No. _____

In the
Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

To the Honorable Brett M. Kavanaugh,
Associate Justice of the United States Supreme Court
and Circuit Justice for the Seventh Circuit

Emergency Application for an Injunction Pending Appellate Review

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Pursuant to this Court's Rule 22 and the All Writs Act, 28 U.S.C. 1651, the undersigned, on behalf of the Wisconsin Voters Alliance and individual petitioner-members, respectfully apply for an injunction pending appellate review of the October 14, 2020 order denying preliminary injunctive relief issued by the United States District Court for the Eastern District of Wisconsin, pending the consideration and disposition of the appeal from that order to the United States Court of Appeals for the Seventh Circuit and, if necessary, pending the filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court. The United States Court of Appeals for the Seventh Circuit on October 23, 2020 denied a motion for injunction pending appeal.

The requested injunction pending appeal would enjoin Respondents from using private federal election grants for the November 3 federal elections and require the Respondents to provide an immediate, itemized and verified accounting of the private moneys used to pay for the November 3 federal elections and the private moneys remaining on account for that purpose.

Notably, in a related case arising out of Pennsylvania in the United States Court of Appeals for the Third Circuit, a Rule 11 petition for writ of certiorari before judgment of the Court of Appeals has already been filed in this Court on October 25, 2020. If the Court were to grant that petition arising out of the Third Circuit, then the Petitioners would still request the issuance of the injunction pending the appeal in this Seventh Circuit proceeding (to apply to the respondents in this case) plus a stay on this

Seventh Circuit proceeding pending this Court's decision regarding the Third Circuit proceeding.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Wisconsin Voters Alliance, inclusive of all the Petitioners, states that it is a non-stock, non-profit corporation, has no parent corporation, and is not a publicly held company.

PARTIES TO THE PROCEEDING

The applicants (plaintiffs-Appellants below) are Wisconsin Voters Alliance, David Tarczon, Elizabeth Clemens-Tarczon, Jonathan Hunt, Paula Perez, Maria Eck, Douglas Doeran and Navin Jarugumilli. The respondents (defendant-Appellees below) are City of Racine, City of Milwaukee, City of Kenosha, City of Green Bay and City of Madison.

LIST OF ALL PROCEEDINGS

The related cases in this proceeding are: Wisconsin Voters Alliance, et al. v. City of Racine, et al., Eastern District of Wisconsin, case no. 20-cv-1487 (complaint filed Sept. 24, 2020) and the appeal filed in the U.S. Court of Appeals for the Seventh Circuit, case no. 20-3002 (injunction pending appeal denied on October 21, 2020). A table of related cases, including the ones arising out of Wisconsin, is provided below.

Federal Court	**Case Number**	**Caption Title**	**Complaint/ Appeal Filing**	**PI/TRO/Inj. Pending App. Denial**
M.D. Pennsylvania	20-cv-1761	Pennsylvania Voters Alliance et al v. Centre County et al	9/25/2020	Compl. dismissed 10/21/2020
Third Circuit	20-3175	(same)	10/22/2020	

E.D. Wisconsin	20-cv-1487	Wisconsin Voters Alliance et al v. City of Racine, et al.	9/24/2020	10/14/2020; 10/21/2020
Seventh Circuit	20-3002	(same)	10/15/2020	10/23/2020
W.D. Michigan	20-cv-0950	Election Integrity Fund et al v. Lansing, City of et al	9/29/2020	10/2/2020; 10/19/2020
Sixth Circuit	20-2048	(same)	10/23/2020	
D. Minnesota	20-cv-2049	Minnesota Voters Alliance et al v. City of Minneapolis	9/24/2020	10/16/2020
N.D. Iowa	20-cv-2078	Iowa Voter Alliance et al v. Black Hawk County et al	10/1/2020	10/20/2020
E.D. Texas	20-cv-0775	Texas Voters Alliance et al v. Dallas County et al	10/9/2020	10/20/2020
N. D. Georgia	20-cv-4198	Georgia Voter Alliance et al v. Fulton County	10/9/2020	
D. South Carolina	20-cv-03710	South Carolina Voter's Alliance et al v. Charleston County et al	10/22/2020	

DECISIONS BELOW

A complaint and motion for preliminary injunction was filed in U.S. District Court for the U.S. District Court for the Eastern District of Wisconsin on September 24, 2020. ECF 1. The district court denied preliminary injunctive relief on October 14. ECF 27. The district court's order is included in the Appendix as Exhibit A. App. 1-3. The Notice of Appeal was filed in district court on October 15, 2020. ECF 30. The district court on October 21 denied a motion for injunction pending appeal. ECF 37. The district court's order is included in the Appendix as Exhibit B. App. 4-5. The United States Court of Appeals for the Seventh Circuit on October 23, 2020 denied a

motion for injunction pending appeal. The Seventh Circuit's order is included in the Appendix as Exhibit C. App. 6.

JURISDICTION

Wisconsin Voters Alliance, including the individual Petitioners, filed its complaint on September 24, 2020 challenging the constitutionality of a state's political subdivisions accepting grants from the Center for Tech and Civic Life to conduct federal elections. ECF 1. The respondents, Wisconsin cities, Racine, Milwaukee, Kenosha, Green Bay, and Madison sought and received a combined grant from Center of Tech and Civic Life of over $6.3 million:

- Green Bay: $1,093,400;
- Kenosha: $862,779;
- Madison: $1,271,788;
- Milwaukee: $2,154,500; and
- Racine: $942,100.

ECF 1. The district court has jurisdiction under 28 U.S.C. 1331 and 1343, and has authority to issue declaratory and injunctive relief under 28 U.S.C. 1343, 1651 and 2201-02.

The United States District Court for the Eastern District of Wisconsin denied the motion for preliminary injunction on October 14, 2020. Ex. A. Wisconsin Voters Alliance filed a timely Notice of Appeal on October 15, 2020. ECF 30. The United States Court of Appeals for the Seventh Circuit has jurisdiction over Wisconsin Voters Alliance's interlocutory appeal from the denial of the motion for preliminary injunctive relief under 28 U.S.C. 1292.

The district court on October 21 denied a motion for injunction pending appeal. ECF 37, Ex. B. The United States Court of Appeals for the Seventh Circuit on October 23, 2020 denied a motion for injunction pending appeal. Ex. C.

This Court has jurisdiction under 28 U.S.C. 1651 and the Court's precedents. Wisconsin Voters Alliance's application is "in aid of [this Court's] jurisdiction," *id.,* because the appellate process will take months to conclude, by which time the November 3, 2020 election will have occurred with CTCL's private funding to pay for our federal elections causing irreparable harm to the people's "federal elections" on November 3, 2020 as defined under the Elections Clause.

CONSTITUTIONAL CLAUSES INVOLVED

The U.S. Constitution, Article I, section 4 contains the Elections Clause:

> Section 4: Elections
>
> 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…

Article I, section 5, makes each house of Congress the judge of the elections of its respective members:

> Section 5: Powers and Duties of Congress
> Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members…

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To the Honorable Brett M. Kavanaugh as Circuit Justice for the U.S. Court of Appeals for the Seventh Circuit:

The Petitioners apply for an injunction pending appellate review, under 18 U.S.C. 1651 and the Court's precedents, prior to the November 3, 2020 election to enjoin Respondents from accepting and using private federal election grants. The district court denied the motion for preliminary injunction on October 14. App. 1-3. The district court denied the motion for injunction pending appeal on October 21. App. 4-5. The Seventh Circuit denied the motion for injunction pending appeal on October 23. App. 6.

Now, the Petitioners seek from this Court an injunction pending appellate review. In addition to considering the merits, this Court balances the equities when granting injunctions, "Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue." *Breswick & Co. v. U.S.,* 75 S.Ct. 912, 915 (U.S. 1955), *citing Yakus v. United States*, 321 U.S. 414, 440 (1943). The Petitioners meet the Court's standards for injunction pending appellate review as explained below.

Introduction

The Elections Clause is found in the beginning of the U.S. Constitution at Article I, section 4. The guarantee of federal elections for Congressional members is a "social contract" in which the federal government has a unique federal interest. In this case, Respondents, local subdivisions of the state, have accepted significant moneys from a private, non-profit corporation to pay for federal elections. The non-profit

Center for Tech and Civic Life (CTCL) has announced $250,000,000 of such federal election grants for the November 3, 2020 election. In exchange for the private federal election grants, the local subdivisions agree to meet the requirements of the grant, to report back to the private, non-profit corporation and to claw-back provisions which are an ongoing liability for the political subdivision. This petition presents the following legal questions:

1. Whether the social contract of the Federal Elections Clause requires exclusively-publicly-funded federal elections, thus prohibiting such private federal election grants.

2. Whether the federal common law under the Elections Clause recognizes such private financing as tortious interference with the social contract embedded in the Elections Clause.

3. Whether the federal common law under the Elections Clause recognizes Article III standing, an actual and concrete injury, for a resident within a political subdivision to challenge the political subdivision accepting private federal election grants interfering with the Elections Clause guarantee of exclusively-publicly-funded federal elections.

STATEMENT OF FACTS

The relevant facts about CTCL's federal private election grants to the Respondents.

The accompanying court decisions, denying the motion for preliminary injunctive relief and the motions for injunction pending appeal are based on undisputed facts about CTCL's private federal election grants to the Respondents. App. 1-6. The attached J.R. Carlson report, attached as Exhibit 4, also provides details regarding CTCL's private federal election grant program. App. 7-26. The undisputed facts are:

- CTCL, a non-party to this action, is a nonpartisan, nonprofit organization formed in 2012 by a "team of civic technologists, trainers, researchers, election

administration and data experts" to "foster a more informed and engaged democracy" and to help "modernize elections."

- CTCL has designated $250,000,000 in grant money, a donation from Jeff Zuckerberg and his spouse, to be paid to election offices across the country "to help ensure that [these offices] have the staffing, training, and equipment necessary so this November every eligible voter can participate in a safe and timely way and have their vote counted."

- These funds may be used for election-related expenses, including to: maintain in-person polling on election day; obtain personal protective equipment for election officials and voters; support drive-thru voting; publish reminders to voters to update their voter registration information; educate voters on election policies and procedure; recruit and hire poll workers; provide increased cleaning and sanitation at poll sites; train poll workers; expand in-person early voting sites; and deploy additional staff or technology to improve mail ballot processing.

- CTCL provides grant funds to any local election office that applies, and the final grant is calculated using nonpartisan criteria.

- CTCL reports that over 1,100 local election administrators across the country have applied for CTCL grants.

- The Appellee Wisconsin cities, Racine, Milwaukee, Kenosha, Green Bay, and Madison sought and received a combined grant from Center of Tech and Civic Life of over $6.3 million:

    - Green Bay: $1,093,400;
    - Kenosha: $862,779;
    - Madison: $1,271,788;
    - Milwaukee: $2,154,500; and
    - Racine: $942,100.

App. 1-26. *Pennsylvania Voters Alliance, et al. v. Centre County, et al.,* --- F.Supp.3d ---- , 2020 WL 6158309 at *1-2 (M.D. Pa. Oct. 21, 2020).

ARGUMENT

The Court should grant the injunction pending appellate review prior to the November 3, 2020 election. This Court's requirements for an injunction pending appellate review are met.

I. This lawsuit is a companion to *Citizens United* because, although corporations or billionaires can constitutionally make unlimited independent expenditures under the First Amendment, corporations or billionaires cannot constitutionally pay for federal elections under the Elections Clause.

This lawsuit challenging private federal election grants is a companion to *Citizens United v. Federal Election Com'n*, 558 U.S. 310 (2010). In *Citizens United,* the Supreme Court held, in part, that the government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity and the federal statute barring independent corporate expenditures for electioneering communications violated First Amendment. *Id.* at 365. The result of *Citizens United* was unlimited independent expenditures relating to campaigns.

The questions presented in this motion are related to *Citizens United:* can those unlimited independent expenditures, constitutionally-authorized under the First Amendment according to *Citizens United,* be made to government election officials to pay for federal elections and to influence federal election policy?

The Petitioners' answer based on the Elections Clause is an emphatic "no." Corporation or billionaires can constitutionally spend millions on independent expenditures, but corporations or billionaires cannot constitutionally pay for federal

elections. Paying for federal elections is synonymous with influencing federal election policy—as shown with CTCL's requirements with its federal election grants.

The Constitution should be interpreted in this way:

> The First Amendment does not apply to private federal election grants; instead, the Election Clause prohibits private federal election grants.

To protect the federal interest in exclusively-publicly-funded federal elections, the Court should identify a patch of federal common law—distinguishable from the First Amendment relied on in *Citizens United*—recognizing a private cause of action and standing for the Petitioners as residents of Congressional Districts to obtain prospective relief against such private federal election grants. Otherwise, private funding of federal elections will eventually invalidate their Congressional elections under the Elections Clause—which is not in their or the public's interest.

II. This Court should adopt a patch of federal common law under the Elections Clause to preserve federal elections from being invalidated by private money paying for federal elections.

This Court should adopt a patch of federal common law under the Elections Clause necessary to protect the election process and the right to vote, intertwined as they are, by recognizing a private cause of action and resident standing in situations where election officials accept private money to pay for federal elections.

During the federal election process, when election officials accept private moneys to pay for federal elections, regardless of its private source and good intentions, the election officials tortiously interfere with the integrity of a core government public function, the federal election process, because the "the right to vote is the right to

participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992).

The Elections Clause is found in the beginning of the U.S. Constitution at Article I, section 4. The guarantee of federal elections for Congressional members is a "social contract" in which the federal government has a unique interest. Petitioners claims this social contract is breached by Respondents' acceptance of the private federal election grants.

The Petitioners, to make their case under the Elections Clause and related federal common law, introduce three legal propositions which are not affirmed in the current case law precedents. The first legal proposition is one of constitutional interpretation. *See Ramos v. Louisiana,* 140 S.Ct. 1390, 1409 (2020) (concurring, Sotomeyer, J.) ("Reasonable minds have disagreed over time—and continue to disagree—about the best mode of constitutional interpretation. ") The Petitioners claim that the social contract of the Federal Elections Clause requires exclusively-publicly-funded federal elections, thus prohibiting such private federal election grants. According to Petitioners, not even Congress can authorize the private funding of our federal elections without violating the Elections Clause.

The second and third legal propositions relate to the federal common law under the Elections Clause. To be sure, there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) and "judicial lawmaking in the form of federal common law plays a necessarily modest role," *Rodriguez v. Federal Deposit Insurance Corporation*, 140 S.Ct. 713, 717 (2020). Nonetheless, in specific contexts, "federal

common law often plays an important role." *Id.* at 717. Federal "common lawmaking must be necessary to protect uniquely federal interests." *Id.* (quotations and citations omitted).

The second legal proposition is that the federal common law under the Elections Clause recognizes such private financing as tortious interference with the social contract embedded in the Elections Clause and recognizes citizens as a third party beneficiary of that social contract for standing purposes. *See* "Liability for procuring breach of contract, 26 A.L.R.2d 1227 (1952), superseded in part by "Punitive damages for interference with contract or business relationship," 44 A.L.R.4th 1,078 (Jan. 1, 1986). "The prevailing rule in nearly all American jurisdictions is that a third person may, in his own right and name, enforce a contractual promise made for his benefit even though he is a stranger both to the contract and to the consideration for the contract." 16 Am. Jur. Proof of Facts 2d 55 (1978), *citing* 17 Am. Jur. 2d, Contracts § 302; 59 Am. Jur. 2d, Parties § 36.

The third legal proposition is that the federal common law under the Elections Clause recognizes Article III standing, including an actual and concrete injury, for a resident within a political subdivision to challenge the political subdivision accepting private federal election grants interfering with the citizen's Elections Clause guarantee of exclusively-publicly-funded federal elections.

The "rights and obligations of the United States" includes that of the fundamental right to vote, the protection of which is found under the U.S. Constitution. Conducting elections is a core government public function. There

should be little doubt that government has a legitimate interest in fair and honest elections. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995). As this Court has declared that the right to vote is intertwined with the right to participate in an election process of integrity:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders,* 376 U.S. 1, 17 (1964). But the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system.

Burdick v. Takushi, 504 U.S. 428, 441 (1992) *citing Anderson v. Celebrezze,* 460 U.S. 780, 788 (1983) and *Storer v. Brown,* 415 U.S. 724, 730 (1974).

Notably, this Court recently reiterated its long held view that a person's right to vote is "individual and personal in nature." *Gill v. Whitford*, 138 S. Ct. 1916, 1929 (2018) *quoting Reynolds v. Sims,* 377 U.S. 533, 561 (1964). Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage. *Id., quoting Baker v. Carr,* 369 U.S. 186, 206 (1962).

III. Under the Elections Clause, political subdivisions of a state have no power to accept private money to pay for federal elections.

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

This 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). This 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).

"Accordingly, the logic behind the plain-statement rule—that Congress must be explicit when it encroaches in areas traditionally within a state's core governmental functions—does not apply when Congress acts under the Elections Clause, as it did in

enacting the NVRA." *Harkless v. Brunner*, 545 F.3d 445, 455 (6th Cir. 2008). "To this end, state election laws cannot 'directly conflict' with federal election laws on the subject." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 399 (5th Cir. 2013), quoting *Voting for America, Inc. v. Andrade*, 488 Fed.Appx. 890, 896 (5th Cir. 2012) (citing *Voting Integrity Project, Inc. v. Bomer,* 199 F.3d 773, 775 (5th Cir.2000)).

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 under the so-called Dillon's Rule because they are mere political subdivisions of the state. *See Pennsylvania Restaurant and Lodging Association v. City of Pittsburgh,* 211 A.3d 810, 816, n. 3 (Pa. 2019), *citing City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868) (Dillon's Rule). This philosophy of the Dillon's Rule has been adopted by this Court in interpreting federal law with such statements as:

> 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 (1907). This Court, more recently, affirmed the principal of Dillon's Rule:

> The States' political subdivisions have no such inherent power and can levy taxes only to the extent authorized by the State. See 16 E. McQuillin, Law of Municipal Corporations § 44.05, pp. 19–24 (rev.3d ed.2003); see also *Wiggins Ferry,* 107 U.S., at 375, 2 S.Ct. 257 (noting "[t]he power of [a State] to authorize any city within her limits to impose a license tax" on ferries).

Polar Tankers, Inc. v. City of Valdez, Alaska, 557 U.S. 1, 27 (2009). Under federal common law Dillon's Rule, a state's counties and cities have no inherent powers over federal elections separate and apart from Congress's express grants of power to them. And, in this case, a state's counties and cities have no express grants of power to accept private federal election grants to fund their own federal election policies because the Elections Clause prohibits it.

Further even if Congress wanted to authorize such private federal election grants to the federal government, states or their political subdivisions, the Elections Clause prohibits Congress from doing that as well. U.S. Const., Art. I, sec. 4.

IV. A private cause of action exists under the Elections Clause and related federal common law based on tortious interference with the "social contract" regarding federal elections.

The district court has original jurisdiction over complaints alleging violations of the Elections Clause. 28 U.S.C. 1331 provides "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1343, titled "Civil Rights and Elective Franchise," provides that "the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person" upon certain elaborated grounds. 28 U.S.C. 1343 (a) (3) provides the district court with original jurisdiction "to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." 28 U.S.C. 1343 (a) (4) provides the district court with original jurisdiction "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

In this case, there is a "civil action authorized by law." To protect the federal interest in exclusively-publicly-funded federal elections, the Court should identify a patch of federal common law to recognize a private cause of action and standing for the Petitioners to obtain prospective relief against such private federal election grants. Specifically, during the federal election process, when election officials accept private moneys to pay for federal elections, regardless of its private source and good intentions, the election officials tortiously interfere with the integrity of a core government public

function, the federal election process, because the "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system." *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)

Under the Elections Clause, the guarantee of federal elections for Congressional members is a "social contract" in which the federal government has a unique federal interest. In this case, a state's local subdivisions have accepted moneys from a private, non-profit corporation to pay for federal elections. In exchange for the private federal election grants, the local subdivisions agree to meet the requirements of the grant, to report back to the private, non-profit corporation and to claw-back provisions which are an ongoing liability for the political subdivision.

Importantly, under the Federal Elections Clause, the federal common law 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). Petitioners acknowledge that there is "no federal general common law." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) and that "judicial lawmaking in the form of federal common law plays a necessarily modest role," *Rodriguez v. Federal Deposit Insurance Corporation*, 140 S.Ct. 713, 717 (2020). But, nonetheless, in specific contexts, "federal common law often plays an important role." *Id.* at 717. Federal "common lawmaking must be necessary to protect uniquely federal interests." *Id.* (quotations and citations omitted).

The federal common law under the Elections Clause recognizes such private financing of federal elections as tortious interference with the social contract embedded in the Elections Clause and recognizes citizens as a third party beneficiary of that social contract for lawsuit purposes. *See* "Liability for procuring breach of contract, 26 A.L.R.2d 1227 (1952). "The prevailing rule in nearly all American jurisdictions is that a third person may, in his own right and name, enforce a contractual promise made for his benefit even though he is a stranger both to the contract and to the consideration for the contract." 16 Am. Jur. Proof of Facts 2d 55 (1978).

Here, it is appropriate for the Court to recognize this tort because there is a significant conflict between the federal policy and the use of state law. *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).

Under the Elections Clause, federal policy constitutionally requires that federal elections be exclusively-publicly-funded. The local government's policies to accept the private moneys to pay for federal elections conflicts with the Elections Clause. Because of this conflict, the federal common law tort should be recognized. If this federal common law tort is recognized under the Elections Clause, then the All Writs Act, 28 U.S.C. § 1651, provides the Court with an equitable remedy prior to an election to

enjoin local public officials from illegally accepting CTCL's moneys to fund federal elections.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." *Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 328 (3rd Cir. 2007), quoting 28 U.S.C. § 1651(a). "The All Writs Act confers on courts 'extraordinary powers' that are 'firmly circumscribed.' "*Alabama v. U.S. Army Corps of Eng'rs,* 424 F.3d 1117, 1132 (11th Cir.2005) (quoting *ITT Cmty. Dev. Corp. v. Barton,* 569 F.2d 1351, 1358 (5th Cir.1978)).

This Court in *FTC v. Dean Foods Co.,* 384 U.S. 597, 606 (1966), held that the All Writs Act where Congress failed to provide a solution regarding preliminary injunctions in Federal Trade Commission matters. At the time, the Federal Trade Commission sought a preliminary injunction under the All Writs Act to stop the respondents from merging until it reviewed the legality of the merger. *Id.* at 605-605. But, respondents argued because Congress had not given the FTC express statutory authority to request preliminary relief, that relief is unavailable. *Id.* at 605-606. The Court agreed with the FTC reasoning that Congress could not have entrusted the enforcement of the Clayton Act to the FTC without allowing the court of appeals to exercise its derivative power under the All Writs Act. *Id.* at 605. Thus, in the absence of explicit congressional direction, courts may exercise their authority under the All Writs Act to ensure effective judicial review.

Similarly, the Constitution, Article I, section 5, leaves to each House of Congress to be judge of its own elections, "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members." But, in this case, Congress has failed to provide specific pre-election remedies against local public officials when illegally accepting private moneys to fund federal elections. 52 U.S.C. § 21112, regarding federal election standards, is too limited requiring only an "appropriate remedy" from the states for HAVA violations, but not the meaningful equitable remedy required prior to the federal election—as demonstrated in this case—to stop local election officials from using private money to fund public elections. So, in this situation, as in *FTC v. Dean Food Co.*, the All Writs Act provides a remedy to the Court based on the federal common law claim detailed above.

V. Standing exists when private federal election grants invalidate federal elections because a resident not having a Congressional representative is actual and concrete injury.

The district court and Seventh Circuit denied the injunction pending appeal. But, if the private cause of action exists, then standing exists because not having a Congressional representative is an actual and concrete injury.

A party invoking federal jurisdiction must allege facts demonstrating that each of the following elements have been satisfied in order to have standing to pursue the case: (1) the plaintiff "suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected

interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Id.* (quotation omitted). That is, the injury "must actually exist" and "must affect the plaintiff in a personal and individual way." *Id.* at 1548 (quotation omitted).

The challenged conduct of the respondents, accepting CTCL's private federal election grants, can be fairly traced to an invalidation of Congressional elections—leaving Petitioners and other residents without representation in Congress. The Petitioners' disenfranchisement involved with not having a representative in Congress is "an invasion of a legally protected interest that is concrete and particularized, not conjectural or hypothetical." The Petitioners not having a representative in Congress is an injury that actually exists and affects the Petitioners in a personal and individual way. The Petitioners would not be able to exercise their First Amendment rights to communicate with a Congressional representative until a new, valid special election occurred. It is not a generalized grievance affecting the general public. Citizens of Congressional Districts whose public election officials refused the CTCL's private federal election grants would still have representation in Congress.

The 2018 matter of the North Carolina Ninth Congressional District is illustrative for the purpose of standing. In that matter, election misconduct led to invalidation of a Congressional election and a vacant Congressional District seat which disenfranchised voter within the Congressional district until a special election could be held. In that case, election misconduct occurred including illegal ballot harvesting. The U.S. Constitution, Article I, section 5, states that the House is the judge of the elections

of its members and the final arbiter of contests. While the election contest in the North Carolina Board of Elections was pending, incoming U.S. House Majority Leader Steny Hoyer issued a statement saying House Democrats won't allow Republican Mark Harris to be sworn in because of the ongoing investigation, "Given the now well-documented election fraud that took place in NC-09, Democrats would object to any attempt by Mr. Harris to be seated on January 3," Hoyer said, adding that "the integrity of our democratic process outweighs concerns about the seat being vacant at the start of the new Congress."[1] The North Carolina Board of Elections concurred—refusing to certify the November 2018 results and scheduling a special election on September 10, 2019.[2] So, the residents of North Carolina's Ninth Congressional District were without representation in the U.S. House of Representatives from January of 2019 through September 10, 2019—an actual and concrete injury particularized to the residents of that Congressional District.

Similarly, the Petitioners are disenfranchised her if the federal courts were to conclude that the private federal election grants invalidate the elections and, in turn, a house of Congress made a decision not to seat a Congressional member for that reason, triggering a special election. Prior to the necessary special election, the Petitioners would not have a Congressional representative which is the type of injury caused by defendant's misconduct which confers standing.

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[1] *See* https://www.politico.com/story/2018/12/28/nc-election-board-turns-down-request-to-certify-a-gop-victory-before-disbanding-1076617 (last visited Oct. 19, 2020).

[2] *See* https://ballotpedia.org/North_Carolina%27s_9th_Congressional_District_special_ election, 2019.

VI. The Petitioners meet all the requirements for an injunction pending appellate review.

In addition to considering the merits, this Court balances the equities when granting injunctions, "Where the question is whether an injunction should be granted the irreparable injury facing the plaintiff must be balanced against the competing equities before an injunction will issue." *Breswick & Co. v. U.S.,* 75 S.Ct. 912, 915 (U.S. 1955), *citing Yakus v. United States*, 321 U.S. 414, 440 (1943).

Here, the balance of equities favors issuing the injunction pending appellate review. 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). There is no adequate legal remedy. As detailed above, private payment for federal elections invalidates Congressional elections and, in turn, the respective houses of Congress may decide they may need to be re-done by special elections. A do-over in the form of a special Congressional election means that the residents and businesses of the Congressional District will not have a Congressional representative, an actual and concrete harm. The balancing of harms favors the issuance of the injunction because the government can use its own resources to fund the federal elections. Sufficient federal and state funds exist; there is no reason that private federal election grants need to be accepted and used. App. 13. The public interest factor always favors valid Congressional elections over Congressional elections rendered invalid by unconstitutional private interference.

CONCLUSION

The Court should issue an injunction pending appellate review which enjoins the Respondents from accepting and using private federal election grants. The requested injunction pending appeal should enjoin Respondents from using private federal election grants for the November 3 federal elections and require the Respondents to provide this Court with an immediate, itemized and verified accounting of the private moneys used to pay for the November 3 federal elections and the remaining private moneys on account for that purpose.

Dated: October 25, 2020.

/s/Erick G. Kaardal
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN VOTERS ALLIANCE, et al.,

Plaintiffs,

v. Case No. 20-C-1487

CITY OF RACINE, et al.,

Defendants.

ORDER DENYING MOTION FOR PRELIMINARY RELIEF

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.

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.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

WISCONSIN VOTERS ALLIANCE, et al.,

Plaintiffs,

v. Case No. 20-C-1487

CITY OF RACINE, et al.,

Defendants.

ORDER

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. On October 14, 2020, the court denied Plaintiffs' motion for a temporary restraining order and other preliminary relief because Plaintiffs failed to show a reasonable likelihood of success on the merits. Dkt. No. 27. Plaintiffs subsequently appealed the court's October 14, 2020 order under 28 U.S.C. § 1292. Plaintiffs also filed a motion for an injunction pending appeal. For the following reasons, Plaintiffs' motion will be denied.

Requests for stays or injunctions pending appeal are governed by Rule 62(c) of the Federal Rules of Civil Procedure, which provides that "[w]hile an appeal is pending from an interlocutory order . . . that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." In determining whether to grant an injunction pending appeal, a court must consider (1) whether the

movant has made a strong showing that it is likely to succeed on the merits on appeal; (2) whether the movant will be irreparably injured absent an injunction; (3) whether issuance of the injunction will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (citations omitted).

The court concludes that Plaintiffs' arguments are insufficient to establish a strong likelihood of success on the merits. In denying Plaintiffs' motion for a temporary restraining order, the court considered and rejected many of the same arguments Plaintiffs now assert. The court's reasoning is set out in the court's October 14, 2020 order and need not be repeated here. Because Plaintiffs have failed to demonstrate a likelihood of success on the merits, no further analysis as to whether to grant an injunction is necessary and their motion for an injunction pending appeal (Dkt. No. 31) is **DENIED**.

SO ORDERED at Green Bay, Wisconsin this 21st day of October, 2020.

s/ William C. Griesbach
William C. Griesbach
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Everett McKinley Dirksen United States Courthouse
Room 2722 - 219 S. Dearborn Street
Chicago, Illinois 60604

Office of the Clerk
Phone: (312) 435-5850
www.ca7.uscourts.gov

ORDER

October 23, 2020

Before

DIANE S. SYKES, *Chief Judge*
JOEL M. FLAUM, *Circuit Judge*
FRANK H. EASTERBROOK, *Circuit Judge*

No. 20-3002	WISCONSIN VOTERS ALLIANCE, et al., Plaintiffs - Appellants v. CITY OF RACINE, et al., Defendants - Appellees
Originating Case Information:	
District Court No: 1:20-cv-01487-WCG Eastern District of Wisconsin District Judge William C. Griesbach	

Upon consideration of the **MOTION FOR INJUNCTION PENDING APPEAL**, filed on October 23, 2020, by counsel for the appellants,

IT IS ORDERED that the motion for injunctive relief is **DENIED**.

form name: **c7_Order_3J**(form ID: **177**)

Stillwater Technical Solutions

"Complex Problems Solved Well"

October 9, 2020

Mr. Phill Kline
Thomas More Society
309 West Washington Street, Suite 1250
Chicago, IL 60606

Mr. Erick Kaardal
Mohrman, Kaardal and Erickson PA
150 South Fifth Street, Suite 3100
Minneapolis, MN 55402

Re: The Legitimacy and Effect of Private Funding in State and Federal Electoral Processes

Dear Mr. Kline:

Introduction -

Thank you for retaining Stillwater Technical Solutions (STS) to survey the impact of public/private partnership funding on state certified Help America Vote Act (HAVA) implementation plans, and state electoral administrative processes. STS is a non-partisan, for-profit research and public-policy advisory firm specializing in federal and local government administrative procedures, land and natural resource policymaking, local governmental relations, and program management.

Thomas Moore Society (TMS) has retained STS to analyze whether grants from private, non-profit organizations that are independent of state certified HAVA implementation plans and legislative appropriations processes may legitimately be integrated with public funding by local governments for electoral administration. Our brief response, expanded throughout this briefing paper, is that there is no statutory or administrative basis or history for local jurisdictions to solicit or receive private funding outside of state plans or legislative and congressional appropriation processes.

STS was specifically requested to brief TMS on the following questions:

1) Whether state certified HAVA implementation plans or state legislative prerogatives are compromised through the injection of private grants from the Center for Technology and Civic Life (CTCL) into local elections offices;
2) If existing appropriations from federal, state or local sources are sufficient to execute the 2020 elections, making funding from public/private partnerships unnecessary;
3) How the reporting and claw back provisions in CTCL agreements with local governments represent an ongoing liability for local governments, skews state legislative budgeting, and result in inaccurate federal and state audits required for HAVA programs;[1]
4) How injection of CTCL funds in discreet jurisdictions distorts legislative appropriation formulas, resulting in an inequitable distribution of funding throughout the state, contrary to HAVA and state implementation plans.

[1] 41 CFR Part 105-71. *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments*.

Approach -

For this survey, STS analyzed the requirements from the U.S. Elections Assistance Commission (EAC) and provisions in CTCL agreements in the context of the state certified HAVA implementation plans for the states of Wisconsin,[2] Minnesota[3,4] Michigan,[5] and Pennsylvania.[6] These four states were selected because of an early emphasis and focused collaboration between CTCL and large municipalities, as well as the timing of CTCL grants, beginning in late spring 2020. A chronology of the CTCL and local governmental transactions, previously reported by STS, was also integrated in this analysis.[7]

Through assessment of the administrative responsibilities of state electoral commissions, as codified in state HAVA implementation plans, and documentation of vast unaccessed federal appropriations through HAVA and the Coronavirus Aid Relief and Economic Security (CARES) Act,[8] STS was able to demonstrate that there is no deficit of governmental funding available to the states or local jurisdictions for administration of the 2020 elections.

One question that emerges is the history, influence, and impact that private funding could have on the long-term *culture* of state and federal elections. Because large amounts of onshore and offshore funding into non-profit foundations has been documented to influence federal agencies and U.S. policymaking,[9] the potential negative effect of funding on state HAVA implementation programs and local elections is of national import, and beyond the scope of this briefing letter.

Background; Situation Appraisal -

The responsibility to administer state and federal elections is the sole prerogative of the Wisconsin, Minnesota, Michigan, Pennsylvania and remaining state legislatures.[10] Those legislatures maintain responsibility for appropriations and delegation of authority to state electoral commissions, who in turn administrate elections on a statewide basis. The state elections commissions enact administrative policies, support county and municipal officials in their individual precincts, and are responsible to administer and report HAVA expenditures in accordance with certified implementation plans approved by the state legislatures and the EAC.

[2] Certified Wisconsin HAVA State Plan of 2002. WI Elections Board. FR Vol. 69 No. 57 March 24 2004.
[3] Certified Minnesota HAVA State Plan of 2002. Mary Kiffmeyer Secretary. FR Vol. 69 No. 57 March 24 2004.
[4] Publication of States Plan Pursuant to the Help America Vote Act. Federal Register Vol. 74, No 237 Friday December 11, 2009.
[5] Certified Michigan HAVA State Plan of 2002. Terri Lynn Land Secretary. FR Vol. 69 No. 57 March 24 2004.
[6] Certified Pennsylvania HAVA State Plan of 2002. Edward Rendell Governor, P.A. Cortes Secretary FR Vol. 69 No. 57 March 24 2004.
[7] *CTCL Grant Awards History, Chronology, and Issues.* Stillwater Technical Solutions. October 2020.
[8] Federal Election Assistance Commission. *Post Primary CARES Act Expenditure Report. September 22, 2020*.
[9] *The Chain of Command. How Billionaires and Foundations Control Environmental Movement. US Senate Report July 30 2014*.
[10] U.S. Const. Art. I, § 4.

With promulgation of HAVA on October 29, 2002 and assistance from the EAC, individual state legislatures are provided a conduit for federal funding and assistance for reform and administration of electoral programs. At the federal level, auditing is the responsibility of the Office of the Inspector General and any necessary prosecutorial actions are undertaken by the U.S. Attorney General.

Access to federal HAVA funding requires participating state legislatures to prepare and certify detailed state implementation plans that ensure election integrity, provide for security, assure privacy, improve voter access, and provide for reporting and auditing. The state HAVA implementation plans provide measures to upgrade voter systems, standards for database integrity, methods of voter communication, requirements for recruitment and training of poll workers, and many other policies to be implemented by electoral officials at the local level.

Preparation and revision of HAVA implementation plans are governed by the administrative procedure statutes of the individual states. State administrative procedures and other executive branch policies typically impose public notification, opportunity for public comment, and other protective, procedural constraints on executive commissions and agencies before HAVA implementation plans may legitimately be modified.

The ongoing availability of HAVA appropriations to state legislatures is dependent upon compliance with state implementation plans and annual reporting to the EAC. All state certified HAVA elections plans must meet the federal audit standards under the *Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments* at 41 CFR Part 105-71.

The CARES Act, signed into law on March 27, 2020, provides an additional $400 million to the EAC, the states, the District of Columbia, and U.S. Territories "*to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle*." The CARES Act requires state agencies to coordinate with the Pandemic Response Accountability Committee, and dissemination of CARES Act funding takes place through the existing HAVA state implementation planning process.

It is important to note that large amounts of the CARES Act relief funding appropriated by the EAC to Wisconsin, Minnesota, Michigan, Pennsylvania and the other states for electoral administration is unspent and remains available to municipalities and counties.[11] Because large amounts of federal funding continue to be available, the need for augmentation from the private sector is both unjustified and unwarranted.

In Wisconsin, as of July 10, 2020, the EAC reported that only 60% of the $7,362,345 CARES funding has been spent.[12,13] This makes solicitation of CTCL funding by Racine Mayor Mason for redistribution to the cities of Madison, Milwaukee, Green Bay, and Kenosha unnecessary and outside of the protocols of the Wisconsin HAVA implementation plan for electoral administration.[14]

[11] Federal Election Assistance Commission. Post Primary CARES Act Expenditure Report. September 22, 2020.
[12] Elections Assistance Commission. CARES Act Quarterly Report to the Pandemic Response Committee. July 10, 2020.
[13] Federal Election Assistance Commission. Post Primary CARES Act Expenditure Report. September 22, 2020.
[14] Ibid. Stillwater Technical Solutions Chronology Matrix. October 2020.

Public funding for administration of local elections has also been made available at the individual state level. In Wisconsin, the state legislature sponsored and funded an aid program called *Wisconsin Routes to Recovery*.[15] The *Routes to Recovery* program reimburses local governments for unbudgeted expenditures necessary to respond to the COVID-19 public health emergency.

The CTCL grant program has the appearance of being initiated after the EAC and Congress appropriated HAVA and CARES Act funding, with the range of funded programs being similar to those already provided for in HAVA state implementation plans.[16] Remarkably, the CTCL grant program is being administered at the local level *independent* of the EAC, delegated state commissions, or state HAVA implementation plans. This approach distorts local and state budgeting processes, circumvents mandated funding formulas that provide for uniform and equitable distribution of funding, and bypasses public notification, public comment, and other administrative processes that ensure the public can hold government accountable.

[15] Guidance. Wisconsin Routes to Recovery Reimbursement Program. September 25 2020.

[16] Elections Assistance Commission. Plans for Use of CARES Act Funds. Report to Pandemic Response Committee.

Conflict Summary -

I. Injection of private funding into county and municipal elections circumvents State and Federal appropriations processes, violates protocols in HAVA state implementation plans, and results in inaccurate reporting under HAVA 254(a)(5):

a. The Help America Vote Act (HAVA) prescribes an intergovernmental administrative process that includes the U.S. Election Assistance Commission (EAC), state legislatures, and delegated state commissions.

b. The mechanism and authority for administration of HAVA mandates for both HAVA and CARES Act appropriation funding is prescribed in Wisconsin, Minnesota, Michigan, and Pennsylvania[17] state certified HAVA plans.

c. The individual state HAVA implementation plans incorporate detailed planning requirements for 13 HAVA categories, including election security protocols; standards for voter systems; equipment procurement requirements; voter and electoral official training procedures; provisional voting and balloting processes; provisions to improve voting access; mail-in voter registration requirements; voter complaint resolution protocols; and appropriations monitoring, auditing and reporting protocols.

d. The claw back and reporting provisions in CTCL contracts with local counties and municipalities, if exercised, will result in skewed recordkeeping and state reporting under HAVA 254(a)(5) and the Uniform Administrative Requirements for Grants and Cooperative Agreements with State and Local Governments at 41 CFR Part 105-71.

e. The claw back language in the CTCL agreements represents a contingent, ongoing, and long-term liability for local counties and municipalities who access the CTCL grants. The public record already records instances of local governments voting to incorporate CTCL funds in their general budget.

f. Scaled up across the 15 states of known CTCL activity, inaccuracies in state/federal HAVA Title II reporting and auditing resulting from unreported funding and claw back provisions is substantial.

g. The appropriate mechanism for charitable donations to electoral processes is through donations earmarked into the general fund of the individual state legislatures. There is no state or federal statutory authority or mechanism for counties, municipalities, or other local electoral jurisdictions to solicit, receive, or appropriate private funding for administration of public elections beyond the authority of state HAVA implementation plans.

[17] Notice. *Publication of State Plans Pursuant to the Help America Vote Act*. Federal Register Volume 69, No. 57. Wednesday, March 24, 2004.

II. HAVA, CARES, and state appropriations for local elections in Michigan, Wisconsin, Pennsylvania, and Minnesota remain sufficient for the 2020 election cycle, rendering CTCL funding unnecessary:

a. Public appropriations for federal elections through the U.S. Election Assistance Commission (EAC), state matching funds, and other public moneys are the appropriate funding sources for administration of U.S. elections. State-level funding formulas provide for proportional and equitable distribution of funds, ensuring resources are evenly allocated to serve the voting public. State and federal mandates require funding recipients to report how election funding was spent within their jurisdictions.

b. For the 2020 election cycle, federal and state appropriations for administration of local elections have been substantially augmented to address the COVID-19 pandemic by additional funding through the CARES Act and other legislation.

c. Additional COVID-19 pandemic response funding for election administration has been made available through state appropriations and other allocations of public funds. As example, the State of Wisconsin used CARES Act funding and state matches for its *Routes to Recovery Program.*

d. The combination of the HAVA election security and CARES Act funding, along with any state matches, remains adequate to facilitate election operations, upgrade of election-specific hardware and software, cybersecurity, training for voter and elections officials, and COVID-19 specific needs. Publicly sourced funding remains sufficient without any private contributions.

e. Local electoral officials in Michigan who performed due diligence on CTCL grants have observed the sufficiency of CARES Act funding and remarked as to the non-necessity of CTCL grants. Michigan's Oakland County Clerk Lisa Brown decided not to seek CTCL funding because "*We already had an opportunity through the CARES Act to get extra equipment and things we would need at the county level. It seemed to me that they were offering up the same sort of thing*." [21]

f. The 2019 HAVA Title II 251 Report to the EAC from Michigan Secretary Jocelyn Benson documents an unexpended HAVA surplus for administration of statewide elections of $1,285,975.[22] The public record indicates that Secretary Benson was aware of the availability of adequate public funding for dissemination to Ann Arbor, Flint, Lansing, East Lansing, Muskegon, Pontiac, Romulus, Kalamazoo, and Saginaw – jurisdictions currently seeking CTCL funds. This contrasts with Secretary Bensons public promotion of CTCL funding for administration of elections in Michigan.

g. Concerns with CTCL funding include lack of public accountability, no state legislative or EAC oversight, and agreements that require reporting of electoral information from government back to a non-governmental organization.

[21] *Benson accused of letting 'partisan operatives' influence election.* Detroit News. October 6, 2020.
[22] Michigan HAVA 251 Funds Report. December 2019.

Table 1 - HAVA and CARES Funding Plus State Matching Funds for 2020 Elections[23]						
	2019 HAVA Carryover	Election Security	Match	CARES	Match	Total
MI	**$6,635,744**	**$12,053,705**	**$2,410,741**	**$11,299,561**	**$2,259,912**	**$34,689,663**
MN	**$6,548,440**	**$7,418,672**	**$1,483,734**	**$6,958,233**	**$1,391,647**	**$23,800,726**
PA	**$3,531,998**	**$15,175,567**	**$3,035,113**	**$14,233,603**	**$2,844,721**	**$38,821,002**
WI	**$4,316,403**	**$7,850,124**	**$1,570,025**	**$7,362,345**	**$1,472,469**	**$22,531,366**

Table 2 - Estimated CARES Act Expenditures 20 Days Post Primary Election[24]					
	Amount Appropriated	State Match	Initial Total Available	Estimated Expenditure	Available Funds
MI	**$11,299,561**	**$2,249,551**	**$13,549,112**	**$6,821,392**	**$6,727,720 49%**
MN	**$6,958,233**	**$1,386,122**	**$8,344,355**	**$363,867**	**$7,980,488 92%**
PA	**$14,233,603**	**$2,831,101**	**$17,064,704**	**$3,511,525**	**$13,553,179 79%**
WI	**$7,362,345**	**$1,472,469**	**$8,834,814**	**$3,228,484**	**$5,303,330 60%**

Table 3 – Government Funding and CTCL Grant Funding		
	2020 HAVA + CARES Funding[25]	2020 CTCL Grants[26, 27]
MI	**$28,023,919**	**$6,369,753 (22.7%)**
MN	**$17,252,286**	**$2,297,342 (13.3%)**
PA	**$35,289,004**	**$15,824,895 (44.8%)**
WI	**$18,254,963**	**$6,946,767 (38.1%)**

h. Because of the COVID-19 pandemic, Congress provided additional elections funding through the CARES Act that nearly doubled the funding levels already provided in the annual HAVA funding. Much of the remaining CARES funding has not yet been expended. The CTCL grant funding is predicated on assisting local election offices in meeting unexpected election expenses resulting from the effects of the COVID-19 pandemic. Because adequate provision for meeting those expenses has already been provided though public sources, the CTCL grants are excess to needs.

[23] *Election Assistance Commission—Election Security Grant Funding Chart July 16, 2020* and *Election Assistance Commission—CARES Grant Funding Chart July 22, 2020*

[24] *ESTIMATED CARES Act Expenditures As Reported in 20 Day Post Primary Reports (September 22, 2020 Update)*

[25] Includes federal funding + state matching funds; does not include 2019 carryover.

[26] CTCL grant dollar amount accompanied with size as a percentage of total government funding for the state.

[27] CTCL grant values must be viewed as approximate because the numbers reported by news sources and local governments vary, and grant awards continue.

III. When evaluated in context of the 2016 presidential election, CTCL grant funding patterns demonstrate partisanship in grant funding awards:

a. A review of data for 2020 CTCL grant-making in Michigan, Minnesota, Pennsylvania, and Wisconsin, and incorporation of 2016 presidential election voting records for jurisdictions receiving CTCL grants, reveals a pattern of greater funding being awarded to jurisdictions where candidate Hillary Clinton won versus grant-receiving jurisdictions where candidate Donald Trump won. While CTCL maintains that it is a non-partisan organization and its grants are available to all local jurisdictions, the grant pattern can be understood to have a clear color of partisanship. Attachment A contains charts, graphs and a table supporting this conclusion.

b. **Michigan** - At the time of this survey, CTCL had awarded eleven grants in Michigan. Recipient cities were Detroit ($3,512,000), Lansing ($443,742), East Lansing ($43,850), Flint ($475,625), Ann Arbor ($417,000), Muskegon ($433,580), Pontiac ($405,564), Romulus ($16,645), Kalamazoo ($218,869), and Saginaw ($402,878). In the 2016 election, only Saginaw was won by candidate Donald Trump; the remainder were won by candidate Hillary Clinton. In total, $9,451,235 (95.7%) was awarded to the ten jurisdictions where candidate Clinton won and only $402,878 (4.3%) where candidate Trump won.

c. **Minnesota** - At the time of this survey, the only Minnesota jurisdiction that had been awarded a CTCL grant was Minneapolis, in the amount of $2,297,342. Candidate Hillary Clinton won the 2016 presidential vote in the jurisdiction.

d. **Pennsylvania** - At the time of this survey, CTCL had awarded seven grants in Pennsylvania. Three of these grants were awarded to the cities of Philadelphia ($10,016,074), Erie ($148,729), and Lancaster ($474,202). Five were awarded to counties: Wayne County ($25,000), Northumberland County ($44,811), Center County ($863,828), Delaware County ($2,200,000), and Allegheny County ($2,052,251). A total of $13,063,828 (94.7%) went to jurisdictions where candidate Hillary Clinton won in the 2016 presidential election; only $692,742 (5.3%) went to jurisdictions where candidate Donald Trump won.

e. **Wisconsin** - At the time of this survey, CTCL had awarded multiple grants to five Wisconsin cities: Milwaukee - two for a total of $2,164,500; Madison - two for a total of $1,281,788; Green Bay - two for a total of $1,625,600; Racine - two for a total of $1,002,100; and, Kenosha - two for a total of $872,779. The $60,000 grant to Racine is what remained of a $100,000 CTCL grant to that municipality that included a stipulation that Racine would distribute a $10,000 sub-grant to each of the other four cities. This appears to place Racine in the position of being an agent acting on behalf of CTCL for the purpose of distributing grant moneys along with CTCL instruction. Candidate Hillary Clinton won handily in all five jurisdictions. [28]

[28] Wisconsin Safe Voting Plan. June 15, 2020.

Concluding Remarks and Opinions -

Despite wars, depressions, onshore attacks, Marxism, and other national traumas, the United States, throughout its 224-year history, has been able to successfully navigate electoral processes with reasonable normalcy. The current pandemic, though real, is neither exceptional nor reason to alter longstanding processes or timing of electoral administration.

The national and state governments provide public funding to carry out elections because funding from private sources could subject electoral officials to coercion, manipulation, and corruption. Private funding into local elections, over time and if allowed, will change the culture of how county clerks and municipalities view and access public funding.

With respect to the CTCL grant program itself, injection of funding into local jurisdictions circumvents longstanding administrative processes that protect voters from disenfranchisement, fraud, or an inequitable statewide distribution of funding across the electoral precincts. This condition could foreseeably and negatively affect rural voters or in-person voters.

Based upon the information in this Briefing Paper, STS offers the following actions or activities for consideration by TMS:

1. Administrative, judicial or informational actions aimed at local governments or municipalities receiving CTCL grants;

2. Provision of information to State Attorneys General who are responsible for oversight of nonprofit organizations within their respective states;

3. Provide support and information to local citizenry of CTCL grant receiving counties and municipalities such that they may inform, disagree with, or even formally challenge grant decisions by local commissions.

Please feel free to contact me as you have questions or comments on the enclosed.

Regards,

J.R. Carlson
Managing Partner
Stillwater Technical Solutions

Attachment A

Charts, Graphs and Tables

Note: Variations in grant amounts were reported by editors, the press and in meeting minutes from local governments. These variations might result in perceived inaccuracies in the dollar amounts of some CTCL grants. Because CTCL continues to make grants, source information in these calculations will outdate. The data presented is sufficient and reliable to conclude clear political trends in CTCL grant awarding patterns.

Except where noted, individual grant amounts are linked to source information.

CTCL Michigan Grants[1]

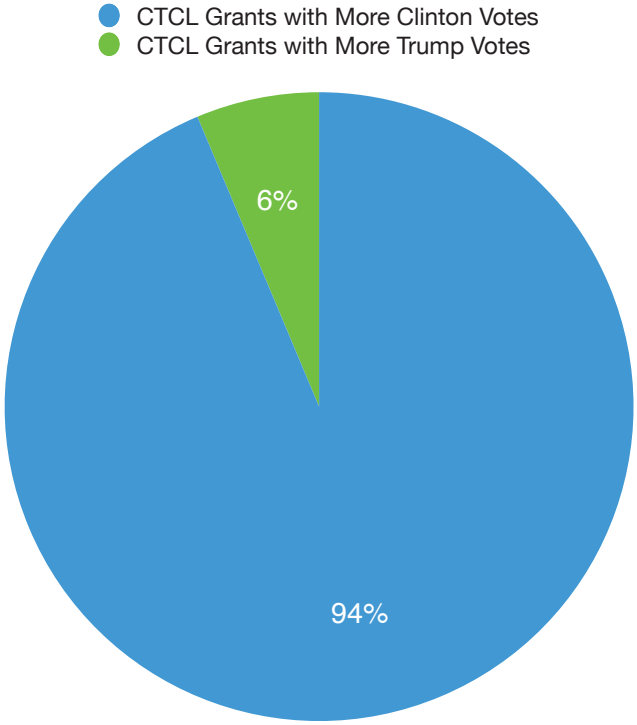


Chart note[1] The chart above contains the sum of CTCL grants to the 10 Michigan Cities listed in Table 1 below.

Table 2

CTCL Grants with More Clinton Votes	CTCL Grants with More Trump Votes
$5,966,875[1]	$402,878[1]

Table 2 note[1]. $5,966,875 and $0 are sums of CTCL's grants to the 10 Michigan cities listed in Table 1 below.

Table 1

City	CTCL Grant with More Clinton Votes	CTCL Grant with More Trump Votes
Detroit	$3,512,000	$0
Lansing	$443,742	$0
East Lansing	$43,850	$0
Flint	$475,625	$0
Ann Arbor	$417,000	$0
Muskegon	$433,580	$0
Pontiac	$405,564	$0
Romulus	$16,645	$0
Kalamazoo	$218,869	$0
Saginaw	$0	$402,878
Total CTCL MI Grant	$5,996,875	$402,878

Clinton Michigan Votes v. Trump Michigan Votes[1]

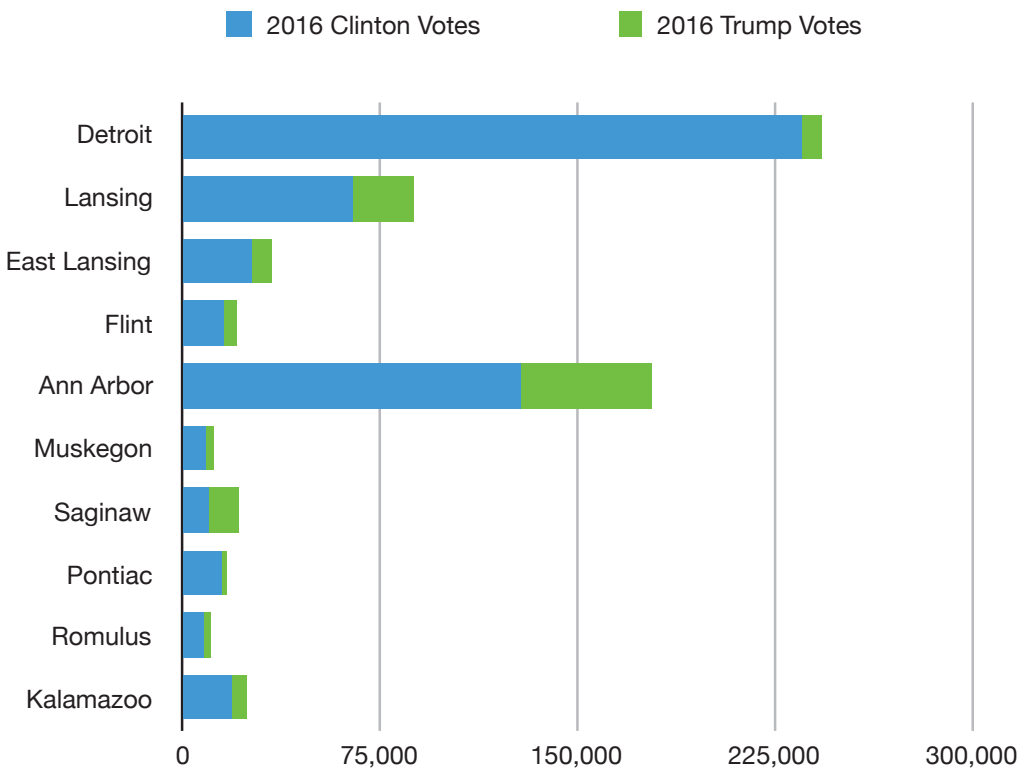


Chart Note[1]. Only the 10 Michigan cities in the above graph received 2020 CTCL funding.

Table 1

City or County	2016 Clinton Votes	2016 Trump Votes
Detroit	234,871	7,682
Lansing	65,272	22,390
East Lansing	26,146	8,294
Flint	16,163	4,677
Ann Arbor	128,025	50,335
Muskegon	8,933	3,372
Saginaw	10,263	11,077
Pontiac	14,351	2,735
Romulus	7,573	3,078
Kalamazoo	18,644	5,456

CTCL Minnesota Grant with More Clinton Votes

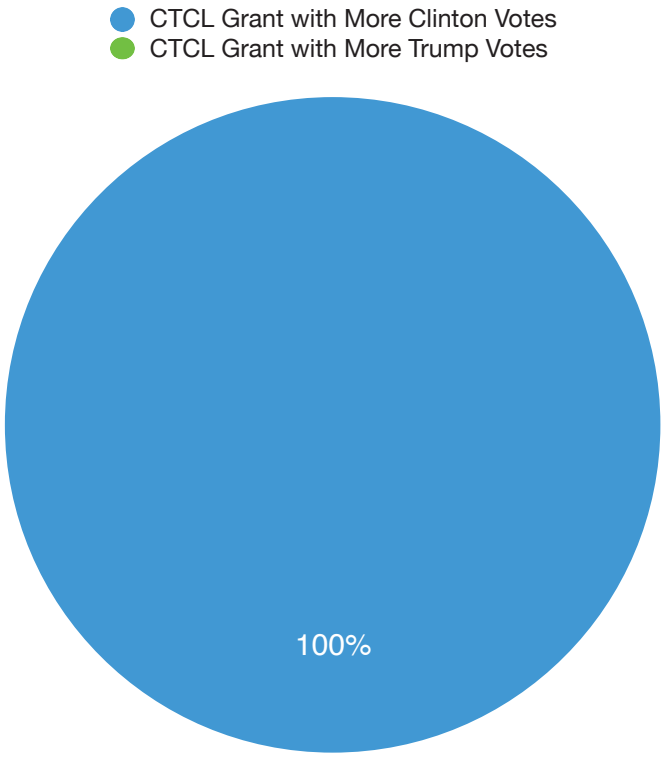


Table 1

City	CTCL Grant with More Clinton Votes	CTCL Grant with More Trump Votes
Minneapolis	$2,297,342	$0

Clinton and Trump Minnesota Votes that Received CTCL Grant in 2020

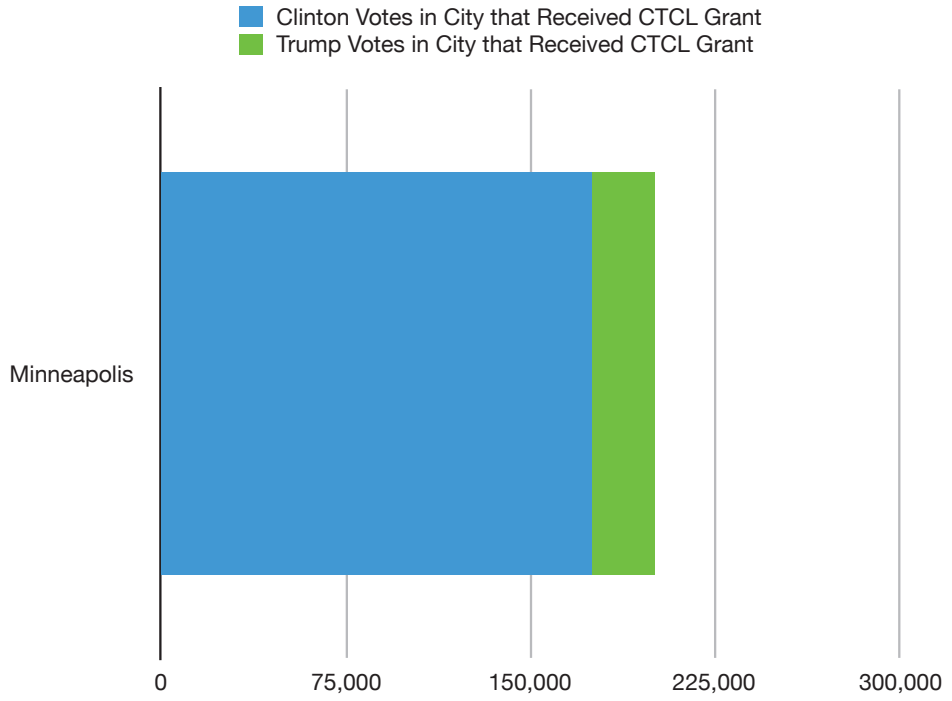


Table 1

City	Clinton Votes in City that Received CTCL Grant	Trump Votes in City that Received CTCL Grant
Minneapolis	174,585	25,693

CTCL Pennsylvania Grants[1]

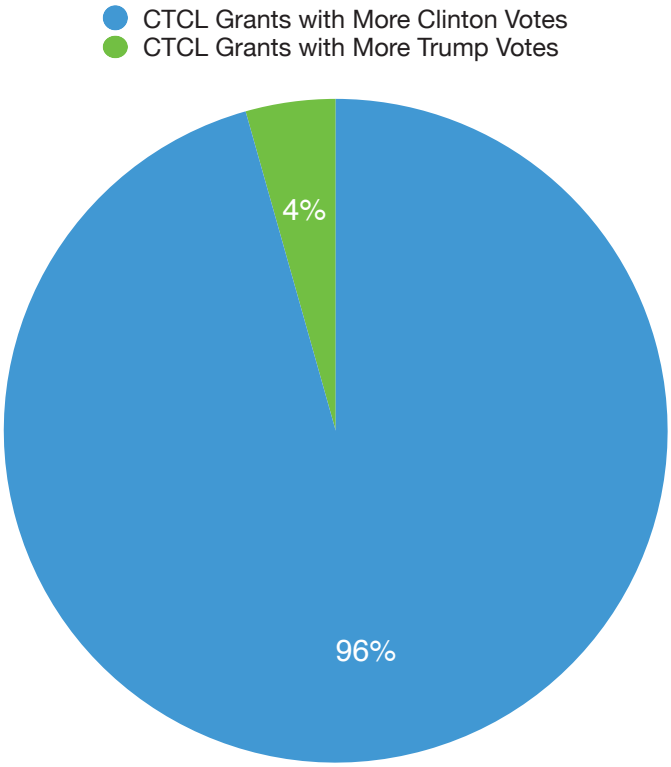


Chart note[1] The chart above contains the sum of CTCL's Pennsylvania grant money listed in Table 2 below

Table 1

CTCL Grants with More Clinton Votes	$15,132,153[1]
CTCL Grants with More Trump Votes	$692,742[1]

Table 1 note[1]. $15,132,153 and $692,742 are sums of the CTCL Pennsylvania grants listed in Table 2 below

Table 2

City or County	CTCL Grant With More Clinton Votes	CTCL Grants with More Trump Votes
Delaware County	$2,200,000	
Philadelphia	$10,016,074	
Centre County	$863,828	
Allegheny County	$2,052,251	
Wayne County		$25,000
Erie		$148,729
Lancaster		$474,202
Northumberland		$44,811
Total CTCL Grants	$15,132,153	$692,742

Pennsylvania Clinton Votes v. Trump Votes[1]

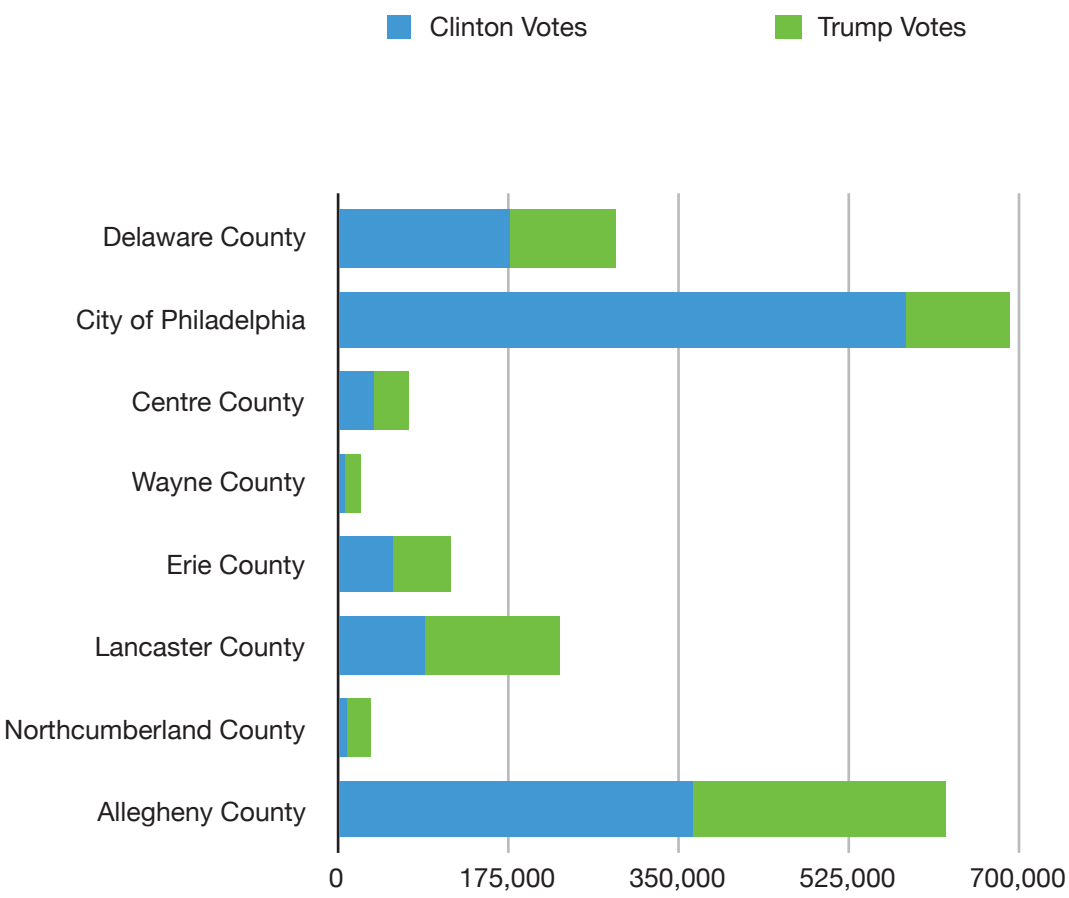


Chart note[1] Only the City of Philadelphia and the seven (7) counties in the above chart received CTCL Pennsylvania grants.

Table 1

	Clinton Votes	Trump Votes
Delaware County	177,402	110,667
City of Philadelphia	584,025	108,748
Centre County	37,088	35,274
Wayne County	7,008	16,244
Erie County	58,112	60,069
Lancaster County	91,093	137,914
Northumberland County	9,788	25,427
Allegheny County	366,934	259,125

CTCL Wisconsin Grants[1]

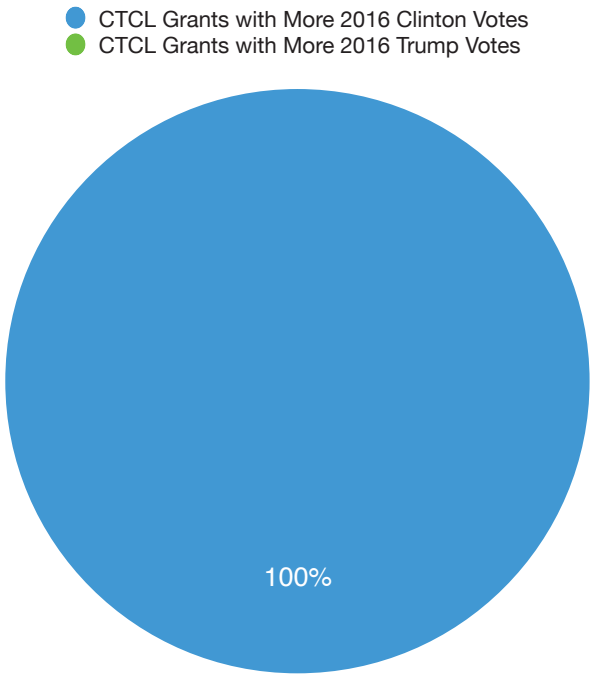


Chart note[1]. The chart above contains the sum of CTCL's 11 grants to five Wisconsin cities listed in Table 1 below.

Table 2

CTCL Grants with More 2016 Clinton Votes	CTCL Grants with More 2016 Trump Votes
$6,946,767[1]	$0[1]

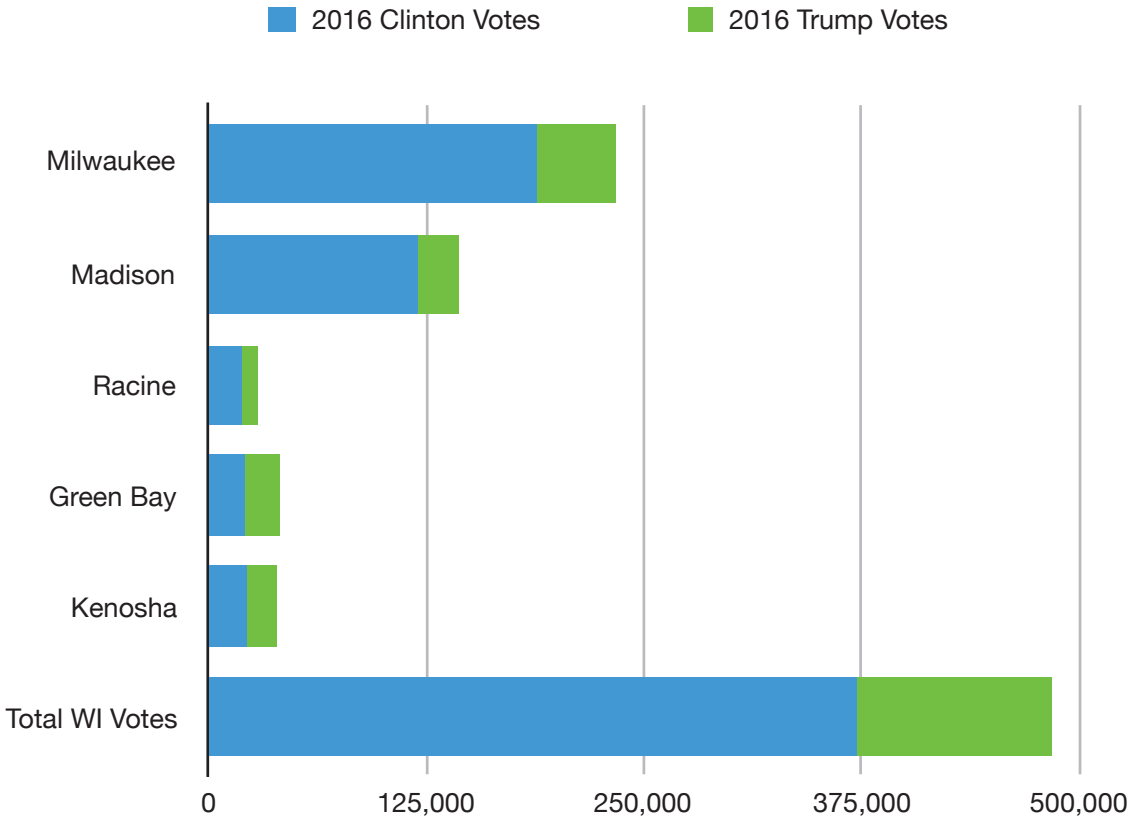
Table 2 note[1]. $6,946,767 and $0 are the sums of CTCL's 11 grants to the five Wisconsin cities in Table 1 below.

Table 1

City	CTCL Grants with More Clinton 2016 Votes	CTCL Grants with 2016 More Trump Votes
Green Bay	$1,093,400	$0
Green Bay	$10,000[1]	$0
Green Bay	$522,200	$0
Kenosha	$862,779	$0
Kenosha	$10,000[1]	$0
Madison	$1,271,788	$0
Madison	$10,000[1]	$0
Milwaukee	$2,154,500	$0
Milwaukee	$10,000[1]	$0
Racine	$942,100	$0
Racine	$60,000[1]	$0
Total CTCL WI Grant	$6,946,767	$0

Table 1 note[1]. CTCL Executive Director Tiana Epps-Johnson wrote Racine Mayor Mason on May 28, 2020. Epps-Johnson letter stated that Racine will receive a $100,000 CTCL grant. As part of CTCL and the City of Racine's agreement, Racine was obligated to redistribute $10,000 to the cities of Green Bay, Kenosha, Madison and Milwaukee and keep the remaining $60,000. There is no hyperlink for these grants.

Clinton Wisconsin Votes v. Trump Wisconsin Votes[1]



Note[1] Only the five Wisconsin cities in the above graph received 2020 CTCL funding

Table 1

CTCL Grant Recipients	2016 Clinton Votes	2016 Trump Votes
Milwaukee	188,653	45,167
Madison	120,078	23,053
Racine	19,029	8,934
Green Bay	21,291	19,821
Kenosha	22,848	15,829
Total WI Votes	371,899	112,804

Clinton won all five Wisconsin cities that received CTCL grants by a margin of 259,096 votes. Trump won Wisconsin by 22,748 votes. CTCL's Wisconsin grant of $6.32 million reached more than three times more Clinton voters (blue in graph) than Trump voters (green in graph). 371,900 Clinton voters / 112,804 Trump voters = 3.30 more Clinton voters

CTCL Grants to MN, WI, MI, and PA

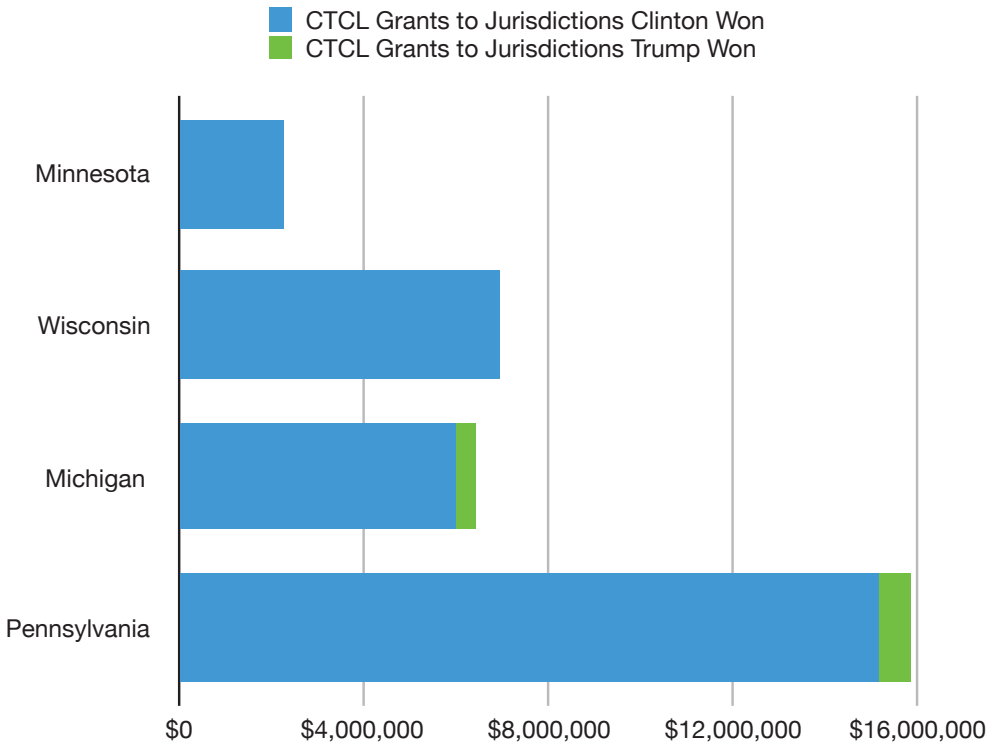


Table 1

State	CTCL Grants to Jurisdictions Clinton Won	CTCL Grants to Jurisdictions Trump Won
Minnesota	$2,297,342	$0
Wisconsin	$6,946,767	$0
Michigan	$5,996,875	$402,878
Pennsylvania	$15,132,153	$692,742

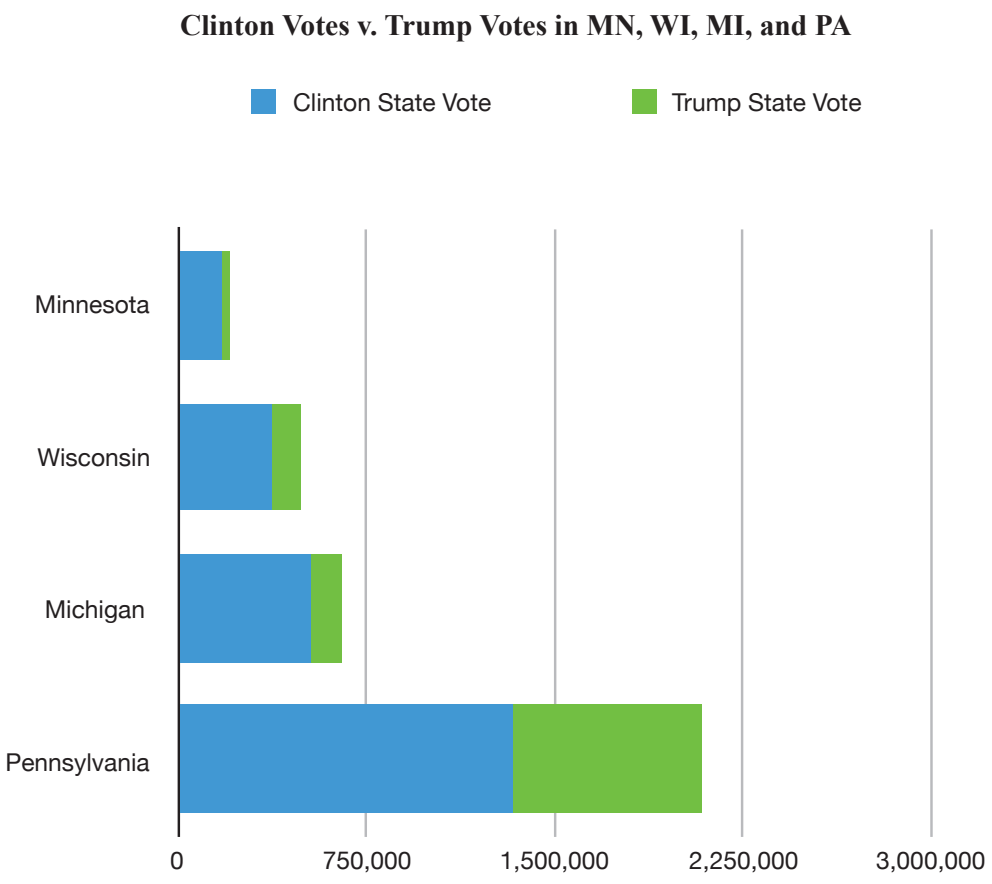


Table 1-1

State	Clinton State Vote	Trump State Vote
Minnesota	174,585	25,693
Wisconsin	371,899	112,804
Michigan	530,241	119,086
Pennsylvania	1,331,450	753,468