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DATE: February 22, 2023

TO: Milwaukee County Board
Milwaukee County Department of Transportation
Interested Stakeholders

FROM: Margaret C. Daun, Corporation Counsel
Karen L. Tidwall, Deputy Corporation Counsel

SUBJECT: Memorandum Concerning Legality of a Proposal for the Milwaukee County Transit System and Milwaukee County to Provide Free Public Transportation on Election Days

I. Issue

Adopted Amendment 1A012 to Milwaukee County’s 2023 budget states that “[i]t is the policy of Milwaukee County to promote citizen access to voter polls in the administration of fair elections. The Milwaukee County Department of Transportation and Milwaukee County Transit System, working with the Office of Corporation Counsel, shall submit a legally permissible plan to provide free rides to all riders on all election days [the “Initiative”] for approval by the Milwaukee County Board of Supervisors.” This Office of Corporation Counsel (“OCC”) memorandum is in response to that budget directive.

II. Analysis

A. Wisconsin State Law

Section 12.11(1m)(a) of the Wisconsin Statutes, titled “Election bribery,” governs the question of whether any person or entity, including the County, may provide to the public free bus transportation on election days. It states that it is illegal to “offer ... anything of value¹ ... to or for any elector ... to induce any elector to go to ... the polls.”²

¹ “[A]nything of value’ includes any amount of money, or any object which has utility independent of any political message it contains and the value of which exceeds \$1.” Wis. Stat. § 12.11(1).

² Section 12.11 states as follows:

Based on the plain language of section 12.11(1m)(a), it is the opinion of the OCC that any provision of free rides to the polls, available to the general public, whether funded by public or private dollars, is illegal for two reasons. First, “anything of value” is defined as anything with a value of more than \$1.00. Given that \$2.10 is the typical charge for a one-way bus ticket, section 12.11 would apply to a free fare.³ Second, given that the budget amendment expressly states that the purpose of the free rides is “to promote citizen access to voter polls,” Milwaukee County could not reasonably dispute that the free rides are the sort of “inducement” to go the polls prohibited by section 12.11.⁴ In summary, if Milwaukee County provided free rides to the polls, regardless of funding source, and such was challenged in court, we believe that Milwaukee County would be nearly certain to lose, whether at trial or eventually before the Wisconsin Supreme Court as currently constituted.

Violation of section 12.11 carries the risk of both *criminal* and *civil* liability, as well as the risk of *removal from office* for elected officials, as detailed below. A violation of section 12.11 is a Class I felony, with maximum penalties of up to \$10,000 and 3 years and 6 months in prison, and a maximum of an additional 2 years of extended supervision. Wis. Stat. §§ 12.60; 939.50; 973.01(2)(d)6. In addition, the Initiative could be challenged in civil court by either filing suit (1) prior to election day, to enjoin (i.e., prohibit) the provision of free public transportation; or (2) after the election, challenging the results of an election based, in part, on providing free transportation in violation of Wis. Stat. § 12.11. The latter could further (and potentially significantly) undermine already fragile public trust in our fair, transparent, and accurate election processes. Finally, and

(1m) Any person who does any of the following violates this chapter:

(a) Offers, gives, lends or promises to give or lend, or endeavors to procure, anything of value, or any office or employment or any privilege or immunity to, or for, any elector, or to or for any other person, in order to induce any elector to:

1. Go to or refrain from going to the polls.
2. Vote or refrain from voting.
3. Vote or refrain from voting for or against a particular person.
4. Vote or refrain from voting for or against a particular referendum; or on account of any elector having done any of the above.

...

(d) This section does not prohibit any person from using his or her own vehicle to transport electors to or from the polls without charge.

³ This interpretation is supported elsewhere in Chapter 12 of the statutes, where the phrase “provide any service or other thing of value” suggests a service is a subset included in the broader category of “things of value.” See Wis. Stat. §§ 12.07(4), 12.08.

⁴ The exception to section 12.11, which allows a person to use “his or her own vehicle” to transport electors to or from the polls without charge, is inapplicable. Although one could argue that the MCTS and the County are “persons,” it is implausible that a court would find persuasive an argument that the legislature intended “his or her own vehicle” to include a County-owned bus.

possibly even more concerning, if a successful candidate for public office, other than a candidate for the legislature or a candidate for national office, is found to have violated section 12.11 *during his or her candidacy*, the court shall remove the candidate from office. Wis. Stat. § 12.60(2)(a).

Notably, other local governmental entities have provided free bus rides on election day, notwithstanding the apparent legal risks. As an example, Kansas City, Missouri, provided free bus rides on election days, even though Missouri’s election law makes it a Class 3 election offense to give, lend, agree to give or lend, offer, promise, or endeavor to procure, any money or valuable consideration to any person in order to induce any voter to vote or refrain from voting. Mo. Rev. Stat. § 115.635(1). We also understand that Racine and Green Bay Counties suspended bus fares on election day in November 2020. However, to date no lawsuit has been brought in Wisconsin (or Missouri) to challenge other jurisdictions’ provision of free rides to the polls. Obviously, the absence of a lawsuit does not establish the legality of the Initiative.

Counterarguments are possible. For example, it could be argued that the free rides are not a thing of value greater than \$1.00 since anyone on any day can simply refuse to pay their fare and still ride the bus, per Milwaukee County Transit System-Department of Transportation policy implemented towards the end of the third quarter of 2022. If the free fares were privately funded, we could also potentially argue that the rides are “private.” The OCC advises that neither of these arguments would likely persuade a court for a variety of reasons, largely because they do not comport with either common sense or a plain language reading of the statute.

B. Potential Challenges to Section 12.11

To date, no lawsuit has challenged the constitutionality of Wis. Stat. § 12.11 based on the Due Process Clause of the Fourteenth Amendment (prohibits the states from depriving “any person of life, liberty, or property without due process of law”), the Equal Protection Clause (unlawful to “deny to any person within its jurisdiction the equal protection under the laws” and thus, prohibits states from discriminating on the basis of race or other classifications), or the Voting Rights Act of 1965. Federal courts have repeatedly ruled on the constitutionality of various state law-based voting restrictions and the outcomes have been extremely widely varied. Clear analogies between section 12.11 and other *successfully* challenged statutes were not identified. Specifically, we could find no case in which a court has addressed the constitutionality of state laws prohibiting free transportation through “Souls-to-the-Polls” initiatives or private companies such as Uber. *Cf. Ohio State Conf. of N.A.A.C.P. v. Husted*, 768 F.3d 524, 539 (6th Cir. 2014), *vacating* 2014 WL 10384647 (6th Cir. Oct. 1, 2014) (state law eliminating voting on Sundays was unconstitutional as disproportionately burdensome to African Americans and poor people).

Also, it is not likely that a lawsuit arguing that federal election laws preempt section 12.11 would succeed because the U.S. Constitution grants broad authority to state legislatures to conduct and regulate nearly all aspects of federal elections through the Elections Clause and the Electors Clause. *See* U.S. Const. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2. This grant includes the areas of voting

procedure and fraud prevention rules and regulations, leaving such regulation to the states. *See, e.g.,* Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431, *et seq.*; 52 U.S.C. § 30143(a); 11 C.F.R. § 108.7(b). Therefore, even though federal law expressly permits certain groups to provide (free) transportation to the polls in federal elections, *see, e.g.,* 11 C.F.R. § 114.4(d)(1) (“A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.”), a court would nearly certainly conclude that those laws do not preempt a state’s ability to regulate voting procedures and fraud prevention rules. *See Priorities USA v. Nessel*, 978 F.3d 976, 985 (6th Cir. 2020) (rejecting voter-advocacy groups’ challenge of a Michigan law barring all spending on transportation to the polls, except for those unable to walk to the polls, concluding that this law was not preempted by FECA, and stating, “[t]here are other ways, without violating Michigan’s statute, to take voters to the polls. Volunteers can drive voters for free. Generally paid campaign workers—ones who are not specifically paid to take voters to the polls—may also fall outside the statute’s ban, as might using cars that are commercially rented for many different campaign purposes, only some of which are to haul voters. So, the organizations’ resources will likely not go to waste. And with the expansion of mailed ballots in Michigan this year, there are likely fewer voters who need to be driven to the polls at all. [This] track[s] the public interest, which lies in both fair elections—conducted with a minimum of fraud—as well as free elections—in which as many eligible voters can vote as desire to”).⁵

Indeed, the Federal Transit Administration on July 1, 2022, in guidance to FTA-funded transit systems regarding transit programs to increase voting access, warned that free-fare election days “may be subject to state or local rules, or require coordination with state or local election authorities.” *Transit Programs Increase Access to Voting*, TRANSIT.DOT.GOV (July 1, 2022), <https://www.transit.dot.gov/funding/grants/transit-programs-increase-access-voting> (last visited Feb. 17, 2023) (“FTA Guidance”). *See also Executive Order on Promoting Access to Voting*,

⁵ The dissent in *Priorities USA*, 978 F.3d at 990, strongly disagreed with the majority’s analysis:

Without any evidence of an anti-fraud purpose, we would need to conclude that voter-transportation fundamentally promotes voter fraud. This proposition beggars belief given that the activity is expressly permitted under FECA regulations and allowed in 49 other states. The majority’s invocation of vote-hauling is unpersuasive. Plaintiffs want to rent buses to help people get to the polls; companies like Uber want to provide discounted rides to the polls in Michigan as they have in every other state. These prohibited activities are a far cry from the majority’s specter of vote-hauling. I think it important to note that the majority does not mention plaintiffs’ constitutional argument. Had they reached the issue, they may well have decided that the stay should be denied. Instead, without spending a single sentence on the merits of the constitutional issue, the majority grants a stay, reimplementing a potentially unconstitutional law days before the election.

WHITEHOUSE.GOV (Mar. 7, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/07/executive-order-on-promoting-access-to-voting> (last visited Feb. 17, 2023).

The FTA Guidance offered other suggestions for federal transit operators, including: (1) providing non-partisan information and registration materials at transit stations; (2) using high-traffic transit stations to place absentee ballot or registration drop-off boxes; (3) implementing temporary service changes to make polling locations easier to reach, such as more frequent service or extended service hours on days that polls are open, or special service to polling locations if they are not on an established route, subject to the FTA’s charter rule; (4) changes to maps, wayfinding devices, or mobile apps, subject to Title VI and ADA obligations, or temporary signage directing riders to stops located near polling places or where voter registration or ballot drop-off boxes are located; and (5) coordination with between transit systems and local election authorities to ensure polling sites are in locations that are easily accessible to transit. *Id.*

Changes in the makeup of the federal courts, including the 7th Circuit Court of Appeals, which hears Wisconsin-based cases, render the likelihood of success if section 12.11 were challenged dubious at best, especially given its facial neutrality and evident careful drafting (i.e., allowing private rides).

III. Examples of Other States’ Election Laws

Wisconsin’s prohibition against giving anything of value greater than \$1 to induce an elector to “go to or refrain from going to the polls” appears to be one of the most restrictive in the country (although a complete survey was not done). The following examples of other states’ laws and case law interpreting them are illustrative:

Alaska. Alaska prohibits a person from paying another person to vote for a particular candidate, proposition, or question, but—in sharp contrast to federal law—no Alaska statute prohibits a person from compensating another person for voting per se. In *Dansereau v. Ulmer*, 903 P.2d 555, 558–59 (Alaska 1995), the court rejected a challenge to the outcome of an election in which the contestants argued that a North Slope Borough voter assistance program, which offered to reimburse rural voters for the gasoline they used to transport themselves to the polls, violated state and federal election laws. The court found that “assuming the Borough’s program paid voters with fuel to vote in the election, regardless of the amount of fuel the voters used to reach the polls, the program would not be a corrupt practice as defined by Alaska law, unless the offers of payment were made with the intent ‘to induce the person to vote for or refrain from voting for a candidate at an election’ as prohibited under Alaska statute section 15.56.030(a)(2).” *Id.* at 560. The court further found “there was no evidence the program as conducted was not candidate-neutral.” *Id.* at 566. “As written, the statute does not prohibit payment to induce persons to vote who would not otherwise vote, so long as they are not induced to vote in a particular manner.” *Id.*

California. It is not unlawful to offer any form of consideration, including cash payment, to a person to vote, provided that the payment is not an inducement to or reward for voting for, or refraining from voting, for a particular person or measure.

Louisiana. In 2018, the Louisiana Attorney General stated that Louisiana state law prohibits government from giving away something of value and therefore free bus service on election day was not legal. “Other states allow the practice, he said, but their state legislatures passed specific exemptions to allow it.” C. Taylor, *AG Landry: Free election day bus rides illegal*, THE DAILY ADVERTISER (Oct. 17, 2018), <https://www.theadvertiser.com/story/news/local/2018/10/16/breaking-councilman-withdraw-free-election-day-bus-ride-proposal/1658934002> (last visited Feb. 18, 2023).

Minnesota. Minn. Stat. § 211B.11: “Transportation of voters to polling place; penalty. A person transporting a voter to or from the polling place may not ask, solicit, or in any manner try to induce or persuade a voter on primary or election day to vote or refrain from voting for a candidate or ballot question.”

Mississippi. Miss. Code Ann. Section 23-15-889 (1972) reads as follows,

It shall be unlawful for any person to sell or offer to sell his vote and it shall be likewise unlawful for any person to offer money or anything of substantial value to anyone for his vote. Anyone violating the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be fined not less than Fifty Dollars (\$50.00) nor more than Five Hundred Dollars (\$500.00), or imprisoned not more than six (6) months, or both.

“As a matter of state law, it is not prohibited to provide voters transportation to the polls on election day. However, it remains a factual question in each instance, as determined by a court, whether the things of value provided to the voters by the candidate or by a third party on behalf of the candidate were made in exchange for the voter’s ballot choices.” Op. Att’y. Gen. No. 2010-00511, Sept. 3, 2010, 2010 WL 4105469.

Oregon: Oregon election law prohibits a person from directly or indirectly “giving or promising to give money, employment or other thing of value” to a person with the intent to induce an individual to register or vote. Or. Rev. Stat. § 260.665(1), (2)(a). However, Oregon specifically excludes “[f]ree transportation to and from the polls for persons voting” from this prohibition. Or. Rev. Stat. § 260.665(4)(f).

IV. Options

Potential options and next steps could include the following:

- offer a reduced bus fare on election days, so long as the value of the price reduction did not exceed \$1.00;
- ask the OCC to refer the matter to the Wisconsin Attorney General for an opinion;
- lobby to clarify Wis. Stat. § 12.11 to exclude free rides to the polls (or clarify that its prohibitions apply only when the thing of value is given to induce a vote for a particular candidate);
- a voter with proper standing could challenge the constitutionality of Wis. Stat. § 12.11 on the grounds that it violates the Due Process Clause of the Fourth Amendment, the Equal Protection Clause, or the Voting Rights Act of 1965; and/or
- consider implementing the suggestions made by the FTA in its Guidance discussed above at pp. 4-5.
