STATE OF WISCONSIN
BEFORE THE ELECTIONS COMMISSION

RICHARD CARLSTEDT, et al.,

Complainants,

v. Case No. EL 21-24

MEAGAN WOLFE, et al.,

Respondents.

RESPONDENTS' SUR-REPLY BRIEF

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 & Lindsay J. Mather, hereby submit the following Sur-Reply to Complainants' Reply (Green Bay).

PROCEDURAL BACKGROUND

As detailed in the Answer, Complainants failed to state probable cause to suggest that any election law had been violated in their Complaint. Rather than filing a reply to Respondents' Answer, Complainants attempted to consolidate this matter with complaints against four other cities and file one consolidated reply. Following objections from all five cities, the consolidated reply was stricken, and Complainants were directed to file a reply specific to the complaint against Respondents. The Reply filed by Complainants nonetheless introduces numerous new factual and legal assertions for the first time. Respondents were granted leave to file this Sur-Reply to address these new factual and legal assertions.

Respondents respectfully submit that the Reply, like the Complaint, was not screened for timeliness or probable cause, as required by Wis. Admin. Code § EL 20.04(1), and their objection

and legal arguments with regard to this issue in the Answer are incorporated herein by reference as if fully set forth herein.

FACTUAL BACKGROUND

Respondents dispute in their entirety the facts as alleged by Complainants in their Reply as factually inaccurate and grossly misstated. As a non-exhaustive list of examples, Complainants allege that Respondent Jeffreys, as well as Michael Spitzer-Rubenstein, was effectively acting as Interim City Clerk, despite the fact that then-Deputy City Clerk Kim Wayte was undisputedly the acting City Clerk in the absence of Respondent Kris Teske. (*See, e.g.*, Reply at 42.) Similarly, Complainants allege that Central Count was wired to provide election results directly to Mr. Spitzer-Rubenstein despite the fact that this is grossly inaccurate and not supported by any facts or records. (Reply at 39.) Complainants further allege that Mr. Spitzer-Rubenstein was in charge of vote counting and ballot transport despite clear evidence to the contrary. (Reply at 43.) In addition, Complainants' proposed statement of facts is filled with opinion and legal arguments that should not be treated as fact. To the extent that the Reply references actions by persons, entities, municipalities, or any organization(s) other than the named Respondents and, by extension, the City of Green Bay, such information should be stricken as outside the scope of this matter.

Respondents also object to the entirety of Complainants' Reply Appendix as being unfairly prejudicial, confusing the issues, misleading the decision-maker, and needlessly presenting cumulative evidence. To the extent the documentation provided pertains to Respondents or the City of Green Bay, all such documentation is unnecessarily cumulative of documents already presented as an appendix to the Complaint.[1] The documents found in pages 872 through 898 of

[1] There are a few documents in the Reply Appendix which pertain to Respondents that were not in the appendix to the Complaint. (*See generally* Reply App. 468-86, 508-17, 601.) Nevertheless, Respondents object to the late inclusion of these documents as cumulative of other evidence already presented.

the Reply Appendix are opinion, not fact, and are unfairly prejudicial, confuse the issues, and mislead the decision-maker. The remainder of the documents produced in the Complainants' Reply Appendix lack any probative value as these pertain to persons, entities, municipalities, or organization(s) other than the named Respondents or the City of Green Bay. Furthermore, these documents are unfairly prejudicial and act to confuse the issues. Based on the foregoing, Complainants' Reply Appendix should be excluded in its entirety.

Instead, Respondents again direct the Commission's attention to Exhibit 1 to the Affidavit of Vanessa R. Chavez, submitted along with the Answer, which contains a comprehensive, detailed, factual report regarding the administration of the November 2020 election, and which has not been disputed by Complainants. In addition, Respondents affirmatively state that the documents presented in the appendix to the Complaint should speak for themselves.

ARGUMENT

The Complaint should be dismissed, as Complainants' Reply does not cure the defects in the Complaint. First, Complainants have failed to demonstrate that the Complaint was timely, and the new allegations contained in the Reply are even more untimely and prejudicial. Additionally, the Reply still does not articulate any law forbidding the acceptance of the CTCL grant funds, and instead asks the Commission to ignore persuasive case law rejecting the same arguments Complainants proffer. Complainants' new legal theories proffered for the first time in the Reply also fail to establish probable cause. Finally, Complainants entirely failed to respond to—and thereby concede—Respondents' argument that any new election law concerning the acceptance of private grant funds should come from the legislature, not the Commission. For all of these reasons, the Complaint should be dismissed.

I. Timeliness[2]

The Complaint was not "filed promptly so as not to prejudice the rights of any other party." WIS. STAT. § 5.06(3). As described in detail in Respondents' Answer, Complainants waited several months after they knew or should have known of the acceptance of the CTCL grant funds to file the Complaint, and in so doing have and continue to prejudice Respondents and the City of Green Bay. Those arguments are incorporated by reference herein.

Complainants first assert that meetings between the mayors of the Cities of Green Bay, Racine, Kenosha, Madison, and Milwaukee were subject to open meetings laws and that the public should have been provided notice of and access to those meetings. This argument is entirely specious. Wisconsin's open meetings laws apply to "governmental bodies," which are statutorily defined:

> "Governmental body" means a state or local agency, board, commission, committee, council, department or public body corporate and politic *created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation* except for the Bradley center sports and entertainment corporation; *a local exposition district* under subch. II of ch. 229; a long-term care district under s. 46.2895; *or a formally constituted subunit of any of the foregoing*.

WIS. STAT. § 19.82 (emphasis added). The mayors of five separate cities cannot reasonably be considered to fall into any of those categories. No "rule or order" exists that could be construed as creating a body consisting of those five officials that would have any authority to bind their

[2] As detailed in Respondents' letters objecting to both of Complainants' reply memos, both of which are incorporated herein by reference, Complainants introduced myriad new factual and legal allegations in the Reply. In addition to the fundamental unfairness of introducing new allegations in a reply, *A.O. Smith Corp. v. Allstate Ins. Companies*, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998), the new allegations in the Reply are even more untimely than the original Complaint. This is particularly true given that the new allegations are based almost entirely on information that Complainants knew at the time of the original filing, including the WSVP. Complainants offer no explanation for waiting to make new allegations against Respondents in the Reply which could have been made in the Complaint. Additionally, the Reply further prejudices Respondents by prolonging the litigation of this matter and requiring yet another response from Respondents to address the numerous new factual inaccuracies therein as well as the same legal arguments that have already been rejected in several fora. Finally, the new allegations in the Reply are not presented in the proper form of a complaint and are not sworn by all Complainants, as required by Wis. Admin. Code § EL 20.03.

respective city governments—as evidenced by the fact that the CTCL grant had to be accepted by Green Bay's *Common Council*, and could not have been accepted by Mayor Genrich alone. The mere fact that the mayors are public officials does not make a meeting between them subject to open meetings laws. *State v. Beaver Dam Area Dev. Corp.*, 2008 WI 90, ¶ 45, 312 Wis. 2d 84, 752 N.W.2d 295 ("[M]erely superficial resemblance to governmental corporations in a single respect is insufficient for an entity to be subject to open meetings and public records laws."). Accordingly, Complainants' allegations of an open meetings violation necessarily fails.

Complainants also argue that promptness should not be analyzed in the context of the doctrine of laches. Although they quote the same portion of the Wisconsin Supreme Court's decision in *Trump v. Biden* as Respondents included in their Answer, Complainants nonetheless appear to argue that laches is not the proper analysis because the Complaint does not express dissatisfaction with the outcome of the election. 2020 WI 91, ¶ 11, 951 N.W.2d 568. Setting aside the fact that the Complaint does in fact express dissatisfaction with the outcome of the election, such an argument is irrelevant, as exact parity of facts or requested relief is not a prerequisite to applying law from one case to another—particularly binding law from the highest court in the state.[3] Laches is therefore the appropriate framework within which to conduct the timeliness analysis.

The first element of laches involves unreasonable delay in bringing a claim. As described in Respondents' Answer, Complainants delayed *months* after they knew or should have known of the circumstances underlying the Complaint before filing this action with the Commission.

[3] Complainants argue that "federal district court cases" such as *Trump v. Biden* are not binding on the Commission or courts in Wisconsin. However, as Complainants themselves note, the *Trump v. Biden* decision came from the Wisconsin Supreme Court, and therefore *is* binding.

Complainants argue that they could not have had reason to believe violations of elections law had occurred until after the election. This argument fails for several reasons.

First, the contents of the Complaint itself demonstrate that Complainants had notice of the facts underlying the Complaint well in advance of the election. Although Complainants contend that the Common Council's acceptance of the Wisconsin Safe Voting Plan ("WSVP") on July 21, 2020 was insufficient notice of the alleged violations, they nonetheless rely exclusively on provisions from the WSVP itself to support their allegations of impropriety, as described in more detail below. It is disingenuous for Complainants to assert that they could not have known of the circumstances giving rise to their Complaint at the time the WSVP and CTCL grant funds were accepted when their sole source of alleged wrongdoing—the WSVP—was part of the agreement considered by the Common Council at that time.

Second, Complainants cannot justify the untimeliness of their Complaint by pointing to the receipt of certain records requests, as the receipt of those records does not equate to the circumstances giving rise to the Complaint. As discussed in Respondents' Answer, the pertinent inquiry is the point at which the Complainants knew or should have known of those circumstances. (Answer at 7-8.) The records upon which the Complaint—and now the Reply—is based were all publicly available months before the Complaint was filed: the CTCL grant funds and the WSVP were discussed at length in several open session meetings that occurred months before the fall 2020 elections, and many documents were made available to the public on the City's website. In fact, the WSVP itself was attached to the agenda for the July 9, 2020 meeting of the Ad hoc Committee on Elections as well as the July 21, 2020 Common Council meeting. Complainants, including a former alderperson for the City of Green Bay, have therefore been on notice of the WSVP and its contents at least since then.

Second, by failing to respond to the argument that Respondents lacked knowledge that the Complaint would be filed—i.e., the second element of the laches analysis—Complainants have conceded that argument by operation of law. *United Coop. v. Frontier FS Coop.*, 2007 WI App 197, ¶ 39, 304 Wis. 2d 750, 738 N.W.2d 578 (Appellant's failure to respond in reply brief to an argument made in respondent's brief may be taken as a concession).

The third element of laches concerns prejudice to the Respondents. As detailed in the Answer, Complainants' delay prejudiced Respondents by depriving them of the opportunity to make any necessary changes prior to the election.[4] The City needs to know immediately if any error is made during the administration of any election, so as to have time to correct the error and make adjustments to its election planning and processes. Delaying for months after the election before filing this Complaint not only prejudices the Respondents but also prejudices every voter in the City who participated in the election with the benefit of the improved procedures and practices the City was able to implement by using the CTCL grant funds. In a situation such as this, where Complainants were on notice in July 2020 of the City's acceptance and intended use of the CTCL grant funds, the Complaint should have been brought early enough to allow the City to make any necessary changes for the remainder of the election cycle, "before the public is put through the time and expense of the entire election process." *Trump v. Biden*, 2020 WI 91, ¶ 11. Rather than bringing the Complaint at the earliest opportunity, however, Complainants chose to wait several months before filing, which significantly prejudiced the Respondents. Complainants' delay in filing their Complaint was "patently unreasonable." *Trump v. Biden*, 2020 WI 91, ¶ 21.

[4] Contrary to Complainants' assertion in their Reply, Respondents have not and do not make any admission of any illegalities or implications of their actions. Instead, the argument is clear that if Complainants believed illegalities existed, the Complaint should have been brought early enough for the City to correct any errors, if necessary. This argument exclusively concerns the untimeliness of the Complaint and the corresponding prejudice to the Respondents based on the allegations against them.

Additionally, Respondents have been and continue to be prejudiced by the tactics of Complainants and their counsel in pursuing this baseless Complaint.[5] Complainants emphasize that the decision of Judge Griesbach, Federal District Court Judge for the Eastern District of Wisconsin, was based on the fact that the plaintiffs in the case before him—who were represented by the same counsel as the Complainants in this matter—"do not challenge any specific expenditure of the money." *Wisconsin Voters Alliance v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020). The instant Complaint fails for the same reason, however. Complainants assert that this Complaint is distinct from the federal court case because it does highlight specific expenditures. However, Complainants repeatedly cite provisions from the WSVP as grounds for alleged violations of election laws, but they still have not pointed to any *specific expenditures* of the CTCL grant funds that are violative of such laws. Complainants' attempt to distinguish this action from *Wisconsin Voters Alliance* necessarily fails due to the lack of specificity of the allegations in the Complaint and the Reply, which render it similar to the *Wisconsin Voters Alliance* action in all material respects.

Respondents continue to be prejudiced in this matter, particularly given Complainants' actions in asserting new facts and new legal theories in the Reply, despite having been made aware of the "fundamental unfairness" of doing so. (Respondents' August 9, 2021 Letter to Commissioners (citing *State ex rel. Gutbrod v. Wolke*, 49 Wis. 2d 736, 749, 183 N.W.2d 161 (1971)).) Although Complainants failed to respond to the facts as set forth by Respondents, and introduced only 30 new pages of relevant, factual documents in their Reply Appendix, all of which

[5] As a point of clarification, Respondents also note that the reference in the Answer to claim and issue preclusion was merely to point out that the concepts are instructive as a result of the fact that Complainants' counsel has also been counsel of record in a number of cases in various jurisdictions across the country in which the same legal arguments proffered here have repeatedly failed. Respondents at no point asserted that either doctrine applies directly to this case; rather, they may provide a guide as to prejudice when one considers the fact that Respondents are still having relitigate the same spurious arguments time after time despite opposing counsel's knowledge that they find no basis in law.

is cumulative of evidence already presented, Respondents have been forced to respond to an 88-page Reply with an included appendix of over 1000 pages, on top of the 33-page Complaint and almost 400 pages of the initial appendix. Additionally, Respondents are prejudiced by opposing counsel's failure to separate the allegations against the Green Bay Respondents from the allegations against individuals in other cities against which he has also filed complaints with the Commission. Not only has this has been a significant burden on Respondents and the City of Green Bay as a whole, but it also acts to confuse the actual issues in this matter to the detriment of Respondents. The result is a Reply which does not provide Respondents with notice of the particular actions in which they are alleged to have engaged that are allegedly contrary to law. (Respondents' August 24, 2021 Letter to Commissioners.) Moreover, the inclusion of alleged wrongdoing by five cities in a complaint against just one is facially prejudicial. (*Id.*)

Complainants did not file the Complaint "promptly so as not to prejudice the rights of" the Respondents. WIS. STAT. § 5.06(3). Additionally, laches should apply to absolutely bar the Complaint. It was not timely filed, Respondents had no reason to expect that it would be filed, and Respondents have been and continue to be prejudiced by it. Accordingly, under both Section 5.06 and the doctrine of laches, the Complaint should be dismissed with prejudice.

II. Complainants Ask the Commission to Exceed Its Authority

As explained in Respondents' Answer, Complainants ask the Commission to exceed its statutory authority by acting in a legislative capacity and creating new election laws. Although Complainants recite several different activities in which the Commission may engage in order to fulfill its statutory purpose of administering election laws, they do not address the argument that this is a policy question best left to the legislature. Again, by failing to address the argument, Complainants concede it. *United Coop.*, 2007 WI App 197, ¶ 39.

Judge Griesbach, in the *Wisconsin Voters Alliance* case in which Complainants' counsel was counsel of record for the plaintiffs, stated outright that neither federal nor Wisconsin law prohibits Respondents from receiving the CTCL grant funds, that the plaintiffs had "presented at most a policy argument," and that the issues raised "are all matters that may merit a *legislative* response." *Wisconsin Voters Alliance v. City of Racine*, No. 20-C-1487, 2020 WL 6129510, *2 (emphasis added). Although that decision is not binding on this action before the Commission, it is nonetheless persuasive authority given that the same legal theories are asserted in both matters and the role of Judge Griesbach in that case was the same as the Commission's role in this matter: to interpret laws concerning the administration of elections in Wisconsin.

The idea that this is a matter best left to the legislature is underscored by Complainants themselves in their repeated requests for *prospective* relief. Complainants repeatedly state that they are not actually concerned about the November 2020 election, but instead they are seeking to "prevent the repetition" of the use of non-partisan grant funds, and their "focus is on the city's election processes in 2022, 2024 and beyond." (Reply at p. 54, 53.) Complainants make no effort to conceal their true goal, which is to have the Commission go beyond its legislatively-created authority to investigate election law violations, and instead create a policy that will apply to future elections. The Commission is an administrative, not legislative, body. The appropriate forum for Complainants' requested policy changes is therefore the legislature, not the Commission.

III. 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.* The new allegations Complainants submit in their Reply do not cure the lack of probable cause in the Complaint: specifically, Complainants still do not point to any election law that Respondents have violated, nor do they cite any specific expenditure of the grant funds that was used in a way that would violate election law. The Complaint should be dismissed in its entirety under Wis. Stat. § 5.06(1) based on its failure to establish probable cause that a violation of law occurred.

A. Home Rule Authority

Elections are matters of statewide concern, as evidenced by the fact that the legislature has enacted statewide voting laws that apply to all jurisdictions. However, among those laws are specific provisions that grant broad authority to municipalities and their municipal clerks, presumably because local election needs may differ based on each unique community's circumstances. *See, e.g.*, WIS. STAT. § 7.15. Authority to administer local elections, therefore, has largely been left to municipalities and their clerks, in accordance with principles of home rule, as described more fully in the Answer. (Answer at 20-22.) Complainants seem to argue that because election administration authority is vested in municipal clerks, municipal governments lack home rule authority and are also forbidden from playing any kind of role in election administration. (*See* Reply at 58-59.) This argument is nonsensical. The City Clerk is an official of the City government, not an entity separate and apart therefrom. The Common Council of the City of Green Bay is in charge of establishing the City budget, which includes the budget for the Clerk's office—including funds for the administration of elections. It also is vested with authority to establish policy under which its officials act, and has statutorily authorized functions such as appointing election officials, approving polling locations, and establishing a board of canvassers. The governing body of a

municipality cannot, by definition, usurp the authority of its *own* city clerk, particularly with respect to establishment of policy.

Complainants also assert that the clerk's authority is also statutorily limited, citing to sections 7.15(1)(a)-(k), (1m), (2)-(15). The claim that section 7.15 operates to limit the clerk's authority to the activities listed therein is facially disingenuous, as Complainants omit important language from the statute. Specifically, section 7.15(1) states, "The clerk shall perform the following duties *and any others which may be necessary to properly conduct elections or registration*." (emphasis added). Section 7.15 is not a limiting statute; rather, it endows municipal clerks with broad authority to take whatever actions are necessary to properly conduct elections. Far from supporting the theory that the clerk is limited in their ability to accept additional funding, section 7.15 appears on its face to support Respondents' position that the clerk has the authority to accept additional funds which are necessary to properly conduct elections or registration.

Finally, Complainants appear to conflate the action of the Common Council accepting the CTCL grant funds with the passage of a local ordinance concerning election law. (Reply at 60-62.) Importantly, the two are distinct. At no time did any government official or governing body of the City attempt to enact or change the law with respect to acceptance of private grant funds. It therefore follows that the City did not at any time attempt to legislate on any matter of statewide concern. Instead, the City accepted private grant funds under existing state and federal election law, which does not prohibit such acceptance and/or use. *See, e.g.*, *Wisconsin Voters Alliance*, 2020 WL 6129510; *Iowa Voter Alliance*, 2020 WL 6151559.

B. Electors and Elections Clauses of the U.S. Constitution

Complainants again argue that the Elections and Electors clauses of the U.S. Constitution prohibit the acceptance of private grant funds by a municipality. Respondents do not dispute that

the Elections and Electors clauses apply to elections in Wisconsin; however, neither provision prohibits the acceptance of such funds, as detailed in Respondents' Answer. Multiple federal courts have reached this conclusion, and despite Complainants' repeated assertions that those decisions should be ignored because they are not binding on actions before the Commission, the legal analyses in those cases are nonetheless relevant here. Federal courts are tasked with interpreting federal law, including the Constitution, and although the decisions come from other jurisdictions, they are persuasive authority that is particularly relevant to this matter because they address arguments identical to those put forth by the Complainants—indeed, in some cases, by the same legal counsel. For the reasons detailed in those federal cases—and Respondents' Answer—Complainants' Elections Clause arguments still fail. Multiple federal courts rejected the argument that acceptance of CTCL funds constituted a violation of the Elections Clause, including cases in which Complainants' counsel represented the plaintiffs. *Georgia Voter Alliance v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1255, 2020 WL 6589655 (N.D. Ga. 2020); *see also Iowa Voter Alliance v. Black Hawk County*, No. C20-2078-LTS, 2020 WL 6151559 at *3 (N.D. Iowa Oct. 20, 2020).

Complainants' Electors Clause argument also fails. In the Reply, Complainants repeat, almost verbatim, their arguments from the Complaint about the applicability of the Electors Clause of the U.S. Constitution. (*Compare* Compl. ¶¶ 106-107 *with* Reply at 63-64.) In doing so, Complainants have again entirely failed to respond to Respondents' counterarguments in the Answer concerning this point, and have therefore conceded it. *United Coop.*, 2007 WI App 197, ¶ 39. Even assuming for the sake of argument that Complainants have not conceded this point, however, this argument still fails. As explained in the Answer, Complainants truncated the cited paragraph from *Trump v. Wisconsin Elections Commission*, 983 F.3d 919 (7th Cir. 2020), omitting a crucial point. Specifically, the Seventh Circuit stated 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." *Id.* at 927. In other words, when the legislature has given a government official the authority to administer elections, the official does not violate the Electors clause when acting pursuant to that authority—even if they are alleged to have made mistakes while doing so. Here, the City and Respondents accepted the CTCL grant funds in order to properly administer the elections in the fall of 2020, in accordance with the statutory scheme created by the legislature. Accordingly, even if acceptance of the CTCL grant funds were found to constitute an error, Complainants have not alleged a viable Electors Clause violation.

C. Equal Protection Violation

In the Reply, Complainants assert for the first time that the City's acceptance and use of the CTCL grant funds in accordance with the WSVP constitutes an equal protection violation. They specifically object to certain stated goals in the WSVP concerning in-person and absentee voting. This claim fails for several reasons.

First, Complainants *still* fail to state with any particularity the specific expenditures of grant funds to which they object. All of the "expenditures" Complainants cite come directly from the WSVP which, as Complainants themselves note, consists of a "general outlined use of the funds." (Reply at 50.) Despite this acknowledgment early in the Reply, however, the allegations of equal protection violations are nonetheless based entirely on the contents of the WSVP. (*See generally id.* at 64-84.) The conflation of the stated objectives in the WSVP with actual expenditures of grant funds is central to Complainants' entire theory of this matter.

Complainants apparently believe that the general goals stated in the WSVP, along with the semi-specific references to potential ways to achieve those goals, are somehow *de facto* evidence of discrimination or other unlawful activity. What they fail to comprehend, however, is that the WSVP was necessarily written in generalities, as the City needed flexibility to be able to determine the most appropriate ways to accomplish its stated goals. The WSVP is not an itemization of how the funds were spent—not least of all because a prospective itemization would have been impractical in the midst of a rapidly-changing public health crisis. Thus, for the sole reason that their allegations of improper spending of the grant funds does not contain any specifics about "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," WIS. ADMIN. CODE § EL 20.03(3), Complainants have failed to set forth facts establishing probable cause, and the Complaint should be dismissed.

As a result, Respondents cannot respond with any kind of specificity to Complainants' allegations of equal protection violations. Respondents disagree that strict scrutiny is the appropriate standard of review. However, even assuming that it were, Respondents meet this burden as they had a compelling governmental interest in providing safe and fair access to the polls for voters, as well as protecting the voting rights of all eligible voters in the City of Green Bay. However, Respondents cannot meaningfully respond to whether certain efforts or expenditures were narrowly tailored to serve that compelling interest, because Complainants failed to provide any specifics about challenged activities. Complainants seem to argue that the City spent the CTCL grant funds in a discriminatory manner. However, the City was cognizant of this concern and intentionally spent the CTCL funds in ways that benefitted all eligible voters in the City equally. The Common Council specifically considered whether voter outreach would be

conducted in an equitable fashion when approving the award of a contract for a "Presidential Election Voter Outreach Campaign." (Chavez Aff. Ex. 1 at 4.) Respondents' efforts to raise awareness of ways to vote safely during a pandemic were conducted in a fair, impartial manner throughout the City, and Complainants can point to no specific expenditure that suggests otherwise.

Complainants also assert several times that the WSVP was not a public health care measure. As an initial matter, it is unclear why Complainants believe that the analysis would change if the WSVP were a health care measure, particularly since no law exists to restrict acceptance of private grant funds, let alone restricts such acceptance to grants that address public health and safety. Nevertheless, Complainants' argument completely ignores the fact that the principal purpose of the WSVP was to make voting as safe as possible during an election in a pandemic. In addition to providing safety equipment for the polling places themselves, several other objectives of the WSVP were specifically aimed reducing the transmission of COVID-19. Increased absentee voting and early in-person absentee voting, for example, were aimed at reducing the size of crowds at polling places on Election Day. Similarly, encouraging registration prior to the election would help cut down on wait times and long lines of voters who need to register. All of these efforts were specifically calculated to keep voters and poll workers alike safe while voting during a deadly pandemic. If further proof were needed, one need look no further than the first page of the document confirming the award of the grant, as well as the first page of the WSVP, to see that Complainants are wrong. (Respondents' Answer Ex. C at 1 ("The grant funds must be used exclusively for the public purpose of planning and operationalizing safe and secure election administration in the City of Green Bay in accordance with the [WSVP]."); *id.* at 4 ("we seek to . . . safely administer elections to reduce the risk of exposure to coronavirus for our

residents as well as our election officials and poll workers.").) The myriad other references throughout the WSVP to ensuring the safety of voters amidst the pandemic support this same conclusion. The mere fact that the document was not prepared by a health care professional, standing alone, does not contradict the City's obvious intention to use the funds to lessen the potential health risks posed by voting in a pandemic.

Finally, Complainants argue that certain planned expenditures in the WSVP, particularly those related to absentee voting, including early in-person absentee voting, are unlawful because they treat electors residing outside of the City differently than those who vote in the City. This argument finds no basis in law. A city "does not act throughout the state. Its jurisdiction and authority is limited to the territory within its boundaries. Within that territory it may exercise such powers as the legislature has conferred upon it." *Safe Way Motor Coach Co. v. City of Two Rivers*, 256 Wis. 35, 43, 39 N.W.2d 847 (1949). By law, the City cannot operate outside of its boundaries. Thus, the City Clerk has no control over election administration outside of the territorial bounds of the City of Green Bay. Moreover, every single municipality within the state of Wisconsin (and, indeed, across the country) was free to apply for grant funds from CTCL. Indeed, over 200 municipalities in Wisconsin alone applied for and received such grants. The City had no control over any other municipality's decision to apply for grant funding from CTCL, or the amount of funds requested by them. Similarly, the City has no control over any other municipality's decision to budget more or less of its general revenues to elections in any given election year, and, in fact, the amount of funding per elector varies substantially across the state. The only way for every municipality in the state, and, by extension, the country, to obtain true uniformity in spending in state and/or federal elections is to have all election activities paid directly by the state and/or federal government, rather than municipalities which have different budgets and constraints on their

ability to allocate resources. Unfortunately, the requirement to fund election activities falls on municipalities, with each required to conduct an election based on the resources available to them. As the City previously noted, it had already exhausted its entire election budget in April 2020, despite still having to conduct elections in August and November. The City's decision to seek available and sorely needed funding was based on the needs of the voters under its authority—that is, within the boundaries of the City of Green Bay. Electors residing within the City were treated uniformly, and the City therefore complied with the requirements of law. Indeed, failure to find additional funds would have been reckless during a highly contested election year amid a pandemic.

In sum, Complainants still fail to state probable cause to suggest that a violation of election law has occurred. Not only can they not point to a specific law that prohibits the conduct of which they complain, they also cannot point to any specific conduct beyond the mere acceptance of the CTCL grant funds that constitutes a violation. Complainants should be indulged no further.

CONCLUSION

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

Dated this 27th day of September, 2021.

Respectfully submitted,

/s/ Lindsay J. Mather
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Lindsay J. Mather (State Bar No. 1086849)
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VERIFICATION

I, LINDSAY J. MATHER, being first duly sworn upon oath, state that I personally read the above verified Response, and that the above Response is true and correct based upon my personal knowledge.

Dated September 27, 2021

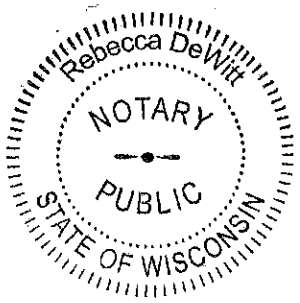
Lindsay Mather
Assistant City Attorney, City of Green Bay
State Bar No. 1086849

STATE OF WISCONSIN)
)ss.
COUNTY OF BROWN)

Signed and sworn before me this 27 day of September, 2021, by

Lindsay J. Mather

(Seal)



Rebecca DeWitt
Signature

Notary Public
Title

My commission expires: 08/26/25