BY THE COURT:

DATE SIGNED: July 29, 2023

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

Electronically signed by Hannah C. Dugan
Circuit Court Judge

THIS IS A FINAL ORDER FOR THE PURPOSE OF APPEAL.

ELIZABETH L. BURKE and
REPUBLICAN PARTY OF WISCONSIN,

Plaintiffs,

v.

Case No. 22-CV-6195
Case Codes: 30952, 30701

THE CITY OF MILWAUKEE and
THE OFFICE OF THE MAYOR OF THE CITY OF MILWAUKEE,

Defendants.

DECISION AND ORDER
MOTION TO DISMISS

BACKGROUND

Defendants, the City of Milwaukee ("the City") and The Office Of The Mayor Of The City Of Milwaukee (Office) brings a Motion To Dismiss the Plaintiffs' Corrected Amended Complaint pursuant to Wis. Stat. § 802.06(2)(a)(6), for failure to state a claim upon which relief can be granted.

Elizabeth Burke ("Burke") and the Republican Party of Wisconsin (RPW) filed a complaint on September 28, 2022, alleging that the City of Milwaukee and Mayor Cavalier Johnson impermissibly engaged in political activities with the project of the non-profit entity "Wisconsin Votes/Milwaukee Votes 2022" (Votes 2022).[1] The Plaintiffs allege that the project was advanced by a progressive, partisan entity known as "GPS Impact." The Plaintiffs submitted a motion for temporary injunctive relief to this Court on September 29, 2022. On October 21, 2022, Judge Gwendolyn Connolly issued a decision and order denying Plaintiffs' request for temporary injunction.

[1] Also variously referred to in the Corrected Amended Complaint as Milwaukee Votes/Wisconsin Votes 2022 and Milwaukee Votes 2022.

On December 15, 2022, Plaintiffs timely filed a Corrected Amended Summons And Complaint. (Document 66) Plaintiffs' Corrected Amended Complaint seeks declaratory relief and injunctive relief or alternatively, a writ of mandamus. The Corrected Amended Complaint relies on Wis. Stat. §943.12 and an internal City of Milwaukee Policy. The Corrected Amended Complaint includes the same legal theories on which Plaintiffs relied in their first complaint, and which the Court previously rejected as "deficient." (Document 43) Plaintiffs' Corrected Amended Complaint does not add any new legal theories; it simply removed Mayor Cavalier Johnson as a named defendant and replaced him with the Office of the Mayor of the City of Milwaukee (Office). The body of the Corrected Amended Complaint includes references to persons within the City employ and some of those specifically employed in the Office (without naming them as defendants)[2] and adds additional factual allegations.

Defendants filed an Answer to the Corrected Amended Complaint on January 3, 2023, and a Motion to Dismiss on January 6, 2023, scheduled for August 8, 2023. After judicial reassignment of the matter in April, the Motion to Dismiss hearing was heard on July 5, 2023.

FACTS

On May 20 2022, Primokow sent an email to Woodall-Vogg, and also addressed to Milwaukee County Mayors and Presidents, titled "Wisconsin Votes Launch." The email stated that the City "plan[ned] to launch a multi-prong communication and education campaign," designed to get out the vote via regional coalition. Wisconsin Votes was to be a "multi-prong communication and education campaign" that would "include a web widget on all City websites for citizens to check their voter registration, [to] remind[] about voting and voting resources at every interaction with the City, and work[] with other businesses, schools, and nonprofits in the area to identify voter education needs . . . ." Prior to the launch, employees such as Peterson communicated about the voting initiative to private businesses to garner their involvement. The initiative lost traction; in August it looked to other nonprofit "partners" to advance the initiative.

On July 6, 2022, Sachin Chheda texted Peterson about his conversation with the Center for Secure and Modern Elections, a national nonpartisan private funding source assisting with

[2] Referenced as Office employees include, Jim Bohl ("Bohl"), the Mayor's Chief of Staff; Alexis Peterson ("Peterson"), the Special Assistant to the Mayor; and Jeff Fleming ("Fleming"), the Mayor's Office's Communications Director and potentially others who are not named. Also referenced are Claire Woodall-Vogg ("Woodall-Vogg"), the Executive Director of the Milwaukee Elections Commission; and Jordan Primokow ("Primokow"), another City of Milwaukee employee. Finally, the Corrected Amended Complaint refers toother unspecified city employees.

elections which was looking to give local funding for elections. Patrick Guarasci (Guarasci) represented CSME. On September 2, 2022, Chheda sent the following text message to Bohl and the Mayor: "Wanted to let you guys know we have been approved for a $1 million grant from the Center for Secure & Modern Elections. The money is coming to the High Ground Institute to support the nonpartisan Milwaukee Votes 2022. Canvass as we discussed. We should set up a meeting next week to give you guys the full update." The "we" in the phrase "we have been approved" is unspecified.

On September 12, 2022, Mayor Cavalier Johnson spoke at a press conference hosted by the Disability Vote Coalition at which he discussed a non-partisan, get-out-the-vote initiative which he called "Milwaukee Votes 2022." A local nonprofit was running and funding the initiative. The Mayor announced that a new "website widget" would soon appear "on many Milwaukee.gov website pages." Milwaukee Votes would have door-to-door canvassing funded by the private sector to encourage eligible voters to exercise the right to vote in the November 2022 elections. He further stated "I'm not asking anybody to cast their ballots for one party or another or one candidate or another. What I'm asking is for people to participate in our process to make sure that their voice is heard at the ballot box." (Exh. GG)

Chheda is involved with Milwaukee Votes. Plaintiffs have alleged that Chheda is the former Chairman of the Milwaukee County Democratic Party and works with Nation Consulting, LLC which provides services, *intra alia*, to candidates for political office. However, Plaintiffs do not allege that the Milwaukee County Democratic Party or Nation Consulting, LLC were involved in running and funding the get-out-the-vote initiative at issue.

Guarasci was a representative of CSME. Plaintiffs allege Guarasci is the principal of G. Strategies, LLC, a firm the Plaintiffs allege has performed work for, *inter alia*, democratic candidates, the Democratic Governors Association, and the Democratic Party of Wisconsin, and allege that he served personally as a Vice Chair of the Democratic National Committee's Finance Committee. Although Guarasci communicated with City of Milwaukee employees in April and June of 2022, Plaintiffs do not allege that any of these communications were of a partisan nature.

Melissa Baldauff (Baldauff) was working with "Milwaukee Votes 2022." Plaintiffs allege Baldauff appears to be a "principal" of GPS Impact, which Plaintiffs allege provides customized targeted communications programs for all mediums and advertises that it "craft[s] integrated solutions for the modern media landscape." Plaintiffs allege that GPS Impact pronounces its

prior success partnering with Democrats, progressive organizations, and initiatives, and in helping to elect Democratic candidates to state and federal offices. Plaintiffs also allege that defendants have been working with GPS Impact, but again the named defendants are governmental entities, not individuals.

Plaintiffs also referenced in the Corrected Amended Complaint that the project included that the City would permit a "widget" to be placed on the City of Milwaukee website pages. The widget was described as "allowing" an individual to determine whether they are registered to vote and provides a link to the State of Wisconsin Elections Commission website for individuals to update their voting address, etc.[3]

Plaintiffs' Corrected Amended Complaint alleges that these activities are unlawful and they seek declaratory judgment and a Writ of Mandamus.

STANDARD OF REVIEW

"A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint." *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 19, 356 Wis. 2d 665, 849 N.W.2d 693 (quotations omitted). To withstand the motion, the complaint must set out "[a]short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief." WIS. STAT. § 802.02(1)(a) (2019); *Data Key Partners*, 2014 WI 86 at ¶ 20. On review, the court must accept as true all well-pled facts alleged in the complaint, along with all reasonable inferences from those facts. *Data Key Partners*, 2014 WI 86 at ¶ 19; *Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶ 11, 283 Wis. 2d 555, 699 N.W.2d 205. The court, however, is not required to accept legal conclusions contained in the pleadings: "a formulaic recitation of the elements of a cause of action" will not meet this standard. *Cattau v. Nat'l Ins. Servs. of Wis., Inc.*, 2019 WI 46, ¶ 5, 386 Wis. 2d 515, 926 N.W.2d 756 (quotations omitted). "If proof of the well-pleaded facts in a complaint would satisfy each element of a cause of action, then the complaint has stated a claim upon which relief may be granted." *Id.* at ¶ 6. Additionally, "if the facts reveal an apparent right to recover under any legal theory, they are sufficient as a cause of action." *Id.* at ¶ 4 (quotations omitted).

[3] Plaintiffs have not alleged that the widgets actually were so placed, on which City website pages they were sited, whether other nonprofit organizations were permitted to place election-relevant widgets, or whether other government, nonprofit organizations or businesses can seek and/or have obtained permission to place widgets on any City website pages.

"A writ of mandamus is a discretionary writ that 'lies within the sound discretion of the trial court to either grant or deny." *Moore v. Stahowiak*, 212 Wis. 2d 744, 747, 569 N.W.2d 711 (Ct. App. 1997) (quoting *Miller v. Smith*, 100 Wis. 2d 609, 621, 302 N.W.2d 468 (1981)). "A writ of mandamus may be used to compel public officers 'to perform duties arising out of their office and presently due to be performed.'" *Pasko v. City of Milwaukee*, 2002 WI 33, ¶ 24, 252 Wis. 2d 1, 20 643 N.W.2d 72, 81 (2002) (quoting *Law Enforcement Standards Bd. v. Village of Lyndon Station*, 101 Wis. 2d 472, 494, 305 N.W.2d 89, 99 (1981)).

A party seeking a writ of mandamus must demonstrate the following elements: (1) the party has a clear legal right that is free from substantial doubt; (2) the duty sought to be enforced is positive and plain; (3) the party will be substantially damaged by the nonperformance of such duty; (4) there is no other adequate remedy at law for the threatened injury. *Lake Bluff Hous. Partners v. City of South Milwaukee*, 197 Wis. 2d 157, 170, 540 N.W.2d 189 (1995). A court should also consider other "equitable factors including 'the urgency of the situation, the equities of the parties, the efficacy or futility of the writ if issued, the public policy or interests that may be involved and the question whether, if issued, the writ will promote substantial justice or on the contrary cause injustice, hardship or oppression.'" *Sterlinske v. School Dist. of Bruce, Wis.*, 211 Wis. 2d 608, 613, 565 N.W.2d 273, 276 (Ct. App. 1997) (quoting *Law Enforcement Standards*, 101 Wis. 2d at 494)). Mandamus is an exceptional remedy only to be applied in extraordinary cases where there is no other adequate remedy. *Moore*, 212 Wis. 2d at 747. "If the applicant has an adequate remedy by another avenue, the writ will not be awarded." *Id.*

ANALYSIS

Defendants argue that Plaintiff's amended complaint fails to state a claim upon which relief can be granted. Specifically, Defendants argue that the complaint relies on a criminal statute and an internal City of Milwaukee policy which are legally deficient arguments.

Plaintiffs alleged legal violation relies upon Wis. Stat. § 946.12. The statute states:

> 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….

Wis. Stat. § 946.12.

When ascertaining a public officer's duty under this statute, Courts may refer to duties imposed by a variety of sources, including 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, Plaintiffs rely on Department of Employee Relations' (DER) "Political Activity Policy." The Political Activity policy 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.

I. WRIT OF MANDAMOUS

Plaintiffs do not have standing to enforce a criminal statute in a civil action. In order for a writ of mandamus to be issued, there must be a clear, specific legal right. Plaintiffs argue entitlement to a Writ of Mandamus under Wis. Stat. Section 946.12 which "constitutes a proscribed statutory duty for all public officers to undertake an act forbidden by law" and "precludes a public officer from using discretionary power "in a matter inconsistent with the duties of the officer's or employee's office or employment or rights of others with the intent to obtain a dishonest advantage for the officer or employee or another." Plaintiffs essentially concede that private citizens do not have standing to enforce criminal statutes. But even absent the concession, Plaintiffs have not and are unable to point to any "right" that either of them has to enforce a criminal statute in a civil suit.

Even if they had such a right, Plaintiffs have not pointed to any authority that would allow a third-party to enforce an internal municipal employee policy through a civil claim. Defendants point to *Wis. Stat* § 63.19 that vests the authority to regulate such matters to the Milwaukee City Service Commission. *Wis. Stat*.§ 63.19 states that the Commission is the administrative body charged with "[i]nvestigat[ing] the enforcement of… its rules… and the conduct and action of the appointees in the official service in its city…" While Plaintiffs argue that defendants' argument assumes that an investigation under Chapter 63 has occurred. They also argue that when no such investigation has occurred, a writ of mandamus is appropriate. Plaintiffs have not identified a statute or case that grants the Court jurisdiction to adjudicate such a violation.

A party seeking mandamus must show that they pose a "clear, specific legal right that is free from substantial doubt." *Lake Bluff Hous. Partners*, 197 Wis. 2d at 170. Plaintiffs cite to *Castalez v. City of Milwaukee*, 94 Wis. 2d 513, N.W.2d 259 (1980). However, *Castalez* has nothing to do with employment policies creating enforceable rights for third party private citizens.[4] Plaintiffs have failed to point to any cases or statute to suggest that Plaintiffs have an enforceable right under the policy, and thus fails on the first prong of mandamus.

Further the activities Plaintiffs describe in the Corrected Amended Complaint do not constitute a violation of the Political Activity Policy and, as such, the complaint should be dismissed. The DER 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." The complaint does not state sufficient facts to conclude that the Defendants engaged in conduct that supported a particular party or candidate.

[4] The holding in *Castalez* stands for the proposition that employment rules confer enforceable rights on employees.

This Court's prior decision cites several persuasive authorities that reject the notion that conduct described in Plaintiffs' complaint amounts to prohibited partisan political activities. (Document 34) Some case law is instructive. Dismissal on appeal was ordered in *Wis. Voters All. v. City of Racine*, No. 20-C-1487, 2020 WL 6129510 (E.D. Wis. Oct. 14, 2020), No. 20-3002, 2020 WL 9254456 (7th Cir. Nov. 6, 2020). In *Wis. Voters All*, the Eastern District of Wisconsin declined to enjoin the City of Racine from accepting grants from the Center for Tech and Civic Life, and rejected the argument that the acceptance of the grants was intended to skew the outcome of statewide elections by encouraging and facilitating voting by favored demographic groups. The Plaintiff claimed the grants were primarily directed to cities and counties in so-called "swing states" with demographics that had progressive voting patterns. 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.

Similarly, in the instant case, Plaintiffs may have presented policy reasons for precluding the City or the Office from involving the municipality in such GOTV activities and communications about them. However, the record before the Court does not support a judicial determination that the statutes and policies and facts and allegations cited can be construed in favor of the Plaintiff's claims asserted and the remedies sought.

Additionally, the Dane County Circuit Court rejected a challenge to the City of Madison accepting CTCL funds finding that no statutory language would operate to prohibit municipal clerks from using private grant money or working with outside consultants in the performance of their duties. In *Liu et al. v. Wisconsin Elections Comm'n*, Dane County Case No. 22-CV-000046, 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.

The Court agrees with the logic of these persuasive authorities.[5] The Plaintiffs have not met their burden of pleading facts sufficient to state a claim upon which relief can be granted. Plaintiffs amended complaint does not state facts that "plausibly show" that all elements of the

[5] See also *Georgia Voter All. v. Fulton Cnty*., 499 F. Supp. 3d 1250, 1257 (N.D. Ga. 2020) ("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.").

state claims are met. *Data Key Partners*, 2014 WI 86 at 2. Plaintiffs fail to explain how the facts stated in the complaint constitute partisan political activity.

This Court also cited cases from other jurisdictions, including Iowa, Michigan, Minnesota, and Texas, in its conclusion that get-out-the-vote-efforts in areas that are weighted more heavily to one side of the political spectrum do not somehow dilute or impair an individual's right to vote.[6] (Document 34) The Court still holds to the logic of these persuasive authorities.

The second prong of a successful mandamus action is establishing that "the duty sought to be enforced is positive and plain." Plaintiffs argue in their brief that the "clear duty" is that public officers must not take actions which violate Sections 946.12(2) or (3). As with prong one, Plaintiff's do not have standing to enforce a criminal statute in a civil action and, as such, the court cannot find that prong two is met; if the court cannot rely on the criminal statute under prong one it cannot analyze any prong-two clear duty under the criminal statute.[7]

To prevail on a mandamus action, the third prong Plaintiffs must satisfy is a showing that the parties will be substantially damaged by the nonperformance of such duty. In their brief, Plaintiffs identify two proposed forms of damage – "undue influence in political campaigns" and "waste of government resources." Burke previously asserted that the initiative would have the effect of devaluing her vote. However, as previously explained, the Corrected Amended Complaint contains no facts plausibly showing that any political campaign was unduly influenced by the voting initiative. Additionally, the allegations that the City's actions were wasteful and "deprived [Plaintiffs] of public funds" are contrary to the facts stated in the complaint. Resp. Brief. at 7-8. The facts in the complaint show that that the voting initiative was funded by private grants.

This Court previously noted that 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.

[6] *Texas Voters All. v. Dallas Cnty*., 495 F. Supp. 3d 441 (E.D. Tex. 2020); *Election Integrity Fund v. City of Lansing*, No. 1:20-CV-950, 2020 WL 6605987, at *1 (W.D. Mich. Oct. 19, 2020); Iowa Voter All. v. Black Hawk Cnty., No. C20-2078-LTS, 2020 WL 6151559, (N.D. Iowa Oct. 20, 2020); *Minnesota Voters All. v. City of Minneapolis*, No. CV 20-2049 (MJD/TNL), 2020 WL 6119937 (D. Minn. Oct. 16, 2020).

[7] In addition, it is not clear from the named parties what actions must not be taken by "public officers;' the named defendants are not public officers themselves, and conversely the Plaintiffs have not provided facts that the City and the Office, as political subdivisions rather than as public officers, have a clear duty that has not been met.

Tex. 2020), the court found that "harm" alleged by the plaintiffs was based on a speculative chain of inferences.[8]

Even if the grants, widgets, and door-to-door encounters were partisan, Plaintiffs' theory assumes the actions will have 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 injunction 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 based on their failure to 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. However, as discussed above, plaintiffs have failed to show that the private funds, widgets, and canvassing will cause the harm they allege. They point to nothing specific that hinders their rights or that establishes influence in political campaigns" and "waste of government resources.

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

[8] See also Georgia Voter All. v. Fulton Cnty., 499 F. Supp. 3d 1250, 1257 (N.D. Ga. 2020) ("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.").

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 do not meet the third prong of the writ of mandamus standards. As such, Plaintiffs have failed to satisfy the third prong of the writ of mandamus because they cannot prove they suffered damages.

II. DECLARATORY JUDGEMENT

To challenge and dismiss this action, the Defendants assert that the Plaintiffs have failed to sufficiently plead *any* claim for declaratory relief. This deficiency is generally included in Defendants' Motion to Dismiss and argued generally in Defendants' brief and briefly at oral argument. Plaintiff asserts a claim for Declaratory Relief in the "case code" under which this action was filed, and generally in their Corrected Amended Complaint. In the Plaintiffs' response brief, the sole declaratory judgment reference is included in one sentence: The Plaintiffs seek declaratory relief in the form of a finding that the Milwaukee Votes initiative violates state law. (See id., ¶¶ 55-64.) ("id" is a reference to the Corrected Amended Complaint). (Document 74)

In Defendants' Reply Brief, the court is asked to find that the argument unanswered, and should be considered either abandoned or conceded. Defendants draw the attention of the court stating:

> It should be noted that Plaintiffs' response brief contains just one, superficial reference to declaratory relief—asserting that "Plaintiffs seek declaratory relief in the form of a finding that the Milwaukee Votes initiative violates state law." (Resp. Brief at 5). Defendants ask this Court to interpret Plaintiffs' failure to substantively defend their claim for declaratory relief as effective abandonment of that claim. *See United Co-op. v. Frontier FS Co-op*., 2007 WI App 197, ¶ 39, 304 Wis. 2d 750, 771, 738 N.W.2d 578, 588 (failure to respond to opposing party's argument may be taken as a concession). (Document 77)

The court could order the Motion to Dismiss under the abandonment theory. However, because the request as pled seemingly is based on the same legal theories addressed under the request for a Writ of Mandamus, the court reviews the same arguments herein based on the same law. As such, the court must order that Plaintiffs' claims for declaratory relief are not substantiated and will be dismissed for the same reasons as those stated above in relation to Plaintiffs' mandamus claims.

CONCLUSION

A declaratory judgment request must be legally sufficient for the court to order. Based on the foregoing the Defendants' Motion to Dismiss is GRANTED. The Defendants have met their burden under the Motion to Dismiss standard. Neither Plaintiff has met or refuted the Motion To Dismiss standard of failure to state a claim upon which relief can be granted.

A writ of mandamus is a discretionary writ that 'lies within the sound discretion of the trial court to either grant or deny." *Moore v. Stahowiak*, 212 Wis. 2d at 747. Based on the foregoing, Plaintiffs have failed to show any standing that either Plaintiff has to enforce a criminal statute in a civil suit. Lack of such standing is contrary to the mandamus requirement that a party show it has such a clear legal right that is free from substantial doubt.

Plaintiffs have failed to show that either Plaintiff has standing to enforce an internal DER policy. Lack of such standing fails to satisfy the first prong for a mandamus order.

Plaintiffs have failed to satisfy the second prong by not establishing a clear duty according to a law for which the Plaintiffs have standing.

Plaintiffs have failed to satisfy the third prong for a mandamus order because the Plaintiff's cannot show that either of them will be or have been substantially harmed. The court recognizes that some of the harm claimed by each Plaintiff is different from the other but neither has substantiated respective harms as claimed.

Perhaps most importantly, Plaintiffs have failed to state facts showing a violation of the Political Activity Policy.

Finally, Plaintiffs have not adequately argued their Declaratory Judgment claim, thereby conceding to Defendants' positions, or abandoning the claim through a failure to prosecute.

The Defendants have met their burden under the Motion to Dismiss standard. Neither Plaintiff has met the Motion To Dismiss standard of failure to state a claim upon which relief can be granted.

The Motion to Dismiss is GRANTED.

SO ORDERED