**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF WISCONSIN**

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Wisconsin Voters Alliance, David Tarczon, Elizabeth Clemens-Tarczon, Jonathan Hunt, Paula Perez, Maria Eck, Douglas Doeran, Navin Jarugumilli,

Plaintiffs,

vs.

City of Racine, City of Milwaukee, City of Kenosha, City of Green Bay, City of Madison,

Defendants.

Case No. 20-CV-1487

**Memorandum in Support of Plaintiffs' Motion for an Injunction Pending Appeal**

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## Introduction

Plaintiffs Wisconsin Voters Alliance, David Tarczon, Elizabeth Clemens-Tarczon, Jonathan Hunt, Paula Perez, Maria Eck, Douglas Doeran, and Navin Jarugumilli seek an injunction pending appeal against the Defendant cities of Racine, Milwaukee, Kenosha, Green Bay, and Madison, Wisconsin.

## Statement of Facts

The statement of facts in support of preliminary injunctive relief are already a part of the record. For the sake of brevity, they are not repeated here.

The complaint was filed on September 24, 2020. The motion for preliminary injunctive relief was filed the same day. The motion hearing was held on October 13. On October 14, the Court denied the motion for temporary restraining order and any other

preliminary injunctive relief based on a failure to show a reasonable likelihood of success on the merits:

> 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**.

Order at 2-3. The Notice of Appeal to the U.S. Court of Appeals for the Seventh Circuit was filed on October 15.

## Argument

### Plaintiffs are entitled to an injunction pending appeal.

The plaintiff have carried their burden on each of the factors required for preliminary injunctive relief including a reasonable likelihood of success on the merits. Therefore, this memorandum's emphasis is on the "likelihood of success on the merits" prong because that is where the court denied the motion. The other prongs for preliminary relief are also covered.

**The Plaintiffs satisfy the factors for a temporary restraining order.**

Injunctive relief is an extraordinary and drastic remedy that should not be granted unless the movant, by a clear showing, carries the burden of persuasion. *Mazurek v. Armstrong,* 520 U.S. 968, 972 (1997). Five factors figure into the determination of whether a preliminary injunction or TRO should be granted. *Roland Mach. Co. v. Dresser Indus., Inc.,* 749 F.2d 380, 385–88 (7th Cir.1984). As a threshold matter, the plaintiff must show (1) a likelihood of success on the merits, (2) irreparable harm if the preliminary injunction is denied, and (3) the inadequacy of any remedy at law. Once this threshold showing is made, the court will balance (4) the harm to plaintiff if the preliminary injunction were wrongfully denied against the harm to the defendants if the injunction were wrongfully granted, and (5) the impact on persons not directly concerned in the dispute (the "public interest"). *Cooper v. Salazar,* 196 F.3d 809, 813 (7th Cir.1999).

## I. The Plaintiffs are likely to succeed on the merits.

The Court's order denied preliminary injunctive relief based on the failure to meet the "likelihood of success on the merits" prong. Regrettably, the Defendants led the Court astray with its arguments that Plaintiffs only made "policy arguments" and had no legal basis for their claims of federal preemption against Wisconsin's cities. To the contrary, the U.S. Constitution, Title 52 of the U.S. Code and federal common law based on the Dillon Rule support Plaintiffs' claim of likelihood of success on the merits based on Election Clause preemption. The Court should reconsider the "likelihood of the success on the merits" prong because the Defendants' legal arguments are incorrect.

### A. Elections Clause preemption is not subject to the Plain Statement Rule which derives from the Supremacy Clause's presumption against preemption; the federal common law Dillon Rule applies to a state's political subdivisions.

Elections Clause preemption is not subject to the Plain Statement Rule. The Plain Statement Rule requires that, when Congress intends to preempt state law, "it must make its intention to do so 'unmistakably clear in the language of the statute.' " *Gregory*, 501 U.S. 452, 460 (1991) (quoting *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989)). However, because Congress's regulation of federal elections displaces state regulations, and because the states have no power as sovereigns to regulate such elections, the plain statement rule, as a creature of the presumption against preemption, has no work to do in the Elections Clause setting; it is unnecessary to prevent inadvertent or ill-considered preemption from altering the traditional state-federal balance. *Fish v. Kobach*, 840 F.3d 710, 731–32 (10th Cir. 2016), *citing Inter Tribal*, 133 S.Ct. at 2257 & n.6.

Importantly, recognizing the uniqueness of the Election Clause, the Ninth and Tenth Circuits apply a canon of statutory interpretation considering "the relevant congressional and state laws as part of a single statutory scheme but treating the congressional enactment as enacted later and thus superseding any conflicting state provision." *Fish v. Kobach*, 840 F.3d 710, 726 (10th Cir. 2016), *citing Gonzalez v. Arizona*, 677 F.3d 383, 394 (C.A.9 (Ariz.),2012).

Under the Elections Clause, counties and cities, as political subdivisions of States, have no power whatsoever over federal elections. The Elections Clause allocates the powers exclusively to the state legislatures and Congress:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the

> Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. (sic)

U.S. Const., art. I, § 4, cl. 1. The Election Clause's phrase "manner of holding elections" for Senators and Representatives "refers to the entire electoral process, from the first step of registering to the last step of promulgating honest returns." *U.S. v. Manning,* 215 F. Supp. 272, 284 (W.D. La. 1963). The Supreme Court has stated that the Elections Clause has two functions: "Upon the States it imposes the duty ('*shall* be prescribed') to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 8-9 (2013). The Supreme Court states that the Elections Clause invests the state with power over Congressional elections subject to Congressional control:

> The power of Congress over the "Times, Places and Manner" of congressional elections "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith." *Ex parte Siebold,* 100 U.S. 371, 392, 25 L.Ed. 717 (1880).

*Inter Tribal Council of Arizona, Inc.,* 570 U.S. at 9. So, the States have "no power qua sovereigns" regarding federal elections; whatever powers the States have regarding federal elections is because Congress allows it. *Fish v. Kobach*, 840 F.3d 710, 731–32 (10th Cir. 2016). Nor does the Constitution impose on the United States the costs incurred by Congress's alterations of federal elections, traditionally borne by the States. *Voting Rights Coalition v. Wilson,* 60 F.3d 1411, 1416 (9th Cir. 1995).

To be sure, Governors and independent redistricting committees, established under state law, have been found constitutionally permissible under the Elections Clause. *Smiley v. Holm,* 285 U.S. 355 (1932) (whether Governor of State through veto power shall have part in

making of state laws concerning the time, place and manner for holding elections is matter of state policy); *Arizona State Legislature v. Arizona Independent Redistricting Com'n,* 576 U.S. 787 (2015) (Elections Clause did not preclude State's people from creating commissions operating independently of state legislature to establish Congressional Districts).

But, in contrast, counties and cities have no powers over federal election policies because they are mere political subdivisions of the state. Importantly, under the Federal Elections Clause, the federal common law Dillon Rule applies. *See* ***Atherton v. F.D.I.C.,*** 519 U.S. 213, 218–19 (1997) (citations omitted) (when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law must first be specifically shown); *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 98 (1991).

Dillon Rule is the principal that local government only exercises (1) powers expressly granted by the state, (2) powers necessarily and fairly implied from the grant of power, and (3) powers crucial to the existence of local government. The Dillon Rule is named after Iowa Supreme Court Justice John F. Dillon and is based on a municipal philosophy he expressed in an 1868 case. *Clinton v. Cedar Rapids* & M. R. R. Co., 24 Iowa 455 (1868). In the court's opinion, Justice Dillon emphasized that local governments are considered an extension of the state and power is distributed to those local governments according to the state constitution. *Id.* at 461-62. This philosophy was later reiterated by the United States Supreme Court in 1907 and has been federal common law since:

> We think the following principles have been established by them and have become settled doctrines of this court, to be acted upon wherever they are

> applicable. Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. For the purpose of executing these powers properly and efficiently they usually are given the power to acquire, hold, and manage personal and real property. The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.

*Hunter v. City of Pittsburgh*, 207 U.S. 161, 178–79 (U.S. 1907). Under the Dillon Rule, the counties and cities have no inherent separate and apart from federal or state grants of power.

### B. Counties and cities have no federal election powers; so, counties and cities cannot dictate federal election outcomes, have no power to favor or disfavor candidates, have no power to favor or disfavor demographic groups and have no power to circumvent constitutional and other federal legal restraints.

Counties and cities do not have powers to have federal election policies. Therefore, counties and cities have no power to dictate federal election outcomes, have no power to favor or disfavor demographic groups, have no power to favor or disfavor candidates, and have no power to evade constitutional and other federal legal constraints.

Under the Elections Clause, the States and their political subdivisions (counties and cities) cannot dictate federal election outcomes; instead, fair and uniform federal elections

are required. From the time of the Elections Clause, the States were to prescribe the "time, place and manner" of U.S. House of Representatives elections subject to Congressional enactments. After 1913, the year the Seventeenth Amendment was enacted, states elected their U.S. Senators instead of the state legislatures appointing U.S. Senators. After 1913, the States were required to prescribe the "time, place and manner" of elections of U.S. Senators as they had been doing for Representatives of the U.S. House—again subject to Congressional enactments.

Under the Elections Clause, the States and their political subdivisions (counties and cities) cannot favor or disfavor candidates. The Supreme Court in *U.S. Term Limits, Inc. v. Thornton,* 514 U.S. 779, (1995), held unconstitutional an Arkansas law that prohibited the candidacy of an otherwise eligible Congressional candidate if he or she had already served three terms in the House of Representatives or two terms in the Senate. The Supreme Court held that the ballot restriction was an indirect attempt to impose term limits on congressional incumbents that violated the Qualifications Clauses in Article I of the Constitution rather than a permissible exercise of the State's power to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives" within the meaning of Article I, § 4, cl. 1. Similarly, the Supreme Court held unconstitutional an initiative amending the Missouri Constitution to require that any failure of United States Senators or Representatives, or nonincumbent candidates for those offices, to support term limit provisions be noted on federal election ballots:

> The [Elections] Clause grants to the States "broad power" to prescribe the procedural mechanisms for holding congressional elections, *e.g., Tashjian v. Republican Party of Conn.,* 479 U.S. 208, 217, 107 S.Ct. 544, 93 L.Ed.2d 514, but does not authorize them to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade

> important constitutional restraints, *U.S. Term Limits,* 514 U.S., at 833–834, 115 S.Ct. 1842.

*Cook v. Gralike*, 531 U.S. 510, 511 (2001).

Under the Elections Clause, States and their political subdivisions (counties and cities) are not to discriminate in favor of or in disfavor of a demographic group. For example, the Supreme Court stated that the right to vote in federal elections includes the right against discrimination:

> This new constitutional right was mainly designed for citizens of African descent. The principle, however, that the protection of the exercise of this right is within the power of congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination. The exercise of the right in both instances is guarantied by the constitution, and should be kept free and pure by congressional enactments whenever that is necessary.

*The Ku Klux Cases*, 110 U.S. 651, 665 (1884). Consistently, the Voting Rights Act of 1965 is a landmark piece of federal legislation in the United States that prohibits racial discrimination in voting. Designed to enforce the voting rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution, the act secured the right to vote for racial minorities throughout the country, especially in the South.

Consistently, the States and their political subdivisions (counties and cities) under the Federal Elections Clause also cannot favor a demographic group. A government favoring a demographic group, similar to the government disfavoring a demographic group, skews election outcomes. "Parity of reasoning suggests that a government can violate the [Delaware] Elections Clause if it skews the outcome of an election by encouraging and facilitating voting by favored demographic groups." *Young v. Red Clay Consol. Sch. Dist.,* 122 A.3d 784, 858 (Del Ch. 2015).

*Red Clay Consol. Sch. Dist.* reveals the dangers of a government scheme to target get-out-to-vote efforts on a favored demographic group. The school district wanted its referendum to pass; so, it targeted parents of school children and adult students for a get-out-to-vote campaign. In the *Young* decision, the court identified the school district's scheme to get-out-the-vote of the parents and adult students as also violating election law. The court held that the school district's improper influence upon a demographic group interfered with the "full, fair, and free expression of the popular will…." *Id.* The court stated that the government favoring a demographic group caused equivalent injury to a voter as the government disfavoring a demographic group. *Id.*

Finally, under the Elections Clause, States are not to circumvent constitutional or other federal legal restrictions. As discussed above, the Elections Clause requires that the Constitution and other federal law preempts any inconsistent action of a State or its political subdivisions.

### C. Under 52 U.S.C. § 20901, counties and cities, as political subdivisions of the State, are preempted from receiving and using private federal election grants to improve federal elections.

Title 52 of the United States Code (52 U.S.C.), entitled "Voting and Elections", is a codification of the "general and permanent" voting and election laws of the United States federal government. Subtitle I covers "Voting Rights." 52 U.S.C. §§ 10101 – 10702). Subtitle II covers "Voting Assistance and Election Administration." 52 U.S.C. §§ 20101 – 21145. Subtitle III covers "Federal Campaign Finance" 52 U.S.C. §§ 30101 – 30146. 52 U.S.C. § 21141 defines "State" to exclude counties and cities:

> In this chapter, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, and the United States Virgin Islands.

Consistent with the Elections Clause, Title 52 imposes federal legal requirements on the States regarding federal elections.

52 U.S.C. § 20901, titled "Payments to States for activities to improve administration of elections," establishes an exclusive prerogative for the federal government to grant funds to states to improve administration of federal elections. 52 U.S.C. § 20901 requires the States to use federal moneys to implement federal policy regarding federal elections:

> (b)USE OF PAYMENT
> (1)IN GENERAL A State shall use the funds provided under a payment made under this section to carry out one or more of the following activities: (A) Complying with the requirements under subchapter III. (B) Improving the administration of elections for Federal office…
> (c)USE OF FUNDS TO BE CONSISTENT WITH OTHER LAWS AND REQUIREMENTS In order to receive a payment under the program under this section, the State shall provide the Administrator with certifications that—(1) the State will use the funds provided under the payment in a manner that is consistent with each of the laws described in section 21145 of this title, as such laws relate to the provisions of this chapter; and (2) the proposed uses of the funds are not inconsistent with the requirements of subchapter III.

Thus, federal election moneys are distributed to the States under the federal policy limitations of 52 U.S.C. § 20901. The States then determine how much of the money is distributed locally.

On December 20, 2019, prior to the COVID-19 pandemic, on the federal Consolidated Appropriations Act of 2020 was signed into law. Public Law No: 116-94 (Dec. 20, 2019). The Act included $425 million in new Help America Vote Act (HAVA) funds, made available to states to improve the administration of elections for Federal Office, including to enhance technology and make election security improvements. On March 27,

2020, in response to the COVID-19 pandemic, the federal Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was signed into law. Public Law No. 116-136 (Mar. 27, 2020). The Act included $400 million in new Help America Vote Act (HAVA) emergency funds, made available to states to prevent, prepare for, and respond to the coronavirus for the 2020 federal election cycle. The States, consistent with 52 U.S.C. § 20901, distributed most of the federal moneys to the counties and cities for federal election purposes. The counties and cities are bound by the federal policy limitations of 52 U.S.C. § 20901.

There is no legal authority under the Elections Clause nor 52 U.S.C. § 20901 for counties and cities, which are political subdivisions of the States, to accept and use private federal election grants. The Elections Clause does not authorize the political subdivisions of the State to have federal election policies. 52 U.S.C. § 20901 authorizes federal payments to States for the purpose of improving election administration. The states, in turn, distribute money to the counties and cities as their respective political subdivisions. 52 U.S.C. § 20901 does not authorize private federal election grants to counties and cities. Dillon's Rule, part of common law under the Elections Clause, is not satisfied; neither the Congress nor the State of Wisconsin has authorized its cities to have federal election policies and to accept private federal election grants.

Under the Election Clause, Title 52 of the U.S. Code and federal common law Dillon Rule, private federal election grants to Wisconsin's local governments, are legally unauthorized.

## II. The moving party will suffer irreparable injury absent the injunction.

The Wisconsin Voters Alliance, absent the injunction, will suffer irreparable injury. There is no administrative remedy that can be granted under HAVA or another federal or state statutory election law that will provide for immediate injunctive relief. In short, the Wisconsin Voters Alliance has no other legal remedy to challenge the Defendants' acceptance of private federal elections grants. The Defendants' acceptance of CTCL's grant reveals a public-private relationship that privatizes federal elections to skew the outcome of an election in urban cities of a favored demographic group. It skews the neutrality of an election which is the core governmental responsibility. *Red Clay Consol. Sch. Dis*t., 122 A.3d at 857–58. Threats of private unconstitutional interference with the November 3 elections pose the same type of "irreparable injury" and are analogous to "irreparable injury" for First Amendment deprivations. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Once the November election occurs, the damage to what is to be fair and uniform elections is complete. Without injunctive relief, the CTCL moneys will cause a non-conformity of uniform elections. This illegal public-private partnership causes the plaintiffs irreparable injury.

## II. The moving party will suffer irreparable injury absent the injunction.

The Wisconsin Voters Alliance, absent the injunction, will suffer irreparable injury. There is no administrative remedy that can be granted under HAVA or another federal or state statutory election law that will provide for immediate injunctive relief. In short, the Wisconsin Voters Alliance has no other option to challenge the Cities' acceptance of a $6.4

million in private federal elections grants. The Cities' acceptance of those CTCL grants reveal a public-private relationship that privatizes federal elections to skew the outcome of an election in an urban city of a favored demographic group. It skews the neutrality of an election which is the core public responsibility of the Wisconsin cities. *Red Clay Consol. Sch. Dis*t., 122 A.3d at 857–58

Threats of private unconstitutional interference with the November 3 elections pose the same type of "irreparable injury" and are analogous to "irreparable injury" for First Amendment deprivations. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Once the November election occurs, the damage to what is to be fair and uniform elections is complete. Without injunctive relief, the CTCL moneys will cause a non-conformity of uniform elections in the Wisconsin Cities. This illegal public-private partnership causes the Wisconsin Voters Alliance irreparable injury.

**III. The harm to other interested parties is little or none if the relief is granted.**

The Wisconsin Voters Alliance absent the injunction, will suffer harm. While it is known that there will be anticipated increases in voting, namely absentee ballot voting, it does not excuse the circumvention of federal and state laws.[1] Hence, the need of the $6.4 million of private federal election grants split between five of Wisconsin's major cities is questionable at best. The Cities have access to HAVA moneys and additional Cares Act moneys, specifically for election related needs—as does every other city or county in Wisconsin responsible for conducting the 2020 federal elections.

[1] *E.g.* Kaardal Decl. Ex. K and L.

On the other hand, the introduction of a public-private relationship in the federal election context is a first-time foreign element not contemplated by either HAVA or with the Wisconsin Elections Commission or the Wisconsin Legislature since the laws exclusively control the conduct and moneys related to federal elections. There is no question of the historical success and consistency of the Cities in their election processes considering the percentages of voters casting ballots. What also is notable are the voter outcomes—predominately progressive. Hence, the $6.4 million in grants from the CTCL raises sufficient questions as to the propriety of the public-private created relationship and the facilitation of a favored demographic group. In short, injunctive relief to stay expenditures of the grant will cause little or no harm to the conduct of elections. It merely preserves the status quo.

Moreover, a state grant process is in place through the Wisconsin Elections Commission should the Cities need more money. By doing so, the Cities will stay true to its core public responsibilities in conducting elections consistent with federal and state laws. For these reasons, the balance of harms favors granting the motion.

**IV. The public interest is aided by the preliminary injunction.**

The public interest, absent the injunction, will be impeded. The Cities' acceptance of the CTCL's grants reveal a public-private relationship that privatizes federal elections to skew the outcome of an election in an urban city of a favored demographic group. It skews the neutrality of an election which is the core public responsibility of the Cities. *Red Clay Consol. Sch. Dis*t., 122 A.3d at 857–58. Threats of private unconstitutional interference with the November 3 elections pose the same type of public interest analysis as in First

Amendment deprivations. As discussed above, the Wisconsin Voters Alliance has no alternative administrative remedy to obtain immediate injunctive relief against the Cities. There is no other avenue to challenge the illegality of the public-private partnership in a federal election in which a grant is specific to a particular demographic group to facilitate an election influencing a core public responsibility of government. On the other hand, the harm that the Cities will experience if they do not use CTCL's private federal election grants is little or none. The Cities can obtain additional funds from the state legislature or the Wisconsin Elections Commission if they need it. For these reasons, the public interest favors granting the motion.

**Conclusion**

For the foregoing reasons and to preserve Wisconsin's democratic elections, the Court should grant the injunction pending appeal.

Dated: October 15, 2020.

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