it out of hand as lacking probable cause. Declining to do so in this instance constitutes a failure to properly administer the Section 5.06 process.

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. (Compl. 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 law had occurred.

II. Complainants' Theories Find No Basis in Law

Complainants assert that the City violated both Wisconsin and federal election laws by accepting the CTCL grant funds. 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 also violated state law by agreeing to the conditions placed on the grant of funds by CTCL. Complainants point to no specific statutory provision that prevents a municipality receiving grant funds subject to conditions from the grantor. Moreover, 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. 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 also assert that the City's receipt of the CTCL grant funds violates the Elections and Electors Clauses of the U.S. Constitution. However, 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 Green Bay City Clerk" was "diverted" by the Respondents (one of whom was the City Clerk at the time[8]), ostensibly in violation of the Elections Clause. Yet, Complainants make no attempt to explain with specificity how the Elections Clause is implicated. Additionally, this same argument has already been rejected in other federal actions. Analyzing an equivalent argument, 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

[8] As City Clerk at all relevant times hereto, it is impossible for Respondent Teske to have "diverted" the authority vested in the city clerk.

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 Cty.*, 499 F. Supp. 3d 1250, 1255, 2020 WL 6589655 (N.D. Ga. 2020); *see also Iowa Voter Alliance*, 2020 WL 6151559, at *3. 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.

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 (2020), 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. *Id.* 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)). Unfortunately, however, Complainants truncated the paragraph when including it in the Complaint—the full paragraph provides that departure from the "legislative scheme for appointing electors" may constitute a violation of the Electors clause, but that is not the case when actions are

taken "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 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. *Id.* at § 7.15. Among their many statutory responsibilities, clerks are directed to "[e]quip polling places," "[p]rovide for the purchase and maintenance of election equipment," "[p]repare" and "distribute ballots and provide other supplies for conducting all elections," "[p]repare official absentee ballots," "[p]repare the necessary notices and publications in connection with the conduct of elections or registrations," "[t]rain election officials" and "advise them of changes in laws, rules and procedures," and educate voters. WIS. STAT. §§ 7.15(1), (9), (11). The City of Green Bay, including Respondents, took necessary actions to fulfill these 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 Respondents] 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

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 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 expended the entire budget for all 2020 elections well before the November 2020 election, and myriad other difficulties. Due to the absence of additional state funding and restrictions on the ability of municipalities to adequately fund local elections under those circumstances, 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 run efficiently, smoothly, and in accordance with State laws and directives from the Legislature and the Commission. 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

As mentioned above, the Commission has already addressed the issue of municipal receipt of private grant funds. Administrator Wolfe told the Assembly Committee on Campaigns and Elections that Commission staff worked with the City and others "to ensure that local election officials had the information and resources they needed to administer a successful election in November." Wis. Legis., *Assemb. Comm. Campaigns and Elections Informational Hearing on Green Bay Election*, Wis. Eye (March 31, 2021), https://wiseye.org/2021/03/31/assembly-committee-on-campaigns-and-elections-14/, at 4:40-5:15 (testimony of Meagan Wolfe, Administrator, Wisconsin Elections Commission). Administrator Wolfe further informed the Committee that a complaint concerning whether municipal election entities could accept and use private grant funds had been filed with the Commission, and that "the Commission dismissed the complaint, noting that there is nothing in Wisconsin elections statutes which prohibits, proscribes, or even discusses grant funding." *Id.* at 4:40 to 5:15. The same is true 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.

III. 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 complaint process established in Section 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,

Vanessa R. Chavez (State Bar No. 1103015)
Lindsay J. Mather (State Bar No. 1086849)
Attorneys for City of Green Bay Respondents
CITY OF GREEN BAY
100 N. Jefferson Street, Room 200
Green Bay, WI 54301
Telephone: (920) 448-3080
Facsimile: (920) 448-3081
Vanessa.Chavez@greenbaywi.gov
Lindsay.Mather@greenbaywi.gov

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

Notary Public, Brown County
State of Wisconsin
My commission is permanent.