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George L. Christenson
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2022CV006195

BY THE COURT:

DATE SIGNED: October 21, 2022

Electronically signed by Gwendolyn G. Connolly
Circuit Court Judge

STATE OF WISCONSIN **CIRCUIT COURT** **MILWAUKEE COUNTY**

ELIZABETH L. BURKE

and

REPUBLICAN PARTY OF WISCONSIN,

Plaintiffs,

v. Case No. 2022-CV-6195

THE CITY OF MILWAUKEE

and

CAVALIER JOHNSON,

Defendants.

DECISION AND ORDER DENYING PLAINTIFFS' REQUEST FOR TEMPORARY INJUNCTION

Elizabeth Burke and the Republican Party of Wisconsin filed the present action in an effort to prohibit the City of Milwaukee's continued participation in a privately-funded get-out-the vote initiative, known as "Milwaukee Votes 2022." The plaintiffs assert that the City and Mayor Cavalier Johnson impermissibly engaged in political activities with a progressive, partisan entity known as "GPS Impact." The plaintiffs seek a temporary injunction in response

to their "significant concerns as to whether the City has been or will be administering the upcoming November 8, 2022 election in accordance with Wisconsin law." The Court has thoroughly reviewed the parties' submissions and finds that the plaintiffs have not met their burden of demonstrating irreparable harm or a reasonable likelihood of success on the merits. Accordingly, their request for temporary injunctive relief is denied.

DISCUSSION

A circuit court may issue a temporary injunction when the movant demonstrates four elements: (1) the movant is likely to suffer irreparable harm if a temporary injunction is not issued; (2) the movant has no other adequate remedy at law; (3) a temporary injunction is necessary to preserve the status quo; and (4) the movant has a reasonable probability of success on the merits. *Service Emps. Int'l Union, Local 1 v. Vos*, 2020 WI 67, ¶93, 393 Wis. 2d 38, 946 N.W.2d 35; *Milwaukee Deputy Sheriffs' Ass'n v. Milwaukee Cnty.*, 2016 WI App 56, ¶20, 370 Wis. 2d 644, 883 N.W.2d 154. As one court stated, "[i]njunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial." *Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 520, 259 N.W.2d 310, 313 (1977). "Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling." *Bostco LLC v. Milwaukee Metro. Sewerage Dist.*, 2013 WI 78, ¶253, 350 Wis. 2d 554, 675, 835 N.W.2d 160, 221 (quoting *City of Harrisonville v. W.S. Dickey Clay Mfg. Co*., 289 U.S. 334, 338, 53 S. Ct. 602, 77 L. Ed. 1208 (1933)).

A decision to grant or deny a temporary injunction is within the circuit court's discretion. *School Dist. of Slinger v. Wisconsin Interscholastic Athletic Ass'n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585, 587–88 (Ct. App. 1997). In the exercise of discretion, a court should first review

the complaint to determine whether it states a cause of action for a permanent injunction.[1] *See id*. at 374. If the complaint is sufficient, the court should also review the evidence presented at the hearing to determine whether the requisite elements have been satisfied. *See id*. at 374-75.

In this case, the Court will assume, without deciding, that the plaintiffs have no other adequate remedy at law, and that an injunction is necessary to preserve the status quo. The question becomes whether the plaintiffs are likely to suffer irreparable harm, and whether they have a reasonable probability of success on the merits.

1. **The plaintiffs have not met their burden of pleading facts to demonstrate a reasonable probability of success on the merits.**

The Court begins its analysis by examining allegations set forth in the complaint. The plaintiffs allege that when Mayor Johnson unveiled Milwaukee Votes 2022 last month, he explained that the initiative would encompass the use of a widget on the City's website, as well as door-to-door canvassing – funded by the private sector – to encourage citizens to exercise their right to vote in the November election. Any questions regarding the initiative were allegedly forwarded to Melissa Baldauff, who has ties with GPS Impact. As a progressive organization, GPS Impact has demonstrated success in furthering the Democratic Party's political agenda. As a result, the plaintiffs "have significant concerns as to whether the City [of Milwaukee] has been or will be administering the upcoming November 8, 2022 election in accordance with Wisconsin law." They rely on Wis. Stats. §§ 19.59(1)(c)2, 69.02(8)(a), 946.12 and the City of Milwaukee Department of Employee Relations' (DER) "Political Activity Policy" to support their request for injunctive relief.

[1] It would be an abuse of discretion to issue a temporary injunction if the plaintiffs have not stated a cognizable claim for a permanent injunction. *Id*. at 374.

Wis. Stat. § 19.59(1)(c)2 provides that "[n]o local public official may use his or her office or position in a way that produces or assists in the production or a substantial benefit, direct or indirect, for the official . . . or organization with which the official is associated." In their initial brief, the plaintiffs argued that Mayor Johnson violated this statute because he used his position and office "to the benefit of GPS Impact, which will gain publicity" as a result of its partnership with the City. However, at the hearing, the defendants submitted an affidavit demonstrating that Mayor Johnson was not "associated" with GPS Impact within the meaning of the code of ethics for public officials. *See* Wis. Stat. §19.42(2). The Court then asked the plaintiffs' counsel if he had any evidence that would suggest to the contrary, and he explained that he "didn't mean to argue that Mayor Johnson has financial ties to this organization." The plaintiffs' counsel also clarified that he was "not proceeding . . . on an argument for 19.59." In light of this concession and clarification, the Court will not consider Wis. Stat. § 19.59(1)(c)2 as a basis for determining whether the plaintiffs are entitled to injunctive relief.

Wis. Stat. § 946.12, which governs misconduct in public office, provides, in relevant part:

> Any public officer or public employee who does any of the following is guilty of a Class I felony:
>
> (1) Intentionally fails or refuses to perform a known mandatory, nondiscretionary, ministerial duty of the officer's or employee's office or employment within the time or in the manner required by law; or
> (2) In the officer's or employee's capacity as such officer or employee, does an act which the officer or employee knows is in excess of the officer's or employee's lawful authority or which the officer or employee knows the officer or employee is forbidden by law to do in the officer's or employee's official capacity; or
> (3) Whether by act of commission or omission, in the officer's or employee's capacity as such officer or employee exercises a discretionary power in a manner inconsistent with the duties of the officer's or employee's office or employment or the rights of others and with intent to obtain a dishonest advantage for the officer or employee or another. . . .

When ascertaining a public officer's duty under this statute, courts may refer to duties imposed by a variety of sources, including the common law, statutes, ordinances, regulations, and policy documents. *See State v. Jensen*, 2004 WI App 89, ¶¶17-18, 272 Wis. 2d 707, 681 N.W.2d 230, *aff'd*, 2005 WI 31, 279 Wis. 2d 220, 694 N.W.2d 56; *State v. Chvala*, 2004 WI App 53, ¶13, 271 Wis. 2d 115, 678 N.W.2d 880, *aff'd*, 2005 WI 30, 279 Wis. 2d 216, 693 N.W.2d 747. In this case, the plaintiffs rely on Wis. Stat. § 69.02(8)(a) and DER's "Political Activity Policy" as the sources for Mayor Johnson's ministerial duties.

Wis. Stat. § 69.02(8)(a) imposes a duty on the mayor to ensure that "state laws are observed and enforced and that all city officers and employees discharge their duties." This statute, standing alone, does not provide any basis to support the plaintiffs' request for injunctive relief because it does not specify any particular duties that must be observed and enforced. Accordingly, Wis. Stat. § 69.02(8)(a) must be read in conjunction with other sources of law in order to determine whether it has been violated.

The only remaining source of "law" cited by the plaintiffs is DER's "Political Activity Policy," which prohibits employees from taking the following actions:

(a) Using City property, supplies or equipment for the production of solicitation materials;
(b) Directing or requiring employees to perform political activity as part of their job duties;
(c) Using one's authority, influence, title, or status within the City while engaging in political activity;
(d) Using one's authority or influence to coerce any individual to participate in political activity; or
(e) Requesting, directing or suggesting that a subordinate officer or employee participate in a political activity.

Unlike the public misconduct statute, which governs the conduct of "public officers" and "public employees," the Political Activity Policy applies only to "employees" of the municipality.

The defendants argue that Mayor Johnson is not an "employee" within the meaning of the policy because he is an elected official.[2] The Court agrees. By its express terms, the DER policy "applies to all *general* city of Milwaukee *employees* and volunteers, including those holding classified and exempt positions including public officials appointed per provisions of Wisconsin State statute 62.51." Mayor Johnson is not a "general employee"; he is the City's chief executive officer. Wis. Stat. § 62.09(8)(a) ("The mayor shall be the chief executive officer."); Milwaukee Code of Ordinances (MCO) § 3-01 (same).

Notably, DER was established to further the City's interest in the development of harmonious and cooperative relationships between city government and its employees, while enhancing employee performance, maximizing efficiency and reducing costs. MCO § 340-3-1. Accordingly, DER was created to support the City's goals "in a way that does not diminish the mayor's and the common council's authority while recognizing the rights of employee representative groups to enter into discussions with the city in the course of setting personnel policies and terms and conditions of city employment." MCO § 340-3-1. Simply stated, the plaintiffs have not developed any argument to demonstrate that DER has the unilateral authority to create employment policies that would operate to bind Mayor Johnson.

Even if the Court were to find that DER's policy applies to the mayor, the plaintiffs' argument would nonetheless fail because the policy defines "political activity" as "an effort to support or oppose the election of a candidate for political office or to support a particular party in an election." In this case, the plaintiffs' complaint is entirely devoid of any allegations that the defendants engaged in conduct that resulted in the support of any particular candidate or party.

[2] The plaintiffs cite a related statute, Wis. Stat. §19.32(1bg), which defines an employee as "any individual who is employed by an authority, *other than an individual holding local office*."

Moreover, as will be explained below, even if the Court were to accept the plaintiffs' implicit assertion that the get-out-the-vote initiative would somehow skew the November election in favor of progressive candidates, such a result would not demonstrate a reasonable likelihood of success on the merits.

Wis. Voters All. v. City of Racine, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), *appeal dismissed*, No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020), is instructive. There, the Wisconsin Voters Alliance and several of its members sought to enjoin the City of Racine from accepting private grants from The Center for Tech and Civic Life (CTCL). *Id*. at *1. They claimed the grants were primarily directed to cities and counties in so-called "swing states" with demographics that had progressive voting patterns. *Id*. They also claimed that acceptance of the grants were intended to skew the outcome of statewide elections by encouraging and facilitating voting by favored demographic groups. *Id*. The Eastern District of Wisconsin court disagreed:

> 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. 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.

Id. at *2 (citation omitted). For these reasons, the court found that the plaintiffs failed to show a reasonable likelihood of success on the merits.

Liu et al. v. Wisconsin Election Comm'n, Dane County Case No. 22-CV-000046, provides further guidance.[3] In *Liu*, several taxpayers filed an administrative complaint against the City of Madison, alleging that the City impermissibly accepted private grant money from CTCL for use in administering the November 2020 election. They claimed that the grant money was used as part of an overall scheme that used municipalities "to facilitate increased in-person and absentee voting in targeted populations through 'partnerships' with other non-government entities or individuals," in violation of state law. The Wisconsin Elections Commission (WEC) disagreed, finding no statutory language that would operate to prohibit municipal clerks from using private grant money or working with outside consultants in the performance of their duties. The WEC noted that the legislature's failed attempt to introduce two bills that would have prohibited any official from "apply[ing] for or accept[ing] any donation or grant of private resources . . . for purposes of election administration." According to the WEC, the introduction of these bills "demonstrate[d] the absence, in existing law, of any prohibition on the acceptance of private grant money or the use of outside consultants." In an oral ruling on judicial review of the WEC's decision, Judge Stephen Ehlke agreed.

Courts in other jurisdictions have reached similar results. For example, in *Iowa Voter All. v. Black Hawk Cnty.*, No. C20-2078-LTS, 2020 WL 6151559, (N.D. Iowa Oct. 20, 2020), the plaintiffs argued that the acceptance of CTCL grants created an unconstitutional public-private partnership because acceptance of the funds "would improperly dictate federal election outcomes, disadvantage certain demographic groups and candidates, and perhaps even result in

[3] "While a circuit court decision is neither precedent nor authority upon which this court may base its decision, many of them are highly persuasive and helpful for their reasoning." *Kuhn v. Allstate Ins. Co.*, 181 Wis. 2d 453, 468, 510 N.W.2d 826, 832 (Ct. App. 1993), *aff'd*, 193 Wis. 2d 50, 532 N.W.2d 124 (1995).

disenfranchisement through election contests." *Id*. at *2. They sought a temporary restraining order, which was denied by the court:

> There may be valid policy reasons to restrict or regulate the use of private grants to fund elections. However, it is for Congress and/or the Iowa Legislature, not the judicial branch, to make those policy judgments. Moreover, the record contains no evidence supporting plaintiffs' accusations that CTCL's grants pose an actual risk of shaping the outcome of any election or of favoring any particular party or candidate. There is no evidence that CTCL has attempted to require counties to spend the funds in such a manner, nor that either defendant has done so.

Id. at *4. The Court agrees with the logic of these persuasive authorities.[4] The plaintiffs' have not met their burden of pleading facts to demonstrate a reasonable probability of success on the merits.

2. The complaint does not include any factual allegations that would support a cognizable claim of irreparable harm.

The plaintiffs claim they will be irreparably harmed because the defendants' partnership with a private, partisan organization to get out the vote "compromises the integrity of the upcoming November 2022 election and harms the Republican Party of Wisconsin," while simultaneously devaluing Burke's vote. They also claim that the partnership hinders government transparency, which negatively impacts the electorate's ability to evaluate election-related communications and make informed decisions.

Courts in other jurisdictions have addressed and rejected similar arguments. For example, in *Texas Voters All. v. Dallas Cnty*., 495 F. Supp. 3d 441 (E.D. Tex. 2020), the court found that "harm" alleged by the plaintiffs was based on a speculative chain of inferences:

[4] *See also Georgia Voter All. v. Fulton Cnty*., 499 F. Supp. 3d 1250, 1257 (N.D. Ga. 2020) ("Fultan County's Fulton County's acceptance of private funds, standing alone, does not impede Georgia's duty to prescribe the time, place, and manner of elections, and Plaintiffs cite no authority to the contrary.").

> Even if CTCL grants were partisan, Plaintiffs' theory assumes the grants will change the electoral outcome. Given the near-infinite variables affecting a federal election, that is "wholly speculative." Ultimately, Plaintiffs' complain that people with different political views will lawfully exercise their fundamental right to vote. That is not a harm. That is democracy.

Id. at 482 (citations omitted).

In *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605987, at *1 (W.D. Mich. Oct. 19, 2020), the Western District of Michigan denied the plaintiff's request for a preliminary inunction based on a similar set of facts. According to the court:

> [F]or the Court to find that Plaintiffs will be injured, it must find in Plaintiffs' favor on each of a series of steps along the way. The Court would have to find that the presence of the CTCL grants would affect the behavior of third parties (including, perhaps, election administrators and voters), that those third parties act, that those third parties act in a way contrary to Plaintiffs' interests, that a large number of those third parties actually do act, that those actions have an effect on the election, and that the outcome of the election is ultimately not to Plaintiffs' liking. On the present record, there is no way for the Court to make findings of fact on any of these questions, let alone all of them.

Id. at *2. The court denied the plaintiffs' request for a preliminary injunction based on their failure demonstrate cognizable harm. *Id*. at *4.

In *Iowa Voter All. v. Black Hawk Cnty.*, No. C20-2078-LTS, 2020 WL 6151559, (N.D. Iowa Oct. 20, 2020), the court reached a similar result:

> Plaintiffs argue that the counties' use of the CTCL grants will cause harm because it will disadvantage certain groups and candidates and improperly influence the outcomes of the upcoming election. The TRO is needed, they argue, because no remedy will suffice after the election is over if the grant funds are used. However, as discussed above, plaintiffs have failed to show that the grants will cause the harm they allege. They point to no specific use of the funds that hinders their rights or that could influence the outcomes of the election. Because harm does not seem likely, let alone irreparable, there is little reason to try to prevent it.

Id. at *4.

Similarly, in *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937 (D. Minn. Oct. 16, 2020), the plaintiffs asserted that the majority of

Minneapolis voters were progressive, and that any action that the City took to encourage or facilitate voting in general necessarily favored this demographic group. The court disagreed:

> Plaintiffs allege no injury to their right to vote. For example, nowhere do they allege that they will be unable to cast a ballot, or that they will be forced to choose between voting under unsafe pandemic conditions and not voting at all. The City's actions in applying for and accepting the CTCL grant and using the grant money to improve all manners of voting in Minneapolis in the 2020 election affect all Minneapolis voters equally. . . . Plaintiffs fail to explain how they will be uniquely affected by Minneapolis's actions [and they] make no allegation that they are unable to access the polls as a result of the City's expenditures funded by the grant.

Id. at *7-8.

The Court finds these cases to be highly persuasive and adopts their reasoning. Accordingly, the Court finds that the plaintiffs' complaint does not state a valid cause for permanent injunctive relief. As a result, it would be an abuse of discretion to grant similar relief on a temporary basis.

3. The issuance of a temporary injunction would impermissibly chill constitutionally protected speech.

"Where an important public interest would be prejudiced, the reasons for denying the injunction may be compelling." *Bostco LLC*, 2013 WI 78, ¶253, 350 Wis. 2d at 675, 835 N.W.2d at 221. In *State ex rel. Two Unnamed Petitioners v. Peterson*, 2015 WI 85, ¶2, 363 Wis. 2d 1, 866 N.W.2d 165, 176–77, *decision clarified on denial of reconsideration sub nom, State ex rel. Three Unnamed Petitioners v. Peterson*, 2015 WI 103, 365 Wis. 2d 351, 875 N.W.2d 49, a special prosecutor initiated a John Doe investigation to root out allegedly illegal campaign coordination between former Governor Scott Walker and certain issue advocacy groups. According to the court, only "express advocacy or its functional equivalent" were subject to regulation under Wisconsin's campaign finance law. *See id.*, ¶75. Since the advocacy groups merely engaged in "coordinated issue advocacy" as opposed to "express advocacy or its

functional equivalent," the court found that the coordinated efforts were constitutionally permissible. In doing so, the court acknowledged that the First Amendment affords the "broadest protection to political expression in order to assure the unfettered interchange of ideas." *Id.*, ¶46. (quoting *Buckley v. Valeo*, 424 U.S. 1, 14, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976)(internal quotes omitted)).

In this case, Mayor Johnson has a constitutional right to promote his constituents' ability and right to vote in the November election, and the members of GPS Impact have a constitutional right to spend money on nonpartisan get-out-the-vote initiatives because such expenditures do not constitute express advocacy or its functional equivalent. As the United States Supreme Court has explained, expenditures pose a lesser risk of government corruption than do contributions to a candidate or party. *See Buckley*, 424 U.S. at 47, 96 S. Ct. at 648. Mayor Johnson and the members of GPS Impact have a right of free speech that is protected by the First Amendment, and the Court is unwilling to issue a preliminary injunction in this case because it would have the unintended consequence of chilling constitutionally-protected speech.

4. The plaintiffs have not introduced any admissible evidence to compensate for their deficient pleadings.

The next issue is whether the plaintiffs presented sufficient evidence at the hearing to permit the conclusion that they were irreparably harmed and have a reasonable likelihood of success on the merits. *See School Dist. of Slinger*, 210 Wis. 2d at 374, 563 N.W.2d at 589. At the hearing, the plaintiffs introduced six exhibits, which consist primarily of text messages and other communications between city employees and private organizations. Some of these communications were apparently forwarded to the plaintiffs' counsel by another attorney who received the documents pursuant to a series of open records requests.

Exhibit A is an email correspondence from the City's Executive Director of the Election Commission, Claire Woodall-Vogg, to Mayor Johnson's special assistant, which included the following announcement:

> We plan to launch a multi-prong communication and education campaign, which will include a web widget on all City websites for citizens to check voter registration, reminders about voting and voting resources at every interaction with the City, and working with other business, schools, and nonprofits in the area to identify voter education needs so that every voter has the resources, education and convenient opportunity to cast a ballot.

Exhibit B is a text message chain that identified Woodall-Vogg as a participant of a meeting to discuss "the Milwaukee votes rollout event." Exhibits C and D appear to be taken from the website of G Strategies, a progressive organization that has not been made a party to this action. These exhibits identify Patrick Guarasci as an individual with strong ties to the Democratic Party. Exhibit E consists of text messages between Guarasci and Woodall-Vogg that reveal communications regarding the use of a widget on the City's website, as well as the expected launch date of the initiative. Finally, Exhibit F reveals that Woodall-Vogg sent the following text message to Mayor Johnson:

> Hi Mayor, Talked to G about our desire to continue the coalition but with community orgs receiving the funding. It was not well-received by the Center for Secure and Modern Elections (CSME). I explained our concerns about the Election Commission receiving funding that is exclusively for voter education and outreach efforts (especially in an obscurely funded way through souls to the polls) in this political climate when the City is trying hard to get the state to assist us with our budget crisis.

The plaintiffs ask the Court to consider these exhibits despite the fact that they are not accompanied by any affidavits to indicate whether the text messages and other communications are true and accurate. In addition, no foundation has been made with respect to how the records were created, and there is no indication as to whether the plaintiffs have personal knowledge of the information contained in the exhibits. Moreover, the plaintiffs have not developed any

argument regarding how the exhibits would somehow qualify as self-authenticating documents or exceptions to the hearsay rule. The Court has serious concerns about the reliability and admissibility of these exhibits.

In any event, even if the Court were to consider the exhibits, they would have no impact on the plaintiffs' deficient pleadings because they do not include any evidence that the defendants were in any way engaged in impermissible partisan activities. While the plaintiffs may have "significant concerns as to whether the City has been or will be administering the upcoming November 8, 2022 election in accordance with Wisconsin law," such concerns do not equate to a violation of the law. The Court agrees that an open, transparent government is essential to preserve the credibility of the electoral process and the accountability of government officials. However, the plaintiffs have not identified any specific law related to government transparency that was allegedly violated. Instead, they are, in essence, asking this Court to make new law and retroactively impose the law on the defendants in order to ameliorate their "significant concerns." The Court is unwilling to do so.

CONCLUSION

For the reasons stated above, the plaintiffs' motion for a temporary injunction is **DENIED**.

SO ORDERED.