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May 9, 2024

Hon. Josh Kaul
Attorney General
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53703

RE: Comments on Request for Attorney General Opinion Interpreting Article III § 7(2) of the Wisconsin Constitution

Dear General Kaul:

The Honest Elections Project (“HEP”) respectfully submits the following comments in response to the Dane County Corporation Counsel’s request for an Attorney General (“AG”) Opinion interpreting Article III § 7(2) of the Wisconsin Constitution. This provision is one of two new election-related amendments to the Wisconsin Constitution that the voters overwhelmingly approved by referendum on April 2, 2024.

Construed properly an “election official designated by law” is a person whose position has been created by public law, who is compensated by public funds, and who is legally and politically accountable to the voting public. An election official cannot be created by delegating administrative authority to consultants, advisors, or other outside individuals or entities. Additionally, a “task in the conduct of any primary, election, or referendum,” includes establishing policies or exercising discretion in the development and implementation of election policies or the interpretation of voting rules.

As explained below in greater detail, any opinion issued by the AG must reflect and vindicate the core purpose underlying both amendments—enhancing election integrity by curtailing the influence of outsiders on the administration of Wisconsin elections. The specific provision at issue here—Art. III § 7(2)—is designed to prevent the duties and responsibilities entrusted by law to election officials from being outsourced to individuals or entities that lack public accountability and that may seek to advance partisan agendas through the manipulation of election rules and procedures. Wisconsin voters have clearly communicated that they want no such external influences on their elections. Therefore, any AG opinion must ensure that Article III § 7(2) is not interpreted so narrowly that it becomes an empty letter; rather, it needs to be construed to guarantee that all decisions regarding election-related policies, rules, and procedures are only made by duly designated election officials, not unaccountable outsiders.

I. BACKGROUND

A. Wisconsin Referendum on Constitutional Amendments

On April 2, 2024, Wisconsin voters cast ballots on the following questions regarding the Wisconsin Constitution¹:

- **Question 1:** “*Use of private funds in election administration.* Shall section 7(1) of article III of the constitution be created to provide that private donations and grants may not be applied for, accepted, expended, or used in connection with the conduct of any primary, election, or referendum?”
- **Question 2:** “*Election officials.* Shall section 7(2) of article III of the constitution be created to provide that only election officials designated by law may perform tasks in the conduct of primaries, elections, and referendums?”

Voters approved the first question by a margin of 54.4%-45.6%² and supported the second question by an even greater margin, 58.6%-41.4%.³ As a result, Article III of the Wisconsin Constitution now contains a new section 7, which reads:

- (1) No state agency or officer or employee in state government and no political subdivision of the state or officer or employee of a political subdivision may apply for, accept, expend, or use any moneys or equipment in connections with the conduct of any primary, election, or referendum if the moneys or equipment are donated or granted by an individual or nongovernmental entity.
- (2) No individual other than an election official designated by law may perform any task in the conduct of any primary, election, or referendum.

This ballot referendum on these two questions did not arise in a vacuum. It was a targeted response to specific instances of outside individuals and organizations exercising undue influence on the conduct of elections in Wisconsin. For example, leading up to the 2020 general election, the Center for Tech and Civic Life (“CTCL”)—a 501(c)(3) nonprofit group financed primarily by hundreds of millions of dollars from Facebook founder Mark Zuckerberg and his wife, Priscilla Chan—made over \$350 million in grants to election administrators throughout the

¹ S.J. Res. 78, 2023-24 Leg. Sess. (Wis. 2023).

² Wisconsin Question 1, Ban on Private and Non-Governmental Funding of Election Administration Amendment (April 2024), Ballotpedia, [https://ballotpedia.org/Wisconsin_Question_1,_Ban_on_Private_and_Non-Governmental_Funding_of_Election_Administration_Amendment_\(April_2024\)](https://ballotpedia.org/Wisconsin_Question_1,_Ban_on_Private_and_Non-Governmental_Funding_of_Election_Administration_Amendment_(April_2024)).

³ Wisconsin Question 2, Only Designated Election Officials To Conduct Elections Amendment (April 2024), Ballotpedia, [https://ballotpedia.org/Wisconsin_Question_2,_Only_Designated_Election_Officials_to_Conduct_Elections_Amendment_\(April_2024\)](https://ballotpedia.org/Wisconsin_Question_2,_Only_Designated_Election_Officials_to_Conduct_Elections_Amendment_(April_2024)).

country,⁴ with Democratic-leaning jurisdictions receiving the bulk of the funds.⁵ For instance, Wisconsin’s five largest cities—all of which were won by Joe Biden—received over 80% of the roughly \$10 million dollar in CTCL grants awarded to communities in the state in 2020.⁶ In supporting passage of Question 1, Wisconsin voters made clear that they do not want the state’s election officials to be financially beholden to rich individuals or ideological organizations.

As for the new amendment prohibiting non-election officials from performing election tasks—which is the subject of the public comment period opened by the AG—it resulted from reports that outside consultants were playing an outsized roles in administering elections in certain cities. And it is important to note the involvement of CTCL in this effort. For instance, during the 2020 election, the city of Green Bay hired a consultant who worked for the left-leaning National Vote at Home Institute and had a long history working with Democratic candidates and organizations.⁷ In this role, this consultant made “recommendations to staff on the logistics, set up, and operations of election operations,”⁸ and it is alleged that he made “persistent efforts to insert himself into elections administration in Green Bay, including directing poll workers and asking if he could help correct missing information on absentee ballot envelopes.”⁹

A witness at a recent U.S. House committee hearing provided further details about this outside consultant and the extent of his involvement in Green Bay’s election operations:

In Green Bay, Wisconsin, emails to the mayor’s office from the center touted its “network of current and former election administrations and election experts available” and expertise in “vote by mail processes,” and promised they would “ensure forms, envelopes, and other materials are understood and completed correctly by voters.” Green Bay’s city government would eventually outsource critical election responsibilities to CTCL. In an email dated July of 2020, the chief of staff for Green Bay Mayor Eric Genrich wrote, “As far as I’m concerned I am taking all of my cues from CTCL and work with those you recommend.”

⁴ William Doyle, *Mark Zuckerberg Spent \$419M On Nonprofits Ahead Of 2020 Election—And Got Out The Dem Vote*, NY Post (Oct. 13, 2021), <https://nypost.com/2021/10/13/mark-zuckerberg-spent-419m-on-nonprofits-ahead-of-2020-election-and-got-out-the-dem-vote/>.

⁵ *Zuckerberg Money Won’t Be In Next Round Of Aid For Elections*, NBC News (Apr. 12, 2022) (“Democratic-leaning counties received a disproportionate share of the money in battleground states like Florida and Pennsylvania”), <https://www.nbcnews.com/politics/2022-election/zuckerberg-money-wont-aid-elections-rcna24002>.

⁶ Scott Bauer, *Wisconsin Voters Approve Ban On Private Money Support For Elections*, AP (Apr. 2, 2024), <https://apnews.com/article/wisconsin-constitutional-amendment-zuckerberg-election-d4b26c877e55ad008521c523477e733d>.

⁷ *Michael Spitzer-Rubenstein*, Influence Watch, <https://www.influencewatch.org/person/michael-spitzer-rubenstein/>.

⁸ Memorandum from Vanessa R. Chavez, City Attorney for Green Bay, to Common Council (Apr. 20, 2021), https://wpr-public.s3.amazonaws.com/wprorg/report_of_2020_election_season_-_final.pdf.

⁹ Chris Rickert, *Gableman Documents Show Coordination With Outside Nonprofits, Pushback From Elections Chief*, Wis. State J. (Apr. 26, 2022), https://madison.com/news/local/gableman-documents-show-coordination-with-outside-nonprofits-pushback-from-elections-chief/article_d86b6203-71a1-52e7-881a-7e1e82471cc6.html (hereinafter, “Dane Co. Letter”).

CTCL eventually helped install an out-of-state operative named Michael Spitzer-Rubenstein in Green Bay and other Wisconsin election offices. Spitzer-Rubenstein engaged in questionable activities for someone who was not a public official, such as asking for direct access to the Milwaukee Election Commission’s voter database. Green Bay City Clerk Kris Teske took leave a few weeks before the election and quit shortly after. She cited Spitzer-Rubenstein assuming her responsibilities as one reason why.

“[Green Bay Mayor Genrich] had [an] agenda when it came to the election and I nor the Clerk’s Office were included even though it’s the Clerk’s job to administer an election,” Teske wrote in an email. “He allowed staff who were not educated on election law to run the election, along with people who weren’t even City of Green Bay employees.”¹⁰

Such alarming accounts of outside activists improperly steering election decision-making in Wisconsin cities led the voters to support Question 2 by a remarkable 17-point margin.

B. Summary of Request for Legal Opinion by the Dane County Corporation Counsel

The request for an AG opinion brought by the Dane County Corporation Counsel centers on the following two questions concerning Article III § 7(2)¹¹:

- Who is an “election official designated by law”?
- What constitutes a “task in the conduct of any primary, election, or referendum”?

As to the first question, the request argues that “the term ‘election official’ as used in Wisconsin Constitution Art. III Sec. 7(2) should be defined by Wis. Stat. § 5.02(4e), ‘an individual who is charged with any duties related to the conduct of an election,’ or an individual appointed by one who is charged by statute with election duties.”¹² And as to the second, the request contends that “[t]he phrase ‘task in the conduct of primaries, elections, or referendums’ should be construed to apply to only to [sic.] those duties prescribed by statute regarding the conduct of elections.”¹³

¹⁰ *American Confidence in Elections: Confronting Zuckerbuds, Private Funding of Election Administration; Hearing Before the H. Comm. on House Admin.*, 118th Cong. 4 (2024) (statement of Mollie Hemingway), <https://docs.house.gov/meetings/HA/HA00/20240207/116804/HHRG-118-HA00-Wstate-HemingwayM-20240207-U1.pdf>.

¹¹ Letter from Carlos A. Pabellón, Dane Cty. Corp. Counsel, to Wis. Att’y Gen. Josh Kaul (Apr. 24, 2024), https://www.doj.state.wi.us/sites/default/files/news-media/4.29.24_Request_for_Election_Officials_Legal%20Opinion_Wisconsin%20Constitution.pdf.

¹² *Id.* at 4.

¹³ *Id.*

C. HEP'S Interest in This Proceeding

HEP believes elections are the cornerstone of democracy and that election laws must protect against fraud and corruption. American public knows that voting is too important to become politicized, but too often their wishes get ignored. This is the reason HEP exists. As a nonpartisan organization dedicated to support the right of every lawful voter to participate in free and honest elections, HEP supports reasonable, common-sense measures to maintain the integrity of the voting process and opposes any efforts to undermine laws that protect against election fraud. Accordingly, HEP submits these comments to urge the AG to adopt an interpretation of Article III § 7(2) that captures voter sentiment and ensures no unaccountable outside individuals or entities can be placed in positions to shape and direct the election process in Wisconsin.

II. PROTECT WISCONSIN ELECTIONS FROM MANIPULATION BY OUTSIDE ACTIVISTS

The legitimacy of our democracy rests upon the American people having trust that elections are free, fair, and untainted by corruption or fraud. Crucial to achieving this objective is installing safeguards to prevent malign actors from manipulating voting procedures to benefit one candidate or party over another. One such safeguard is Article III § 7(2), which was ratified by Wisconsin voters by a sweeping margin. It must be given an interpretation that affirms the voters' intent to protect the election process in Wisconsin from interference by outside influences.

On the question of who is an "election official designated by law" under Article III § 7(2), HEP urges the AG to interpret this phrase to prevent a jurisdiction from outsourcing any election administration duties to outside consultants or advisors. HEP does not necessarily object to Dane County's recommendation that "election official" be interpreted consistent with Wis. Stat. § 5.02(4e), so long as "individual who is charged with any duties relating to the conduct of an election" means a person whose position, appointment, and duties are defined in either state or local law. In other words, an "election official" should be a person whose position has been created by public law, who is compensated by public funds, and who is legally and politically accountable to the voting public.

Dane County adds that "election official" should also include "an individual appointed by one who is charged by statute with election officials."¹⁴ To the extent that such phrase consists of deputies (or other equivalent positions) who are otherwise public employees, then HEP does not object. However, if Dane County contemplates consultants, advisors, or other outside individuals or entities to be eligible for "appointment" and able to receive delegated administrative authority, HEP vehemently objects. The situation that occurred in Green Bay during the 2020 election should not be allowed to happen again.

¹⁴ Dane Co. Letter, *supra* note 10, at 4.

As for what constitutes a “task in the conduct of any primary, election, or referendum,” HEP believes that this phrase must include actions involving the development and implementation of election policies, the interpretation of voting rules, or the exercise of discretion in any way. In other words, this phrase should encompass any decisions regarding, for example, ballot design, polling place and drop-box locations, absentee ballot handling and processing, early voting procedures, vote-counting standards, and poll-worker direction. These “tasks” must be limited to election officials only.

Dane County raises the concern that an overly broad interpretation of “task” could bring within its ambit actions like ballot printing by commercial vendors, software and hardware security from municipal or county IT departments, and law enforcement officers helping transport sealed ballots. We do not think such a sweeping interpretation was intended by the sponsors of the amendment. As the Dane County letter notes, the amendment’s co-author, Senator Eric Wimberger, stated that “it was unrealistic to interpret the provision as banning outside help for all election-related activities.”¹⁵ The types of activities described above by Dane County (*e.g.*, ballot printing, IT security, and law enforcement assistance) do not involve the relevant individuals establishing policies or exercising discretion. Instead, they are all ministerial in nature. As such, they are not the type of activities that would fall within the definition of “task.”

If this is the understanding of the term “task” that Dane County advances in its letter, then HEP is supportive of that position. However, if Dane County intends for “task” to be subject to an even narrower interpretation such that an outside consultant could conceivably be given policymaking or discretionary authority of any kind, HEP strongly opposes such approach.

In short, under Article III § 7(2), any development or interpretation of election-related policies or rules and any exercise of discretion with respect to the voting process must be undertaken by a person authorized under state or local law to carry out such responsibilities. Any interpretation that deviates from this understanding must be rejected.

III. CONCLUSION

As the nation’s premier nonpartisan group devoted to supporting the right of every lawful voter to participate in free and honest elections, HEP is committed to preserving the integrity and legitimacy of the election process at the federal, state, and local levels. For this reason, HEP has an acute interest in seeing that the recent amendments to the Wisconsin constitution, which were ratified by the state’s voters by strong majorities, are not undermined or diminished in any way. HEP, therefore, urges the AG to issue an opinion that gives full effect to the amendments’ animating objective—to blunt the influence of outside money and outside activists on the administration of elections in Wisconsin.

¹⁵ *Id.* at 3.



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If HEP can ever be of assistance at any point during this process, please let us know.

Sincerely,

A handwritten signature in black ink, appearing to read "Jason Snead", written in a cursive style.

Jason Snead
Executive Director