STATE OF WISCONSIN
SUPREME COURT

Wisconsin Voters Alliance, Ronald H. Heuer, William Joseph Laurent, Richard Kucksdorf, James Fitzgerald, Kelly Ruh, William Berglund, John Jaconi, Donna Utschig, Jeff Wellhouse, Kurt Johnson, Thomas Reczek, Linda Sinkula, Atilla Thorbjorsson, Jeff Kleiman, Navin Jarugumilli, Jonathan Hunt, Suzanne Vlach, Jacob Blazkovec, Donald Utschig, Carol Aldinger, Jay Plaumann, Deborah Gorman, Robert R. Liebeck, Valerie M. Bruns Liebeck, Edward Hudak, Ron Cork, Charles Risch, Karl Lehrke, Arnet Holty and Joseph McGrath,

Petitioner,

v.

Wisconsin Elections Commission, and its members, Ann S. Jacobs, Mark L. Thomsen, Marge Bostelman, Julie M. Glancy, Dean Knudson, Robert F. Spindell, Jr., in their official capacities, Governor Tony Evers, in his official capacity,

Respondents.

Appeal No. 2020-AP-001930-OA

On Emergency Petition For Original Action
Before This Court

NON-PARTY BRIEF OF WISCONSIN STATE CONFERENCE NAACP AND LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Joseph S. Goode (State Bar No. 1020886)
Mark M. Leitner (State Bar No. 1009459)
John W. Halpin (State Bar No. 1064336)
Allison E. Laffey (State Bar No. 1090079)
LAFFEY, LEITNER & GOODE LLC
325 E. Chicago Street, Suite 200
Milwaukee, WI 53202
(414) 312-7003 Phone
(414) 755-7089 Facsimile
jgoode@llgmke.com
mleitner@llgmke.com
jhalpin@llgmke.com
alaffey@llgmke.com

Attorneys for Wisconsin State Conference NAACP and Lawyers' Committee for Civil Rights Under Law

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INTEREST OF THE NON-PARTIES

This brief is submitted on behalf of Wisconsin State Conference NAACP ("Wisconsin NAACP") and Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"). Wisconsin NAACP and Lawyers' Committee have a mutual interest in this action because Petitioners seek to disenfranchise more than 3.2 million Wisconsin citizens who voted in the November 3, 2020 presidential election. Such disenfranchisement will directly affect the members of Wisconsin NAACP whose votes will be invalidated if the Petition is granted and wholly undercut the Lawyers' Committee's mission to ensure that all eligible voters have the right to vote and see their votes counted.

INTRODUCTION

Petitioners ask this Court to do what no court in our nation has ever done before: invalidate all votes cast in a state for a national election. That they do so at all should give one pause. That they do so on the basis of claims that they were aware of long before the election and based on spurious, unsubstantiated, and inadmissible "evidence" is inexcusable.

Most brazenly, Petitioners center their case on the "expert" report of someone who assuredly is not an expert, but rather a partisan political operative, and whose methodology and analyses are faulty and misleading. Upon this most slender of reeds, Petitioners would have this Court invalidate the votes of 3.2 million Wisconsin voters.

This Court is not the proper vehicle to entertain this suit, which at best raises numerous material issues of fact. Under the circumstances presented by Petitioners, this Court should summarily reject the Petition.

ARGUMENT

I. PETITIONERS' CLAIMS DO NOT QUALIFY AS AN ORIGINAL ACTION IN THIS COURT.

Granting the Petition would expand the proper institutional role of the original action in this Court well beyond its limits. Contrary to Petitioners' argument, Art. VII, Sec. 3(2) of the Wisconsin Constitution and Wis. Stat. §

809.70 do not appoint this Court as a roving commission obligated to act at a litigant's whim that a case is important. "We are not here to step in and referee every intractable political stalemate. We are not here to decide every interesting legal question." *Wis. Legislature v. Palm*, 2020 WI 42, ¶168 (Hagedorn, J., dissenting).

The Petition should be denied for two primary reasons. First, Petitioners' challenge to the election relies in significant part on disputed, if not completely false, assertions of fact. Most important are the opinions in Matthew Braynard's report purportedly questioning the validity of nearly 100,000 votes. Section III of this brief explains why his report should be summarily disregarded. Standing alone, however, the mere existence of disputed facts warrants summary denial of the Petition, because "it is the principal function of the circuit courts to try cases and of this court to review cases which have been tried[,]" *Petition of Heil*, 230 Wis. 428, 436, 284 N.W. 42 (1939), and this Court has expressed a strong aversion to acting as a trier of fact in original actions. "The Supreme Court is not a fact-finding tribunal, and although it may refer issues of fact to a circuit court or referee for determination, it generally will not exercise its original jurisdiction in matters involving contested issues of fact." Wis. S. Ct. IOP III.B.3. *See also In re*

Exercise of Original Jurisdiction of Supreme Court, 201 Wis. 123, 229 N.W. 643, 645 (1930); *City of Hartford v. Kirley*, 172 Wis. 2d 191, 195 n.2, 493 N.W.2d 45 (1992).

The Petition must be denied for a second, independent reason: the relief Petitioners seek is not available as a matter of law in this or any Wisconsin court. Their "claims" based on local governments' supposedly improper receipt of private funds to help conduct the election have not only been rejected by a federal district court,[1] but they are fundamentally inconsistent with Wisconsin's rule that "the voters' constitutional right to vote 'cannot be baffled by latent official failure or defect.'" *Ollmann v. Kowalewski*, 238 Wis. 574, 579, 300 N.W. 183 (1941)(quoting *State ex rel. Wood v. Butler*, 38 Wis. 71, 89 (1875)). Thus, Petitioners' claims would fail even if they were right that the law prohibits localities from accepting private money; even when officials err, citizens' votes will be counted "where the elector himself is not delinquent in the duty which the law imposes on him." *State ex rel. Symmonds v. Barrett*, 182 Wis. 114, 127, 195 N.W. 707 (1923).

1 *Wis. Voters Alliance, et al. v. City of Racine, et al*., Case No. 20-C-1487, 20WL 6129510 (E.D. Wis. October 14, 2020). *See* attached Exhibit A.

Likewise, Petitioners' claims based on counting votes supposedly cast by ineligible voters or in violation of other Wisconsin election laws cannot support an original action because the exclusive remedy for those claims is under the recount statute, Wis. Stat. § 9.01, and such claims must first be brought in the circuit court. Wis. Stat. § 9.01(6)(a). "As to defects, irregularities, mistakes, and fraud having as their immediate effect the disqualification of a ballot or ballots, the remedy provided by sec. 6.66 [9.01] is exclusive." *Clapp v. Joint Sch. Dist. No. 1*, 21 Wis. 2d 473, 477-78, 124 N.W.2d 678 (1963); *see also Carlson v. Oconto Cnty.*, 2001 WI App 20, ¶ 7, 240 Wis. 2d 438, 623 N.W.2d 195. The remedy sought by Petitioners not only is wildly excessive because it would destroy 3.2 million Wisconsin citizens' fundamental right to vote, it is also barred by Wisconsin law.

II. THE DOCTRINE OF LACHES BARS PETITIONERS' AFTER-THE-FACT ATTEMPT TO INVALIDATE THE ELECTION.

Petitioners argue the extraordinary relief of tossing out the entire election is justified to address several purported but unproven irregularities, each of which Petitioners knew about months—if not years—before they filed this suit a full three weeks after Election Day. The law is clear: challenges to election procedures must be raised before an election is conducted so that problems can be fixed *before* the election is held and voters

are not disenfranchised *after* their votes are cast. The Petition is precluded by this bedrock rule of election law, rooted in the doctrine of laches.

Laches equitably "bar[s] relief when a claimant's failure to promptly bring a claim causes prejudice to the party having to defend against that claim." *Wis. Small Businesses United v. Brennan*, 2020 WI 69, ¶ 11, 393 Wis.2d 308, 946 N.W.2d 101. Laches has three elements: "(1) a party unreasonably delays in bringing a claim; (2) a second party lacks knowledge that the first party would raise that claim; and (3) the second party is prejudiced by the delay." *Id*., ¶12. "Even if all three elements are satisfied, application of laches is left to the sound discretion of the court." *Id*.

The inquiry into the reason for the delay "is case specific; [courts] look at the totality of circumstances." *State ex rel. Wren v. Richardson*, 2019 WI 110, ¶18, 389 Wis.2d 516, 936 N.W.2d 587. Reasonableness depends "not on what litigants know, but what they might have known with the exercise of reasonable diligence." *Id*., ¶19.

It is generally unreasonable for a petitioner to seek to overturn the results of an election based on claims that the petitioner could have asserted when there was still time to correct those procedures. Otherwise, parties would be encouraged to "'lay by and gamble upon receiving a favorable

decision of the electorate' and then, upon losing, seek to undo the ballot results in a court action." *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983)(quoting *Toney v. White*, 488 F.2d 310, 314 (5th Cir. 1973)). "[C]ourts have been wary lest the granting of post-election relief encourage sandbagging on the part of wily plaintiffs." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1180 (11th Cir. 1988); *cf. Hawkins v. Wis. Elections Comm'n*, 2020 WI 75, ¶10, 393 Wis.2d 629, 948 N.W.2d 877 (2020) (not reaching the issue of whether doctrine of laches barred election case).

Nearly every claim of election impropriety alleged by Petitioners could have been pursued well before Election Day. For instance, local clerks' refusal to remove voters from the "indefinitely confined" list, which Petitioners challenge, has long been the practice in Wisconsin and was publicly reinforced through a directive from the Wisconsin Elections Commission ("WEC") on May 13, 2020, *over six months ago*. (Petition, ¶ 79.) Petitioners' challenge to the long-standing practice of local clerks' filling in missing witness-address information on absentee ballot envelopes is likewise untimely, as that practice had been mandated by WEC since at least October 18, 2016, *over four years ago*. (Petition, ¶ 87.) Petitioners'

claims that several cities and counties improperly received funds from private entities arise from grants that were announced publicly as early as July 6, 2020, *over four months ago*. (Petition, ¶ 49.)

Moving to the second laches element, Petitioners' unreasonable delay creates a presumption that opposing parties "had no advance knowledge or warning of [that] claim." *Brennan*, 2020 WI 69, ¶18; *Schafer v. Wegner*, 78 Wis.2d 127, 133 (defendant lacked knowledge of claim because of unreasonable delay in asserting it). Petitioners provide no evidence to undercut this presumption.

The third element, prejudice to the defending party, is readily established. "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." *Brennan*, 2020 WI 69, ¶19, quoting *State ex rel. Wren*, 2019 WI 110, ¶32. Here, overturning the democratic will of more than 3.2 million eligible Wisconsin voters would irreparably undermine WEC's efforts to ensure public trust and confidence in the electoral system. *See Hawkins*, 2020 WI 75, ¶10 (denying relief in ballot access case against WEC where it would create "confusion and disarray and would undermine confidence in the general election results."). The delay also

adversely affects the state Defendants' core interests in administering elections. Invalidating the election which WEC is tasked with overseeing and protecting, Wis. Stat. § 5.05(1), would negate the time and resources WEC expended planning, coordinating, and implementing the 2020 General Election.

Most important, equity weighs strongly in favor of applying laches, because Petitioners' delay in asserting their claims would severely prejudice the 3.2 million eligible Wisconsin voters who lawfully cast ballots for President during the 2020 General Election. Voiding these votes would not only be unconscionable, but would also likely violate state and federal guarantees of the right to vote. Wis. Cons. art. III, sec. 1; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 665 (1966).

III. PETITIONERS' PURPORTED EXPERT REPORT IS INADMISSIBLE.

Petitioners rely heavily on the "expert" report of Matthew Braynard (the "Report"). Braynard is not an expert in the fields his report covers: political science, statistics, and surveys. Rather, he is a partisan political operative, whose substantial and ongoing connections to the Trump campaign strips his report of any semblance of objectivity. Moreover, his superficial analyses are based on mischaracterizations of the databases from

which his data is drawn, unscientific "surveys" based on unrepresentative samples, and flawed methodologies and extrapolations. Ultimately, his conclusions are speculation and unsupported lay opinions, completely divorced from a factual foundation. Petitioners do not meet their burden of satisfying the preliminary questions of expert qualifications, reliability and "fit" to the facts of the case required by this Court and the heightened standards of Wis. Stat. § 907.02. *See generally State v. Dobbs*, 2020 WI 64, ¶¶43-44, 392 Wis.2d 505, 945 N.W.2d 609 (2020).

First, Petitioners have not demonstrated that Braynard is qualified to undertake the survey described in the Report, or to opine as to the inferential statistics in it. He has not published a single peer-reviewed article in any relevant scientific field, and, as far as is known, has never been accepted as an expert by any court. (*See* Report at 4.)

Rather, Braynard is a political operative. After working for the 2016 Trump campaign, he has spent the past four years as Executive Director of an organization called Look Ahead America, working "with over thirty other former Trump campaign staffers with the goal of registering and turning out disaffected, patriotic voters." (*See* Report Ex. 1.)

In addition to the $40,000 Petitioners paid him (Report at 4), Braynard has personally received over $600,000 on behalf of his "Voter Integrity Project.," *See* Voter Integrity Project, GiveSendGo Campaign, https://givesendgo.com/voterintegrity; Matt Braynard, Gab (Nov. 16, 2020), https://gab.com/mattbraynard/posts/105223610078696550, last accessed on November 26, 2020 (noting Braynard's refusal to publicly disclose invoices for purported expenditures). The "Voter Integrity Project" includes both former Trump campaign staff and current White House staff, including a senior advisor to President Trump—and according to Braynard—is "in frequent communication" with the Trump campaign and legal team, to which he has been providing his research, which also raises allegations of campaign finance law violations. Ellie Rushing and William Bender, *Pro-Trump 'voter integrity' group that is calling Pennsylvania voters has ties to White House*, Philadelphia Inquirer (Nov. 13, 2020), https://www.inquirer.com/politics/pennsylvania/voter-integrity-fund-pennsylvania-georgia-wisconsin-trump-2020-20201113.html, last accessed on November 27, 2020; David Corn, *Former Trump Aide Challenging Vote Count Once Praised a Right-Wing Assassin*, Mother Jones (Nov. 13, 2020),

https://www.motherjones.com/politics/2020/11/matt-braynard-trump/, last accessed on November 26, 2020.

Braynard's analysis is also flawed at every step. Indeed, numerous academics have already flatly rejected Braynard's methodology and conclusions as "completely without merit" and found that reliance on his conclusions would be "irresponsible and unethical." Francesca Paris, *Williams prof disavows own finding of mishandled GOP ballots*, BERKSHIRE EAGLE (Nov. 24, 2020), https://www.berkshireeagle.com/news/local/williams-prof-disavows-own-finding-of-mishandled-gop-ballots/article_9cfd4228-2e03-11eb-b2ac-bb9c8b2bfa7f.html, last accessed on November 26, 2020.

Braynard misconstrues what the presence of a voter's name in a database may indicate about the voter. For example, Braynard examined data provided by "L2 Political" that purportedly identifies Wisconsin voters who were sent an absentee ballot but who failed to return it. (Report at 7-8.) But this list almost certainly includes voters whose ballots *were* returned but did not arrive until after the November 3, 2020 deadline and were therefore not counted, as well as voters who did not return their mailed ballot but instead voted in person.

Even more important, it is essential to survey methodology that the sample surveyed must be representative of the population for which the surveyor intends to draw conclusions. *See, e.g.*, A. Lynn Phillips et. al., *What's Good in Theory May Be Flawed in Practice: Potential Legal Consequences of Poor Implementation of A Theoretical Sample*, 9 Hastings Bus. L.J. 77, 90–93 (2012) (discussing nonresponse and coverage biases in survey methodology). Contrary to this most basic survey methodology, Braynard did not ensure a representative sample for his alleged voter survey. He simply instructed his staff to make phone calls to "a sample" of the voters on the list or look them up on "the internet and social media." (Report at 7-10; Report Ex. 2, 3.) Braynard has in fact admitted that his investigation was not random, but rather "focus[ed] on areas with exceptionally high Democratic turnout." Ryan Briggs and Miles Bryan, *Former Trump staffer fishing for fraud with thousands of cold calls to Pa. voters is short on proof*, WHYY (Nov. 13, 2020), https://whyy.org/articles/former-trump-staffer-fishing-for-fraud-with-thousands-of-cold-calls-to-pa-voters-is-short-on-proof/, last access on November 27, 2020. He then relied on those who self-responded – self-evidently not a representative sample – an improper survey practice exacerbated because there is no indication how he verified that the

self-responders were in fact the voters in question. *Id*. (reporting suspicious cold calls and voicemails and manipulative behavior by survey callers); Rushing and Bender, *supra* at 11 (reporting voicemails asking voters to call the surveyors back to enter their responses).

Similar problems permeate all other aspects of Braynard's Report. He supposedly compared data from the National Change of Address ("NCOA") database and other states' voter databases with Wisconsin's voter database "match[ing]" names from one list to the other. (Report at 8-10.) But the NCOA database does not reflect changes in legal residency but rather changes in mailing address, making its use in comparison to voter registration records unreliable as an indicator of continued eligibility. *See, e.g.*, *VOTER REGISTRATION – Information on Federal Enforcement Efforts and State and Local List Management*, U.S. Gov't Accountability Office Report (June 2019) at 48-49, https://www.gao.gov/assets/710/700268.pdf, last accessed on November 26, 2020 ("[A]n indication of a change in address in NCOA data does not necessarily reflect a change in residence.").

Such a bare comparison of lists is highly likely to result in false positives, including identification of students, military personnel, and others who continue to reside and lawfully vote in Wisconsin while temporarily

located elsewhere, as well as voters who share the same or similar names as individuals residing at other addresses. Further, voters who did move but did so within twenty-eight days of Election Day (*i.e*. on or after October 7, 2020) continued to be eligible to vote at their former address in the November 3, 2020, election, either in person or by absentee ballot. *See* Wis. Stat. §§ 6.10(3), 6.85(2).

Braynard's methodology for his indefinite confinement analysis is particularly problematic. Nowhere does he justify the standard he used as a basis for determining that a voter was "not indefinitely confined: "whether the individuals had posted [on social media] on or near election day doing something inconsistent with indefinitely confined status." (Report at 10.) Yet he applies this unexplained standard to extrapolate, again without supporting explanation, from the 38 voters who identified as supposedly "Conclusive[ly] NOT I[ndefinitely] C[onfined]" out of 84 voters located on social media, or 45.23% of his "sample," to all 213,215 Wisconsin voters who indicated they were indefinitely confined. (Report at 10; Report Ex. 3.) This concocted statistic is then relied on by Petitioners as evidence of 96,437 "Illegal Votes Counted." (Petition at 3.) Such unexplained and unsupported

manipulation of numbers to reach a pre-conceived result is inadmissible and entitled to no weight whatsoever.

In Wisconsin, courts should not "'admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Seifert v. Balink*, 2017 WI 2, ¶75, 372 Wis. Wd 525, 888 N.W.2d 816 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)). But *ipse dixit* is all that Braynard has. Nowhere in his report or its exhibits does he provide details sufficient even to identify the principles he applied and the methodology he used to apply them—and these omissions are fatal to consideration of his conclusions. *Seifert*, ¶61.

For the foregoing reasons, this Court should ignore Braynard's Report.

CONCLUSION

For the reasons set forth above, Non-Parties Wisconsin State Conference NAACP and Lawyers' Committee for Civil Rights Under Law respectfully request that this Court deny the Petition for original action.

Dated this 27th day of November 2020.

/s/ Joseph S. Goode
Joseph S. Goode (State Bar No. 1020886)
Mark M. Leitner (State Bar No. 1009459)
John W. Halpin (State Bar No. 1064336)
Allison E. Laffey (State Bar No. 1090079)
LAFFEY, LEITNER & GOODE LLC
325 E. Chicago Street, Suite 200
Milwaukee, WI 53202
(414) 312-7003 Phone
(414) 755-7089 Facsimile
jgoode@llgmke.com
mleitner@llgmke.com
jhalpin@llgmke.com
alaffey@llgmke.com

Attorneys for the Wisconsin State Conference NAACP and Lawyers' Committee for Civil Rights Under Law

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the Court's November 24, 2020 Order and the rules contained in Wis. Stat. §§ 809.19(8)(b) and (c) for a non-party brief with a proportional serif font. The length of this brief is 3071 words.

Dated this 27th day of November 2020.

/s/ Joseph S. Goode
Joseph S. Goode (State Bar No. 1020886)

CERTIFICATE OF COMPLIANCE WITH WIS. STAT § 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief that will be filed pursuant to the Court's November 24, 2020 Order.

A copy of this certificate will be served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated this 27th day of November 2020.

/s/ Joseph S. Goode
Joseph S. Goode (State Bar No. 1020886)

EXHIBIT A

2020 WL 6129510
Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

Wisconsin Voters ALLIANCE, et al., Plaintiffs,
v.
CITY OF RACINE, et al., Defendants.

Case No. 20-C-1487
|
Signed 10/14/2020

Attorneys and Law Firms

Gregory M. Erickson, William F. Mohrman, Erick G. Kaardal, Mohrman Kaardal & Erickson PA, Minneapolis, MN, for Plaintiffs.

Scott R. Letteney, City of Racine City Attorney's Office, Racine, WI, James M. Carroll, Kathryn Z. Block, Milwaukee City Attorney's Office, Milwaukee, WI, Bryan A. Charbogian, Christine M. Genthner, Edward R. Antaramian, City of Kenosha, Kenosha, WI, Vanessa R. Chavez, Lindsay Mather, City of Green Bay, Green Bay, WI, Michael R. Haas, Patricia A. Lauten, Steven C. Brist, Madison City Attorneys Office, Madison, WI, for Defendants.

ORDER DENYING MOTION FOR PRELIMINARY RELIEF

William C. Griesbach, United States District Judge

***1** Plaintiffs Wisconsin Voters Alliance and six of its members filed this action against the Cities of Green Bay, Kenosha, Madison, Milwaukee, and Racine seeking to enjoin the defendant Cities from accepting grants totaling $6,324,527 from The Center for Tech and Civic Life (CTCL), a private non-profit organization, to help pay for the upcoming November 3, 2020 election. Plaintiffs allege that the defendant Cities are prohibited from accepting and using "private federal election grants" by the Elections and Supremacy Clauses of the United States Constitutions, the National Voters Registration Act (NVRA), 52 U.S.C. §§ 20501–20511, the Help America Vote Act (HAVA), 52 U.S.C. §§ 20901–21145, and Section 12.11 of the Wisconsin Statutes, which prohibits election bribery. The case is before the Court on Plaintiffs' Motion for a Temporary Restraining Order. The defendant Cities oppose Plaintiffs' motion and have filed a motion to dismiss for lack of standing. Having reviewed the affidavits and exhibits submitted by the parties and considered the briefs and arguments of counsel, the Court concludes, whether or not Plaintiffs have standing, their Motion for a Temporary Restraining Order should be denied because Plaintiffs have failed to show a reasonable likelihood of success on the merits.

It is important to note that Plaintiffs do not challenge any of the specific expenditures the defendant Cities have made in an effort to ensure safe and efficient elections can take place in the midst of the pandemic that has struck the nation over the last eight months. In other words, Plaintiffs do not claim that the defendant Cities are using funds to encourage only votes in favor of one party. It is the mere acceptance of funds from a private and, in their view, left-leaning organization that Plaintiffs contend is unlawful. Plaintiffs contend that CTCL's grants have been primarily directed to cities and counties in so-called "swing states" with demographics that have progressive voting patterns and are clearly intended to "skew" the outcome of statewide elections by encouraging and facilitating voting by favored demographic groups.

The defendant Cities, on the other hand, note that none of the federal laws Plaintiffs cite prohibit municipalities from accepting funds from private sources to assist them in safely conducting a national election in the midst of the public health emergency created by the COVID-19 pandemic. The defendant Cities also dispute Plaintiffs' allegations concerning their demographic make-up and the predictability of their voting patterns. The defendant Cities note that municipal governments in Wisconsin are nonpartisan and that, in addition to the five cities that are named as defendants, more than 100 other Wisconsin municipalities have been awarded grants from CTCL. The more densely populated areas face more difficult problems in conducting safe elections in the current environment, the defendant Cities contend, and this fact best explains their need for the CTCL grants.

***2** 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. The risk of skewing an election by providing additional private funding for conducting the

election in certain areas of the State may be real. The record before the Court, however, does not provide the support needed for the Court to make such a determination, especially in light of the fact that over 100 additional Wisconsin municipalities received grants as well. Decl. of Lindsay J. Mather, Ex. D. Plaintiffs argue that the receipt of private funds for public elections also gives an appearance of impropriety. This may be true, as well. 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. Absent such a prohibition, the Court lacks the authority to enjoin them from accepting such assistance. To do so would also run afoul of the Supreme Court's admonition that courts should not change electoral rules close to an election date. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020).

The Court therefore concludes that Plaintiffs have failed to show a reasonable likelihood of success on the merits. Plaintiffs' Motion for a Temporary Restraining Order and other preliminary relief is therefore **DENIED**. A decision on the defendant Cities' motion to dismiss for lack of standing will await full briefing.

SO ORDERED at Green Bay, Wisconsin this 14th day of October, 2020.

All Citations

Slip Copy, 2020 WL 6129510